Constitutional Justice in Asia

"Freedom of Expression and Freedom of Association"

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3rd Summer School of the Association of
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MESSAGE FROM THE PRESIDENT

The Constitutional Court of the Republic of Turkey holds the 3rd Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of "Freedom of Expression and Freedom of Association" in Ankara between 30 August - 9 September 2015 within the scope of the AACC activities.

We are pleased to host the 3rd Summer School of the AACC in Turkey. We believe that the presentations of the participants throughout the Summer School reflect legal experiences and practices of the AACC members and make significant contribution to the field of comparative constitutional justice.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their knowledge and experiences that would contribute to the development of the constitutional justice and the rule of law in the Asian continent. This event also serves for the enhancing the relationship and strengthening the cooperation among our institutions.

I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf the Turkish Constitutional Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN

President of Constitutional Court of
the Republic of Turkey

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OPENING ADDRESS ON

"THE THIRD SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE" ORGANIZED BY CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY[1]

Grand Tribunal Hall, Ankara, 25 August, 2015

Distinguished Guests, Justices, and Rapporteurs,

I would like to welcome you to the 3rd Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions.

Rather than delivering a formal opening speech, I want to share my opinions with you on the general aspects of the freedom of expression along with relevant case-law of the European Court of Human Rights and the Turkish Constitutional Court.

This year, fourteen countries including Turkey are taking part in the Summer School. On behalf of myself and the Court, I would like to thank the esteemed delegates of the participating countries. In fact, this summer school has started two years ago, and at the very beginning we had participants from nine countries. Last year in 2014 the number of countries participating in the school increased to ten, and fourteen countries are participating in this summer school. Please let me mention these countries one by one: Azerbaijan, Algeria, Indonesia, Spain, Montenegro, Kyrgyz Republic, South Korea, Malaysia, Mongolia, Uzbekistan, Russia, Tajikistan, Thailand, and Turkey.

Twenty three representatives from these countries will exchange opinions on freedom of expression and share the experiences of their countries. As a matter of fact, the first aim of this summer school is to enhance the existing ties and cooperation among the members of the Association. Its second aim is to facilitate exchange of valuable experiences of both member and non-member countries. We heard

1 Translated by the Department of Foreign Relations, Turkish Constitutional Court.

from our colleagues at the Board of Members Meeting of AACC in Jakarta two weeks ago that the summer school was very fruitful project that contributes to realize the goals of the AACC. We are proud to host and organize the Summer School and contribute to the AACC.

Dear Guests,

The main theme of the summer school of this year is freedom of expression. Freedom of expression holds a primary place among the fundamental rights and freedoms. However, a few questions arise at this point; first, why do we have or must have freedom of expression, and second, why freedom of expression has a privileged place among other freedoms. A particular importance is attached to freedom of expression in both international human rights treaties and national constitutions.

In fact, there has been an effort to respond to these questions by competent sources, and the answer has been sought mainly on two levels. The first one is the idea that freedom of expression is an aim, a value in itself, and that we have freedom of expression since it is an extremely important element of our existence. And the other one is that freedom of expression is valuable in instrumental terms. It is in fact a key for many other values. The instrumental approach is that freedom of expression is necessary to attain many values.

I will touch briefly on the details of these two approaches and then I will explain within this theoretical framework how the European Court of Human Rights and the Turkish Constitutional Court approach this freedom on a philosophical basis. That is, I will mention how they determine the fundamental parameters of this freedom and what kind of an approach they adopt on concrete cases. The freedom of expression, whether defined as a value or aim by itself or not only as an instrument but also as an aim, is a reflection of freedom of thought, which is an aim by itself because it is the thought that represents the real value.

Since thought is a fundamental element of human existence, explanation of that thought is accepted as a value in itself. One of the

most well-known expressions in this regard is uttered by Descartes: "I think, therefore I am" is formulated again as an element of certainty. That is, he says "it is obvious that I undoubtedly exist because I think; since I think, I exist". Of course, this idea is not the result of only western philosophy. Mevlana Celaleddin-i Rumi, who had lived on these lands hundreds of years before Descartes, also stated that "thought lies at the foundation of existence". Mevlana says that "human being is made up of thought. The rest is flesh and bone".

Distinguished Participants,

This is an expression which is usually heard but not deeply contemplated. Thought lies at the foundation of human existence. Of course, thought does not make any sense if it only lies within the human mind. What really matters is to be able to reflect this thought and express it. Again, Mevlana defines freedom of expression in an almost absolute manner. He says "if you are not a slave, address as a sultan, express your opinions in whatever way you like".

Having explained the purposive aspect of freedom of expression, we can now turn to its instrumental aspect. What does freedom of expression mean for us in instrumental terms? First of all, freedom of expression is one of the indispensable elements of democratic society, as expressed in the judgments rendered by the European Court of Human Rights and the Turkish Constitutional Court. So, why is that so? That is because it is of vital value in accommodating the differences. It is a very general fact that society is diverse. Society is a whole composed of different elements; world views, life styles, and ideologies contradicting one another, different from one another, and incompatible with one another. The biggest challenge faced by modern democracy is to facilitate co-existence of these differences. Successful democracies are the ones that can accommodate the differences in the best way.

Dear Guests,

Diversity is not something to be praised or condemned; it is a fact. Diversity is a part of life, it is a fact that we have to accept and

manage. Diversity is a source of richness but realistically speaking, sometimes differences could be a source of conflict and some unrest as well. Therefore, diversity is a fact to be managed irrelevant of the assessment whether it is good or bad.

The essence of managing diversity is managing the relations with others; the source of diversity is the difference between the majority and others. So, who is the other? Or, what is the other? This is an important concept discussed in political philosophy or in philosophy in broader terms. It is simply one of the magical concepts, if you will, in the postmodern thought. I define the other as an entity both inside and outside us. The other is outside us, the other is the one not thinking in the same way as we do, it is the one different from us, the one living differently from us. Marginalization is excluding the different ones from our world or sentencing or suppressing them. On the other hand, the other is inside us because we are also the other in relation to the ones we define as others. We are the other in the eyes of the person whom we have marginalized. That is why each of us has the other figure inside ourselves. So, such a situation arises as to how we shall determine our relationship with the other. That is where freedom of expression comes into play.

Freedom of expression is in fact the freedom of the other having a place inside and outside us. It is actually freedom of all individuals; my freedom and the others' freedom. Thus, not silencing the others is the most important element of freedom of expression. Lyotard, one of the eponyms of postmodern thought, formulates it very well: "the awfulness of the death penalty is not the death or killing of the person". When the person is condemned to death, s/he loses her/ his life which is one of his/ her most precious assets. But what is of primary importance, he says, is that the person is deprived of his/ her right to call out to others; that is, the right to express oneself is terminated. Once you kill the person, you eradicate the opportunity for the person to call out to others and to express herself/ himself. For Lyotard, this is the greatest harm; thus, censoring the society, silencing the society and coming up with the project of a silent society are attacks aimed not only against the human spirit but also

against the foundations of democratic society. So, we can conclude that freedom of expression is, in instrumental terms, the most important instrument for us to live in peace with the other, to live in a tranquil manner with our differences. Therefore, freedom of expression is valuable and has a primary and special place among the other freedoms.

Freedom of expression has derivations. There are some other freedoms which are in an organic relationship with freedom of expression. Freedom of organization, freedom of assembly, freedom of demonstration, freedom of association, freedom of information are among such freedoms implying different dimensions of freedom of expression but formulated today as independent rights. Hence, without freedom of expression, it is not possible to mention of a democratic society where diversity can coexist.

Dear Guests, Ladies and Gentlemen,

The European Court of Human Rights has been emphasizing the importance of free speech for 40 years. Beginning with the precedent dated 1976, it has been stating on every occasion that freedom of expression is the *sine qua non* of democratic society, and that this freedom applies not only to the views that are not hurtful or in favour but also to the contrary opinions that are disturbing and shocking to a segment of the society or to the State. By doing so, the Court lays the foundation for a healthy relationship with the other.

The European Court of Human Rights and the Turkish Constitutional Court have the same aim when the three elements of democratic society are considered. Three concepts, pluralism, tolerance and open-mindedness, are emphasized almost in every judgment. They are at least underlined in the judgments on freedom of expression rendered by both the European Court of Human Rights and the Turkish Constitutional Court. The aim of these three concepts is to ensure the management of diversity in a peaceful way.

Pluralism is a concept aimed at co-existence of differences. Likewise, tolerance is implying that people who think differently in

the society shall stand one another. Tolerance implies a hierarchy. In a way, the one who tolerates stands at a higher level and is aware of the truth, while the thoughts of the one tolerated is at the lower level. This is so because everybody holding certain belief, thought or ideology considers it as the truth, and they tolerate others who do not share same thoughts. Therefore, hierarchy is an understandable metaphor concerning the tolerance among the members of the society. However, on the political level, it is a dangerous concept considering with respect to the relationship between the State and the individual or between the State and civil society. There should be no hierarchical relationship between the State and the individual, and the State should not be in a position tolerating thoughts or worldviews of the individual. Accordingly, the relationship between the State and the individual must be defined by the concept of recognition rather than tolerance. That is, the State, taking up an equal position before all ideologies and world views, is in the position and liable to provide them all with the opportunity to express themselves all together on the condition that they do not resort to violence.

Certainly, everybody can claim that her/his thought is right. Yet, s/he has to show respect for another person's right to claim the same thing. And, dear guests, fanaticism is not peculiar to a certain belief or ideology. There might be fanatics in every ideology, every religion, and every belief. In this regard, those groups having fanatic elements should work toward smoothing such thoughts. Thus, pluralism, tolerance and open-mindedness appear before us as the sine qua non elements of the democratic society.

Now, I would like to say a few words regarding how the Turkish Constitutional Court approaches towards freedom of expression in general. In the individual application, the Court so far has rendered 18 judgments of violation on freedom of expression within the standards set by the European Court of Human Right, in such a way as to enrich those standards. However, it would be wrong to limit the Court's approach towards freedom of expression to the individual application. The Court also rendered judgments within

the constitutional review which may be defined as rights-based judgments regarding freedom of expression, emphasizing the freedom of expression as an indispensable element of democratic society.

In general, the Turkish Constitutional Court applies a three-prong test as the European Court of Human Rights does. While assessing whether an interference with freedom of expression exists, the Court applies the test of legality at the first stage because, in accordance with Article 13 of the Constitution, restriction of fundamental rights should be solely prescribed by law. There are two dimensions of this requirement. First, the law does not imply the body of legal rules but specifically a legislative rule. In other words, the Court, rather in a narrow way, interprets this requirement as the law enacted by the Parliament. In contrast, the European Court of Human Rights interprets it in a broader sense to cover regulations and the case. The second dimension is that it does not suffice that the law exists but it should be explicit and foreseeable. Unless it has these features, the interference or the rule as the basis for the interference can be considered to constitute a violation of freedom of expression.

The Turkish Constitutional Court found a violation of freedom of expression on the basis of legality in the cases of Twitter and Youtube. In the first one, the Court held that the law did not vest the administration with the power to block access completely, hence, it found a violation of freedom of expression in respect of the legality requirement. In the second one, determining that the law was not sufficiently explicit and foreseeable, it found a violation of freedom of expression on the basis of quality of the law.

It should be also mentioned that the Turkish Constitutional Court, in parallel with the European Court of Human Rights, sets broad limits for the criticisms directed at politicians and the persons exercising public authority. In other words, patience and tolerance of politicians and public officials should be broader compared to those of ordinary citizens not having a political responsibility or not in the position to exercise public authority. In this context, the Constitutional Court regarded the conviction of a columnist having

criticized the members of Parliament as an extreme interference with freedom of expression. Likewise, the Court regarded the compensation award against a scientist who had questioned the quality of drinking water and criticizing the metropolitan municipality mayor as an extreme interference.

The second prong of the test is whether the interference is based on a legitimate aim or not. This prong is satisfied if the interference is made for legitimate aims such as protection of the public order, the national security, the rights and liberty of others, and prevention of crime as enumerated in the Constitution. The third prong relates to the question of whether or not it is necessary and proportionate in a democratic society within the scope of Article 13. In this assessment, the Constitutional Court defines the concept of democratic society in a broad and libertarian sense. In line with the case-law of the European Court of Human Rights, the Court considers whether there is a pressing social need to limit the right to freedom of expression in a particular case and whether the restriction is reasonable (proportionate to the legitimate aim). If the limitation is unreasonable, it constitutes a violation of the freedom of expression.

In addition, unlike the European Convention on Human Rights, the Turkish Constitution includes the criterion of "untouchable core of a right". At the third prong, the Turkish Constitutional Court preliminarily applies this criterion. The Court evaluates whether the interference renders a right non-exercisable or whether it touches the essence of that right. If there is an interference with the core or essence of the right, a violation is found without resorting to questions whether or not it is necessary and proportionate in the democratic society. However, the Court usually finds a violation of freedom of expression at the third prong on the basis of not being necessary and proportionate in the democratic society.

Before concluding my speech, I must also note that freedom of expression is not full of roses, there exists certain problems concerning its limits and its interaction with other freedoms. It is well known that protection of personal rights of others, hate speeches,

libel, and the propaganda of terrorism constitute the conventional limits of freedom of expression. However, the internet phenomenon poses novel questions with respect to freedom of expression. We encounter complex issues here because internet is not controllable or it simply has no limits. Just like diversity, this aspect of internet is a fact regardless of the question whether good or bad.

In addition to new challenges, internet has introduced new dimensions into the realm of freedom of expression. For instance, the right to be forgotten has took place in literature. Google scans news and posts information about individuals upon search. This information may not always reflect the truth, and when others search about this individual online, even years and years later, let's say the grandchildren of a person, they are exposed to unverified or unreliable information. If this person goes to court and proves that this information is false, the court may order or should be able to remove this content from internet. Here the issue arises whether such content should be removed or not.

Another point is that whether internet portals may be held responsible for online comments of users. Some expressions which constitute libel or hate speech may be stated in comments on a website, on a news site for example. And the question is whether only the ones making the comments are liable for them. However, the fact that most of those comments are anonymous makes it more complex. Who is liable in this case? The one making the comment, the one allowing that comment to be made, the ones having set up that portal or the ones operating that portal?

The European Court of Human Rights has recently rendered a judgment on this issue. The judgment of 16 June 2015 rendered by the European Court of Human Rights, *Delfi AS v Estonia*, is very interesting in this regard. In case of conflict between freedom of expression and personality rights, the Court seems to be deciding in favour of the latter. In this case, comments including criticisms, harsh expressions and even expressions of hatred have been directed against a columnist working for the news portal called "Delfi". The mentioned portal does not remove these comments

automatically. It removes them only after a complaint is made. The European Court of Human Rights agrees on the opinion held by the Estonian courts that these comments that were available on the portal for one month are in breach of personal rights. This judgment is really interesting and it will be subject to intense discussions in coming days.

I would like to end my speech by wishing you all a successful and fruitful summer school program. Thanking the participants from abroad for their participation, I would like to express that we are glad to see them here among us. I also would like to thank academicians who will lecture at the summer school and the Rapporteur Judges who will deliver presentations.

I express my gratitude on behalf of myself and the Turkish Constitutional Court to all our colleagues putting effort into the organization of this event.

I wish you all healthy, peaceful and good days.

Zühtü ARSLAN

President of the Constitutional
Court of the Republic of Turkey

OPENING SPEECH ON

THE THIRD SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Esteemed Ladies and Gentlemen,

As the Secretary General of the Constitutional Court of the Republic of Turkey and the Chairman of the Executive Board of the 3. Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions, I say welcome on behalf of my Court and I greet you with respect. You have arrived from long distances to participate in the 3. Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions. By accepting our invitation no matter how far you are away from your families and homes for a period of eleven days throughout the 3. Summer School, I owe you a debt of gratitude for the contribution you make to this environment of synergy that our Association is trying to create.

As you know, the Association of Asian Constitutional Courts and Equivalent Institutions held its first Congress in 2011, although it is a new formation compared with the other bodies operating in the related area, it has made progress on institutionalization in a short span of time. In this respect, expression of the need for a permanent general secretariat during the last Board of Members Meeting and also willingness of three countries, among which our country is also seen, to establish the general secretariat within their own structure are indicative of this fact as well. Summer school programs which we realized with your participation in previous years, which we received positive feedback later on, and thus, the third of which we are holding this year are activities contributing to the efforts of institutionalization of our Association and creating a sharing environment among the members of the Association.

The theme of our 3. Summer School has been designated as "Freedom of Expression and Freedom of Association." Mevlana Celaleddin-I Rumi Fihi Mafih, who is one of the first defenders of the freedom of expression, briefly rejects the crime of thought in the rubaie of his work titled "Whatever there is, it is inside":

"There is no accusation because of thought. The inside of a human is the world of freedoms. Thoughts are nice, no judgement can be rendered based on them.

As long as thoughts are inside, they have no names, reputation and signs. Is there any judge who shall tell that you have admitted in this way from inside or have sold in that way, or who shall tell you to swear that you do not think so from inside. He/ she cannot tell. Because no judgment can be delivered on the inside of a person. Thoughts are like birds flying in the air."

According to John Stuart Mill who is another defender of the freedom of expression, the freedom of expression is an indispensable (sine qua non) instrument to explore the reality. According to Mill, as the individual and the society are inclined to make mistakes, it is necessary that an order which can approach expression of every kind of thought with tolerance so as to reach the truth be set up. In the most general terms, the freedom of expression includes all the freedoms such as oral and written narrative, artistic representation, personal appearance and choice of image, demonstration, march, assembly and association.

Our Constitutional Court interprets the freedom of expression in the widest sense, and the restriction of this right is stipulated on very hard conditions as a requirement of the provisions of our Constitution and the European Convention on Human Rights. In this regard, our Court puts forward that any intervention against the freedom of expression should be legal, consistent with the requirements of a democratic social order, and measured.

In this respect, even though the freedom of expression and the freedom of association are such broad subject matters that it is not possible to fully examine them in the duration of eleven days, I think that the program will be followed by all the participants with

interest, and the presentations and discussions to be made will be highly beneficial in respect of the participants.

On the other hand, our program is not only limited to the academic meetings, but also includes some social activities so that you, our dear guests can have a better time. We are planning to realize the bowling tournament which we organize annually and traditionally this year as well. Moreover, I have no doubt that you will admire the social activity which we are going to organize on 5-6 September in Istanbul, one of the most beautiful cities in the world. Apart from all these, you can see the details about the other activities to be held in the program that we will hand out to you. I would especially like to emphasize that you would not hesitate to get in touch with me in person or my colleagues responsible in the executive committee in the event that you might need help on any matter both throughout and in the aftermath of the summer school.

Meanwhile, I congratulate the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic and the Constitutional Court of Mynmar on being member of the Association of the Asian Constitutional Courts and Equivalent Institutions during the recent Board of Members meeting, and I wish them success in their endeavors.

Before I end my speech, I again say welcome, I express my gratitude to our President Prof. Dr. Zühtü ARSLAN, in particular, who does not withhold any support to hold the 3. Summer School, and to our dear guests for your participation and contributions, and to all my colleagues who show great effort for the organization, and I pay my respects to all of you in the hope that the 3. Summer School program will be useful for all of us.

Selim ERDEM

Secretary General of the Constitutional
Court of the Republic of Turkey

CONSTITUTIONAL COURT: INTERPRETER OF CONSTITUTON OR PROTECTOR OF INDIVIDUAL RIGHTS?

Assoc. Prof. Dr. Ali Rıza ÇOBAN
TURKEY

CONSTITUTIONAL COURT: INTERPRETER OF CONSTITUTON OR PROTECTOR OF INDIVIDUAL RIGHTS?

Assoc. Prof. Dr. Ali Rıza ÇOBAN[*]

Honourable Presidents, Distinguished Judges, Ladies and Gentlemen,

It is great privilege and honour for me to be here. I would like to thank organisers for this opportunity.

I would like to start my presentation with a question: what is the role of constitutional courts? Is it to interpret the constitution or to protect individual rights? Most of you may find such a question unnecessary because the answer is quite simple: both! The role of constitutional courts is protection of individual rights through interpretation of constitution.

Nevertheless, I think this question is extremely important for the courts which have jurisdiction to decide individual applications or constitutional complaints, especially for those which have full individual application system. I mean by a full individual application a system where individual applications against court judgments are possible.

It is true that the aim of introduction of full individual application is to protect individual rights and constitutional courts may protect those rights through interpretation of the constitution. So we can say that there are two aspects of the role constituonal courts are playing in individual applications. Firstly, the aim of individual application is to provide individual justice through redressing violation on the applicant's rights. This is the subjective function of the individual application. Second function of individual application

[*] Assoc. Prof. Dr., Former Rapporteur-Judge of the Constitutional Court of the Republic of Turkey.

is to provide constitutional justice through creating an opportunity for constitutional court to interpret constitutuional provisisons relating to fundamental rights. This aspect of the judgment of the constitutional court transcends the concrete application and creates an authority which must be followed by other public authorities including ordinary courts. This is the objective function of individual application. It is not possiple to separate these two functions and both functions are realized simultaneously. But one of these functions can be put into the center when organising the institution of individual application.

The role of constitutional courts in protection of individual rights is subsidiary. The primary responsibility in protecting individual rights belongs to the legislative, executive and judicial organs. Therefore, an individual who thinks that his/her individual rights have been violated, firstly should apply to the competent administrative and judicial organs. That is, the applicant must have exhausted all the remedies provided by law by means of the ordinary courts before filing an individual application. The ordinary courts must have the opportunity to remedy the violation; if they don't do that, then the Constitutional Court has a subsidiary role. In other words, the individual application is a subsidiary remedy. It is not an alternative remedy; the affected person cannot choose between going to ordinary courts and going to the Constitutional Court. The affected person must go to the ordinary courts and if he doesn't get remedy, then he must go to the Constitutional Court. So, the individual application will be employed only when all other judicial remedies have been proven useless. According to this principle of subsidiarity, also, the applicant must have invoked the alleged violation at the ordinary courts. It has to be demonstrated to tell the ordinary courts that this fundamental right has been violated. Then, after invoking this violation, if the applicant does not have a remedy, he can go before the Constitutional Court[1].

This subsidiary role of constitutional courts in protection of fundamental rights requires individual application system to

1 Luis Lopez-Guerra, ECtHR and Turkey-II: Constitutional Complaint and ECtHR, TAA (2010) p.63.

be constitutional -justice -focused. If the system is organised as individual-justice-focused then constitutional courts can face an enourmous workload. The constitutional court as the highest court of the country can not deal with all fundamental right complaints of millions of citizens. As soon as the constitutional court interpreted the constitution and found a violation of a constitutional right, the opinion of the constitutional court should be followed by legislative, executive and judicial organs and unconstitutional regulations and practices should be eradicated. But if ordinary courts refuse to follow the precedence of the constitutional court, then similar applications will inevitably continiue to come and whatever precautions are taken, the constitutional court will declare bancrupty in a very short time.

Therefore, in order to guarantee the success of the individual application, a mutual understanding and cooperation should be developed between the constitutional court and other high courts in terms of following the precedence of the constitutional court. In this regard, on the one hand, the constitutional court should refrain interfering with the interpretation of law by competent high courts; on the other hand, other high courts should obey the precedence of constitutional court established by interpretation of constitution by the constitutional court. Although it is not easy to draw a bold line between interpretation of a law and interpretation of constitution, self-conscienceness of both constitutional court and other high courts of limits of their competences will prevent a possible conflict of competences.

Even if the constitutional court and other high courts refrain from conflict of competence and other high courts strictly follow the precedence of the constitutional court, still constitutional court may be squeezed under heavy workload if it dares to redress every human rights violation.

This is exactly what happened in Germany, Spain, Slovenia and the ECtHR. In those coutries, growing number of applications hamperred the capacity of the courts to deal with the really relevant cases and provoked growing delays. Just writing an inadmissibility decision for thousands of cases took most of the time and resources

of the courts. As a result, seeing the unsustatainability of the sysyem, all the above mentioned countries reformed their systems in the last two decades and changed considerably the very concept, the very meaning of individual application.

This trend can be defined as the constitutionalisation of individual application. In other words, the prime role of individual application changed from protection of rights to interpretation of constitutions. This change was most radical in Spain, more moderate in Germany and most moderate at the ECtHR. In all of those systems several structural reforms were made to increase the effectiveness of the system and to increase the numbet of decisions delivered by the Courts. Admissibility criteria were also made much stricter in those reforms. But since those measures were not enough to guarantee the effectiveness of the system, new substantive admissibily criteria which made individual application more constitutional juctice focused were introduced. One of those substantive admissibility criteria is "fundamental constitutional significance" (in Germany) or "special constitutional relevance" (in Spain) of the application. According to this criterion only the applications which have fundamental constitutional significance can be admitted. A similar criterion is the maxim of *de minimis non curat preator* which requires a minimum level of severity of disadvantage suffered by the applicant for admission of the application.

To start with European Human Rights Protection System, following the subtantive structural changes by Protocol No. 11 in 1998, Protocol No. 14 made some extra procedural and substantive changes in the system. One of the main innovations of Protocol No. 14 is the introduction of a new admissibility criterion. Acoording to new provision added in Article 35(3) (b) of the Convention:

> "*The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:…*
>
> *(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on*

the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal." [2]

This admissibility criterion was introduced to give the Court more flexibility in the admission of applications in order to enable a more rapid disposal of unmeritorious cases in the long term and to give the Court the possibility to concentrate its resources on cases which are significant for the interpretation of the Convention[3].

This provision is one of the most important steps towards constitutionalisation of ECtHR protection system. But it can't be said that Strasbourg protection system has been constitutionalised by this change. Rather a compromise was established between constitutionalisation and protection of fundamental rights. According to this provision the Court will examine only applications which the applicant suffered a significant disadvantage. But if respect for human rights requires examination of the merits of the application, an inadmissibility decision cannot be given on the basis of this criterion.

Since the entry into the force of Protocol No.14 in June 2010, new admissibility criterion could not create the expected effect, but gradually the Court is appliying it more and more.

But there is an area which is fully constitutionalised in the Strasbourg system. ECtHR is applying constitutional significance test in admission of cases referred to the Grand Chamber. According to Article 43 of the ECHR, the request of any party to a case that the case be referred to the Grand Chamber shall be accepted only if the case raises a serious question affecting the interpretation or application of the ECHR of the protocols thereto, or a serious issue of general importance. So it can be argued that the sysyem of the ECHR considers that some cases are not important enough to be considered by the Grand Chamber[4].

2 See for a report on this issue, http://www.echr.coe.int/NR/rdonlyres/D4E1DEBF-BC2B-4BB8-93FD-2A4956731E0F/0/RAPPORT_RECHERCHE_New_admissibility_cirterion_EN.pdf

3 Xavier-Babtiste Ruedin, *"De minimis non curat the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)"* (2008) E.H.R.L.R. Issue 1, p.81.

4 Xavier-Babtiste Ruedin, p.97.

We can argue that the Strasbourg protection mechanism is getting gradually constitutionilised and we can expect it will be more constitutional justice focused in the future. There are even some people who defend the power of Certiorari to be given to the ECtHR like US Supreme Court[5].

A similar constitutionalisation tendency can also be observed in national constitutional jurisdictions. In order to tackle with the workload problem, national constitutional court laws have been amended to make admission of individual complaints more difficult.

In 1990s a new admissibility criterion was added to the the Federal Constitutional Court Act. According to Article 93a, a constitutional complaint shall be accepted in so far as it has fundamental constitutional significance. This can also be the case if the complainant suffers especially grave disadvantage as a result of refusal to decide on the complaint. In other words, a complaint can be accepted only if it has fundamental constitutional significance or refusal may cause grave disadvantage.

The Federal Constitutional Court clarified this criterion. According to the Constitutional Court's established case-law a complaint has fundamental constitutional significance if it raises a constitutional question which cannot be automatically answered on the basis of Basic Law and has not been clarified by the case-law of the Federal Constitutional Court or with respect to which new need for clarification has arisen due to the change of circumstances. There must, therefore, be serious doubts as to the answer to the constitutional question. An indication that a constitutional question has fundamental constitutional significance may in particular be the fact that there has been a dispute about the question in the specialised literature or there has been different answers to it in the case-law of the nonconstitutional courts[6]. It can be said that a constitutional complaint has no fundamental constitutional

5 See for explanation about Writ of Certiorari, http://www.techlawjournal.com/glossary/legal/certiorari.htm.

6 BVerfGE 90, 24-25 (8.2.1994).

significance if the issues that it addresses have already been dealt with in constitutional case-law[7].

It is for the applicant to prove that constitutional complaint has fundamental constitutional significance[8]. It is generally argued that constitutional complaint system has lost its subjective function and objective function of it has come to the fore by this change[9].

The developments in the Spanish system has also followed a similar pattern and change was more radical. After several reforms relating to the procedure before constitutional court relating to the amparo, a substantive change was made in the Spanish Constitutional Court Law in 2007. According to Article 50 (1)(b) a constitutional protection claim (amparo) can only be accepted if it justifies a decision about the content by the Constitutional Court because of its special constitutional relevance (especial transcendencia constitucional), which shall be seen in terms of its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content or scope of fundamental rights. The applicant should also justify constitutional revelance of his application in addition to formal procedural requirements. Meeting procedural requirements will not be enough for an applicant to make his claim be examined by the Conatitutional Court even if his constitutional rights were violated. So, the text of the Law established an additional requisite saying that the applicant, when presenting his application, must justify the constitutional relevance of his claim. Otherwise, if it is not justified, then the court might reject the admissibility saying that it has not any kind of special relevance in it.

The reform of 2007 introduced a complete change on the function of the amparo complaint. Until the reform of 2007, this complaint was conceived as a remedy against any violation of fundamental rights. The court, therefore, should admit and decide on those cases which complied with the formal requirements of the

7 Andreas PAULUS, "*The admission Procedure and the Concept of "Fundamental Constitutional Significance" in §93a of the German Federal Constitutional Court Act*" paper presented at the Turkish Constitutional Court in 51st Anniversary of the Court (2013) Ankara.

8 Ece GÖZTEPE, *Anayasa Şikayeti*, AUHF Yayınları no. 530, Ankara, 1998, s. 97.

9 Ece GÖZTEPE, *a.g.e.*, s. 112-113.

law and presented signs of a violation of fundamental rights. But after the reform of 2007 the approach to the amparo complaint has completely been modified. The new approach can be defined as an objective approach[10].

The philosophy behind the new approach is that protection of fundamental rights is a task to be performed by the ordinary courts. It is an impossible task for a court of 12 persons to be a real guarantee of fundamental rights of 45 million Spanish citizens. If these rights are guaranteed, this must be via ordinary courts. They have a direct, immediate and wider contact with the applicants and therefore, what is important is to have a general protection of these fundamental rights[11].

Consequently, the role of the Constitutional Court, according to the new approach, would be to decide on those cases which present a special constitutional relevance, on which a decision of the court is needed as an orientation, as a guideline, as a directive to the other courts, as well as to the administration and even to the legislative power on the application and interpretation of fundamental rights. So, the role of the court would be to interpret the Constitution, to give guidelines, to coordinate, to unify, but deciding on those cases would present a special relevance[12].

The peculiarity of the Spanish system in this regard is that special constitutional relevance is an absolute requirement and severity of disadvantage suffered by the applicant would not affect admission of the Court. Even if the applicant suffered grave disadvantage as a result of violation of his fundamental rights, the application will not be admitted unless it's contitutional relevance is justified. So it can be said that Spanish amparo has completely been constitutionalised[13].

The Spanish Constitutional Court clarified a new admissibility criterion by a leading case in 2009[14]. According to this judgment of the

10 Luis Lopez-Guerra, ECtHR and Turkey-II: Constitutional Complaint and ECtHR, TAA (2010) p.66.

11 Ibid.

12 Ibid, p.67.

13 Ibid.

14 See for English translation of the judgment dated 25.6.2009 No. 155/2009. http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC1552009en.aspx.

Constitutional Court in these cases would be special constitutional relevance;

" a) that of an appeal which raises a problem or facet of a fundamental right subject to protection on which there is no case law of the Constitutional court,

b) or that the occasion requires that the Constitutional Court clarify or change its doctrine, as a consequence of a process of internal reflection, as occurs in the case in question, or due to the new social realities which have arisen, or regulatory changes relevant for the configuration of the content of the fundamental right, or a change in the doctrine and theory of the guarantee bodies entrusted with the interpretation of the international treaties and agreements referred to in art. 10.2 SC;

c) or when infringement of the fundamental rights claimed originates from the law or another provision of a general nature;

d) or if the violation of the fundamental right derives from reiterated case law interpretation of the law that the Constitutional court deems to be damaging to the fundamental right, and on which it believes it necessary to declare another interpretation pursuant to the Constitution;

e) or when the Constitutional Court case law on the fundamental right alleged in the appeal is not being complied with in a general and reiterated manner by ordinary Jurisdiction, or there are contradictory judgments on the fundamental right, either by interpreting the constitutional doctrine in a different manner, or by applying it in some cases and not recognising it in others;

f) or in the event that a court clearly declines its duty to respect the case law of the Constitutional Court (art. 5 OLJ);

g) or, in short when the matter raised, despite the fact that it is not included in any of the aforementioned cases, transcends the case in question because it raises a legal issue which has general and relevant, social or economic repercussions, or has general political consequences, effects which above all could lead in particular, although not exclusively, to specific electoral or parliamentary protection of rights."

The Turkish Law on the Constitutional Court (of 2011) has followed these examples and enshirined a substantive admissibility criterion in Article 48(2). According to this provision, the Court may dismiss applications which do not bear significance for the enforcement and interpretation of the Constitution or for the determination of the scope and limits of fundamental rights, and which do not involve significant damage sustained by the applicant.

This provision is closer to German regulation and tries to make a comprimise between objective and subjective functions of individual application. Accordingly, the applications which donot raise any significant question in terms of interpretation of constitution will be rejected unless the applicant suffered a significant damage.

The Turkish Constitutional Court has not rejected any application up to now because the application does not have constitutional significance. This must be considered quite normal since individual application was introduced a very short time ago and the Court has not established case-law in any field clearly yet. But it must not be suprising if we see some inadmissibility decisions on the basis of this criterion in the future once the case-law of the Court is established in some areas.

As a result I can say that constitutional courts nowhere in the world are capable of protecting fundamental rights of citizens. Protection of fumdamental rights must be the task of ordinary courts. The role of constitutional courts should be limited to interpreting constitutions and guiding ordinary courts. As an objective defender and interpreter of fundamental rights in cases which have constitutional significance, constitutional courts should provide decisive interpretations of the constitution to the inferior or ordinary courts. Thank you very much for your patience.

FREEDOM OF ASSEMBLY AND FREEDOM OF EXPRESSION IN THE REPUBLIC OF AZERBAIJAN AT PRESENT TIME

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ABSTRACT

In the article the issue of important aspects of democracy and the main elements of formation and development of civil society such as the rights to assembly, freedom of expression, press are analysed on theoretical conception and normative basis. The right to form political parties, trade unions and other social unions and to be a part of existing unions is the right enshrined in the Constitution of the Republic of Azerbaijan and other laws. The wide research as to the legal basis in concerning the setting-up of the unions in Azerbaijan is given in the article. The Unions functioning in politic, education, culture, health, sports, ecology and other spheres increase the role of civil society.

There has been given a wide description of the legislative basis of expression and press freedom in Azerbaijan, which moves on the democracy state building path. And finally, the article especially emphasizes the importance of responsibility of mass media in giving objective information to society via media and internet based on the freedom of expression, and keeping national interests.

KEY WORDS: *Assembly, expression, freedom, human rights, mass media, non-governmental organization, political party, press, religious organisation, trade union, thought.*

FREEDOM OF ASSEMBLY AND FREEDOM OF EXPRESSION IN THE REPUBLIC OF AZERBAIJAN AT PRESENT TIME

Sabina ALIYEVA[*]

Human rights and freedoms are among of the actual problems of the present period. The whole history of mankind showed itself as the history of formatting the conception of human rights and development of the human rights.

The ensuring and protection of human rights are one of the main duties of the state. In this purpose the relevant legislative acts are being passed and current legislation is brought to meet realities.

One of the main rights which are reflected in our Constitution is right of assembly.[1] The right of assembly is a necessary right to form the important element of the democracy – civil society. To implement the right of assembly people can organize different unions and obtain opportunity to solve public problems together.

The right of assembly gives the opportunity to persons to solve the problems they face by means of coming together and making collective idea, coming to overall decision and having mutual profit and it forms the basis for conception "union".

It is said in the Article 58.2 of the Constitution of the Republic of Azerbaijan: "Everyone has the right to establish any union, including political party, trade union and other public organization or enter existing organizations. Unrestricted activity of all unions is ensured."

The right of assembly is very important in its meaning and contains some kind of freedom of self-expression. This right is important from the view of freedom for free thinking people to

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1 Article 58 of Constitution of the Republic of Azerbaijan.

unite with their like-minded fellows to bring their ideas into life.

This right is implemented in the following forms:

1.Non-governmental organizations

2. Political parties

3. Trade unions

4. Religious organizations.

Though above mentioned unions differ from each other by their goals, terms and structure, they have common particularities:

1. They are independent unions voluntarily created in purpose to provide community interests.

2. They are not created in purpose to get profit.

There can be created unlimited non-governmental organizations. At the same time the registration of the union as a legal body is essential for its existence. Just registration by the states gives the union more privileges. By registration the union obtains the legal body statute. So some donors and/or state authorities give priority for cooperation to the unions which have the legal body statute. And at the same time the lack of the registration can cause some problems in their work.

The work of NGOs in the Republic of Azerbaijan is determined in accordance with the Civil Code of the Republic of Azerbaijan[2], and the laws "On the non-governmental organizations (social communities and foundations)"[3], "On state registration and state registry of legal entities"[4]. The law of the Republic of Azerbaijan "On the non-governmental organizations (social communities and foundations)" in its article 1.3 says that "This Law defines the rules of establishment, operation, reestablishment and liquidation of non-governmental organizations as legal entities, running, management

2 The Civil Code of the Republic of Azerbaijan - 2000 year.

3 Law of the Republic of Azerbaijan "On the non-governmental organizations (social communities and foundations)" – 13 June 2000.

4 The Law of the Republic of Azerbaijan "On state registration and state registry of legal entities"-12 December 2003.

of non-governmental organizations, and their relationships with state bodies".

The definition of "non-governmental organizations" includes only public associations and funds. Public Association is a voluntary, self-governed non-governmental organization, established by the initiative of a number of physical and/or legal persons, united on the basis of common interests with purposes, defined in its constituent documents, without mainly aiming at gaining profits and distributing them between its members. According to the records of the Justice Ministry there are more than 3600 NGOs in Azerbaijan[5].

They try to enlighten people on the topics mentioned above and to help to solve problems people face to by means of those projects. Today the main donors who support NGOs are Ministry of Youth and Sports of the Republic of Azerbaijan[6], Youth Foundation of the President of the Republic of Azerbaijan[7], the Council for State Support for NGOs[8].

The Foundation is a non-governmental organization without members, established by one or a number of physical and/or legal persons based on property contribution, and aiming at social, charitable, cultural, educational or other public interest work. At present time the most reputable Foundation in our country is Heydar Aliyev Foundation[9] headed by the first lady of Republic of Azerbaijan the member of Parliament Mehriban Aliyeva. The aims of this Foundation is to support the heritage of Heydar Aliyev and his gains in economic, social, cultural life of Azerbaijan and efforts to integrate Azerbaijan into world family, to study, propagandize and support implementing of worked out strategy aimed to improve financial position people of Azerbaijan, and to support wide scale projects and programs on science, education, culture, healthcare, sports and ecology, to implement programs for prosperity of

5 http://mqf.az/en.
6 http://www.mys.gov.az/.
7 http://youthfoundation.az/.
8 http://www.cssn.gov.az/.
9 http://www.heydar-aliyev-foundation.org/en.

Azerbaijan and its people, to organize exchange specialists, to help to increase scientific and creative country's potential, to develop infrastructure of the children's institutions, to disclose persons' creative potential and knowledge, to help them to show their skills and to develop, to bring up all-round educated children and youth, to help people with special needs, to help solving local problems, to develop healthcare service, to support researches in ecology, to advocate healthy life style, to popularize widely Azerbaijan culture, to protect moral values, to organize exhibitions of creative children, youth and artists, to organize events to increase the international authority of the Republic of Azerbaijan, to bring Azerbaijani truth to world community, to support religious tolerance, to build a civil society, to protect national moral values during integration into global world, to widen cooperation and to hold projects with local and international funds, NGOs, community organizations, to direct workshops and conferences on actual subjects in the Republic of Azerbaijan.

The person's social political interests and needs are considered to be a very important issue. Political parties form these interests, collect people around some idea and help them to express their political demands. That is why parties are more accurate in expressing and defending their interests and serve as an vanguard of some groups. As opposed to other organizations the political parties are organized to fight for state power in accordance with existing laws, to form government or to take a part in government. The Law of the Republic of Azerbaijan "On Political Parties" says: "Article 3. Principles of establishment and functioning of political parties Political parties shall be established and function on the basis of the principles of freedom of association, voluntariness, the equality of rights of their members, self-government, legality and publicity. The rights of members of a political party shall be defined in its charter and may not contradict the Constitution and laws of the Republic of Azerbaijan, international legal instruments on human rights and freedoms ratified by the Republic of Azerbaijan."[10]

In our country which is interested in establishing a democratic

10 The Law of the Republic of Azerbaijan "On Political Parties" – 03 June 1992.

state there are a lot opportunities for multiparty system. It is not coincidence that there are more than 50 parties in Azerbaijan. In accordance with the article 2.3 of the Decree 625 the President of the Republic of Azerbaijan on 2012 May 8, the Ministry of Finance was entrusted to divide money from state budget among parties and send them to their bank, and from 2013 this amount was divided between the parties[11].

The activity of other form of union - the trade union is regulated by the Constitution of the Republic of Azerbaijan, the Law of the Republic of Azerbaijan "About trade unions" and other legislative acts on trade unions. The Law of the Republic of Azerbaijan "About Trade Unions" defines legislative frames of these unions. For instance, in the Article 1 of this Law it is said that "Trade union represents independent public non-political organization, that joins employees, engaged in production and non-production sphere, as well as pensioners and persons, being educated, on a voluntary individual membership principle for the protection of their labour, social, economic rights and legal interests at working places, professions, branches and on the general republican level. It operates on the basis of own Articles and present Law".[12]

Trade Unions are non-political independent social organizations which do not depend on state bodies and political parties, and their aim is to protect the legal interests of employees, engaged in production and non-production sphere, as well as pensioners and persons being educated. Trade unions protect the labour rights of their members, take part in the working out of state occupational policy.

Trade unions come to conclusion on importance of making collective contract and take part as a party of the contract (the other party is an employer). The General Collective Agreement which is made every three years or annually between the Azerbaijan Council of Ministers, Azerbaijan Trade Unions Confederation and Azerbaijan National Confederation of Business (Employers) Organizations is very important for labour, social and economical regulations.

11 http://www.e-qanun.az/framework/23555.

12 The Law of the Republic of Azerbaijan "About Trade Unions" – 24 February 1994.

The minimum pay and minimum living wage, increasing criteria of needs, development of labour market, protection of job places, opening of new vacancies, improving of work conditions, defence of people who need social adaptation, ensuring people with job, defence of labour rights, labour security and other issues are settled in accordance with this Agreement. In accordance with legislation of the Republic of Azerbaijan in cases of reduction of the number of workers and staff, termination of the employment contract because of non- compliance with job requirements the trade unions should approve it in advance. Trade Unions also act as a party of collective labour disputes and to solve it justly and legally have the right to organize strikes and other public actions which are provided by the law of assembly freedom.

Trade unions carry out control over state of occupation, observance of the legislation about guarantees in occupational field within the limits of their authorities and in the legally established order.

The religious organizations as it is shown from the name are to bring together people for their religious and moral interests. Hereby the 7 article of the Law "On freedom of religious belief" of the Republic of Azerbaijan includes religious communities, educational centres, monasteries into religious organizations.[13]

Religious unions are voluntary organization for adult people to make religious researches and disseminate their religion. According to the law, religious organizations are voluntary organizations of religious people gathered to practise their religion. It is said that now there are more than 500 registered and in total more than 800 religious organizations in our country.[14] The mosques mostly play a role of religious communities. Though, our country is civil state and religion is separated from state, religious organizations as other organizations can play active role in the country's life and has the opportunity to bring their contribution into resolving the community's needs. Article 5 of the law says that religious organizations have the right to participate in social life and use mass

13 The Law of the republic of Azerbaijan "On freedom of religious belief" – 20 August 1992.
14 http://scwra.gov.az.

media as the other organizations. But it is prohibited for religious units to participate in political parties and donate them. The main activities of the religious unites are charity and enlightenment. This activity is implemented via independent and social funds. The religious organization in accordance with current legislation and their statue being a legal body can launch publishing house, polygraphs, manufacture, rebuilding business, orphanages, boarding schools, hospitals and etc.

Speaking on freedom of assembly we should also speak about connected to it freedom of expression, freedom of thoughts, press freedom. The main signs of the democracy – freedom of expression and press freedom play important role in progress of all-round developed states and people. Azerbaijan is among countries where freedom of expression is protected and press freedom is respected. Article 47 of the Constitution of the Republic of Azerbaijan says that everyone may enjoy freedom of thought and expression (47.1) and nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions. (47.2).[15] Freedoms of thoughts, expression and information not only the base and one of the main principles of modern informative society and work of free mass media but also one of the indicators of democratic development of the country. Being of inseparable part of human rights and freedoms, the freedom of expression, thoughts and their support shows the level of democracy in the state and how successful democratic institutions are.

Azerbaijan started to build democratic and developed state from the first days of its existence and we see the successful results of it. Now the main elements of democracy supporting of freedom of expression, press, and development of the free press became the priority. But if we look back for the beginning of the 24 years of independence of our country we see chaos, anarchy and disorder. This situation showed itself in the press as well as in the other areas. There were obstacles for freedom of expression and thought and journalists met with physical oppressions. As in the other areas 1993 year after Heydar Aliyev came back to power he paid attention

15 http://www.constcourt.gov.az/laws/26.

to development of independent media as a part of democracy challenges.

The abolition of press censorship by the decree of the National Leader in 1998 helped to develop free, independent media and increased the number of them. It built the base for existence of numerous media organs and informative agents, online medias, journalists' unions. Note that for developing national media Heydar Aliyev was awarded with a prize "Journalists' friend" in 2002.[16]

One of the most important expressions of the national leader "Press is a mirror of the society". Mr.Heydar Aliyev provided changes in legislation to abolish the obstacles on the way of freedom of expression, thoughts, press and information, and put free press as a priority for developing of civil society in Azerbaijan. He claimed that he is an advocate of freedom of expression and guarantor of free press by saying following: "Our mutual aim is to give press more freedom, to support freedom of expression, to develop democracy in all spheres of Azerbaijan."

President Ilham Aliyev from his first steps as a President proved that he is a successor of the way of Heydar Aliyev in terms of supporting free press development. Some amendments and changes to the Constitution were adopted to stop intervention in private life and provocative writings and it précised the role of mass media in the society and its responsibility. Development of the law-based state and civil society was provided by integration into world information area and moving into informative society. This opened opportunities let people, society and state to meet their information needs, and give opportunity for mass media to develop and to meet international standard. Among the steps showing attention to press we can list the organization the Foundation to Support Development of Mass Media at the President of Azerbaijan and Media Council[17] which were set up by the decree of Mr. Ilham Aliyev,[18] debts newspapers to publishing houses were deleted many times, social situation of the journalists and material base of

16 http://www.ntrc.gov.az/az/content/news/187.html.
17 http://www.kivdf.gov.az.
18 http://e-qanun.az/alpidata/framework/data/16/f_16497.htm.

newspapers were improved and etc. As the result of it freedom of expression, thoughts, press and pluralism are continuously developing in our country and protected on a very high level. For the last two years the head of the state Ilham Aliyev was twice awarded with the name "Journalists' friend" and this shows the attitude of media society to attention paid to mass media in this period of time.[19]

It is known that open and hidden economical-political-militarily confrontation between states in modern world leading in five directions on water, earth, area, space and at the same time in virtual world which is based on high tech. From this point of view we can understand and accept that leading politicians call XXI the century of information confrontation.

No doubts that opportunities of Internet make this confrontation sharper. It is a reason why our press has the duty to inform local and international community about realities in the country. Taking in account the influence on people's mind of paper and online press, it is clear that this mission should be taken with responsibility and objectivity. For this reason, mass media should bring to the world community the truth about Karabakh, the attitude of Azerbaijan state on solving the problem, and to expose Armenian fraud. Because the supporters of Armenian circles who cannot accept the success of Azerbaijan continue the campaign against Azerbaijan. They try to introduce Azerbaijan as non-democratic state. In this situation writers and authors should answer to this approach with objective and operative information about achievements of Republic of Azerbaijan to local and international communities.

Of course the existence of different ideas and political trends in the country is a sign of pluralism development. It is normal moving power for every society. But national and state interests should be taken first and the professionalism and patriotism of journalists are very important. Expression and press freedom do not imply the "right to write one wants". Because there is legal bounds and balance in the world. The rights of one person finish where the

19 http://en.president.az/articles/10247.

rights of the other start. It is unacceptable if opposition acts against the interests of the state and people. It is inadmissible that some sites believing in iconic west democracy using pluralism try to discredit our society. Because mass media which present western life style and mentality do not understand that they do not help to build democracy in the country with original culture but trying to impose odd values in formatting country. Though every nation's form of state and system of democratic values makes blend with its religion, philosophy, art, in total its culture. Unfortunately, some circles forget their national identity and traditions, and try to bring discussions of internal problems outside the country.

In our country there are no restrictions to social networks (Facebook, Twitter and etc.) Being a mirror of society the press should give its opinion on the problems. But the approach must be objective, without any bias. And it is the wish of Azerbaijan state and society of Azerbaijan where all necessary actions for democratic reforms, including freedom of expression, thoughts and information freedom as well as pluralism development are taken. The main task of the press to enlighten taken actions, to show negative objectively, to help to find solution to some problems. It is natural that mutual efforts open a wide road to development and progress. We should stress one more point if today we call press the forth power it takes more responsibility to realize.

The Constitutional Court of Azerbaijan Republic adopted a number of decisions on the discussed issue, as an example I want to describe two of them.

On Abolition of Free Transport Workers Union, year 2001. The petition of the Prosecutor's Office notes that Free Transport Workers Union opposing to the aims and duties of its Charter as well as opposing to Article 83 of the Law of Azerbaijan Republic "On Road Traffic" established illegal checkpoints in Baku and on few roads of Baku-Guba Highway. The mentioned Union assuming powers of the state bodies acted on the mentioned checkpoints under "monitoring group" and implemented control for movement of transport.

Under pretence of infringement of the traffic rules, members of the Union repeatedly demanded from drives to present driving licences, documents concerning right to carry on business and other documents as well as illegally withdrawing the documents drew up protocols "On Administrative Delinquencies" and thus, roughly violated rights of citizens. In this connection, the Ministry of Justice sent in three warnings to the Union within one year.

Taking into account the above mentioned and three written warnings addressed to the Union within one year according to Article 31.4 of Law of Azerbaijan Republic "On Non-Governmental Organisations (public unions and funds)", the Prosecutor's Office of Azerbaijan Republic asks the Constitutional Court for abolition of the mentioned Union.

Constitution of Azerbaijan Republic as well as a range of international documents provide for the right to free associations. Free activity of associations shall be guaranteed. However, from the materials of the case it is obvious that the Union exceeded the bounds of duties and aims determined by its Charter. The Union interfering into activity of state bodies and other organisations infringed the Law under pretence of protection of drivers' rights, interfered into activity of the State Concern "Azeravtonagliyat" and State Traffic Police and carried out a range of illegal checks-up in the traffic sphere. Law of Azerbaijan Republic "On Road Traffic" does not provide for the right of any physical or legal person as well as of any public organisation, except for the authorized state bodies, to stop the means of transport and check-up drivers' documents.

The Constitutional Court underlines that the State considering public associations as a part of society shall create all conditions established by law which are necessary for the activity of such associations. However, public associations in their activity shall observe the Constitution and laws. Article 80 of the Constitution of Azerbaijan Republic states that infringement of provisions of the Constitution and laws of Azerbaijan Republic including usurpation of rights and liberties and also failure to fulfil responsibilities specified in the Constitution and laws of Azerbaijan Republic shall be persecuted.

Ignoring three written warnings sent to it, the Union continued to interfere into activity of the state bodies, put obstacles into activity of the specific organisations and violated human rights provided for by the Constitution and laws of Azerbaijan Republic. Thus, the Union in its activity violated principles of the supremacy of the Constitution and protection of human rights which are the main attributes of the legal state.

Being guided by Articles 130.3.7 of the Constitution, Articles 75, 76,78, 80-83 and 85 of the Law of Azerbaijan Republic "On Constitutional Court", the Constitutional Court of Azerbaijan Republic decided:

1. To abolish the Free Transport Workers Union registered by the resolution of 2 June, 1999, № 1134 of the Board of the Ministry of Justice.

2. To recommend to the Prosecutor's Office of Azerbaijan Republic to provide for examination of the facts via procedure determined by legislation which were presented by the representative of the respondent party during the court session.

Next decision of the Constitutional Court of Azerbaijan Republic was about conformity of Article 33 of the Law of Azerbaijan Republic "On Mass Media" with Articles 60.1,71.2 1nd 71.7 of the Constitution of Azerbaijan Republic. Year 1999.

According to Article 33 of the Law of Azerbaijan Republic "On Mass Media" in case of refusal to publish or distribute the refutation or response as well as infringement by mass media of the established monthly term for publication or dissemination of refutation, the citizen or the organization can apply to court during six months from the date of publication of information not corresponding to reality (truth).

The body submitted a petition asks for verification of conformity of these provisions of the Law with Article 46.1, Article 60.1, Article 71.2, 71.7 and Article 147.2 of the Constitution of Azerbaijan Republic.

In connection with the petition, the official texts of Article 33 of the Law of Azerbaijan Republic "On Mass Media", Article 7 of the Civil Procedure Code of Azerbaijan Republic certified by the Administration of the Milli Majlis (Parliament) of Azerbaijan Republic are enclosed to the case.

The Constitutional Court of Azerbaijan Republic notes the following.

Freedom of expression and information, the right to get information, the delivering to public of objective and corresponding to reality information is an integral part of the legal status of mass media. According to this status the use of mass media against private life of citizens, their honour and dignity as well as dissemination by them of information not corresponding to reality are prohibited.

Everyone has the right to require refutation from mass media concerning information not corresponding to reality.

In most cases the demands concerning publication or dissemination of refutation are lodged with the purpose of protection of honour and dignity.

According to Article 46.1 of the Constitution of Azerbaijan Republic everyone has the right to defend his/her honour and dignity.

In Article 60.1 of the Constitution of Azerbaijan Republic it is envisaged that judicial protection of rights and freedoms of every citizen is ensured.

Contrary to these provisions of the Constitution of Azerbaijan Republic Article 33 of the Law of the Azerbaijan Republic "On Mass Media" provides for obligatory pre-trial procedure of consideration of dispute. So, according to specified Article of Law the citizens and organizations can enjoy their right to apply to court only after refusal of mass media to publish or to disseminate the refutation, or after the expiration of monthly term established for publication or dissemination of refutation. Such order infringes the rights of physical and legal persons stipulated in Article 60.1 and Article 71.1, 71.7 of the Constitution of Azerbaijan Republic.

Besides this, the right for protection of honour and dignity was also reflected in the Civil Code of Azerbaijan Republic.

According to Article 7.1 of this Code a citizen or an organization can demand via court the refutation of information discrediting honour and dignity if those who disseminated such information will not prove its correspondence to reality. It follows from these provisions that the civil legislation does not provide for obligatory pre-trial procedure of settlement of such disputes.

Thus, the provisions of Article 33 of the Law of Azerbaijan Republic "On Mass Media" contradict also to requirements of Article 7 of the Civil Code of Azerbaijan Republic.

In connection with above stated and also taking into consideration the requirements of Article 147.2 of the Constitution of Azerbaijan Republic about direct legal force of the Constitution of Azerbaijan Republic, the Constitutional Court of Azerbaijan Republic considers that physical and legal persons have the right to apply directly to court on the issue of non-correspondence to reality of information disseminated in press. However right of the person to apply to court does not exclude his/her right to apply to mass media.

As regards the six-monthly term of limitation of action provided by Article 33 of the Law of Azerbaijan Republic "On Mass Media", the Constitutional Court of Azerbaijan Republic notes that according to legislation if the court considers the reasons of missing of term of limitation of actions valid, it can restore this term.

Being guided by Article 130.3.1 and 130.7 of the Constitution of Azerbaijan Republic, Articles 75, 76, 78, 81, 82, 83 and 85 of the Law of Azerbaijan Republic "On Constitutional Court", the Constitutional Court of Azerbaijan Republic decided:

1. To recognize the provisions of Article 33 of the Law of Azerbaijan Republic "On Mass Media", limiting the right of a person for judicial protection, contradicting to Article 60.1, Article 71.2, 71.7 of the Constitution of Azerbaijan Republic as null and void.

The person who considers that his/her rights are violated, depending on his/her will can apply to mass media or directly to court for restoration of these rights.

CONSTITUTIONAL FRAMEWORK OF THE FREEDOM OF EXPRESSION AND POLITICAL ORGANIZATION

Prof. Dr. Yusuf Şevki HAKYEMEZ

TURKEY

CONSTITUTIONAL FRAMEWORK OF THE FREEDOM OF EXPRESSION AND POLITICAL ORGANIZATION

Prof. Dr. Yusuf Şevki HAKYEMEZ[*]

The freedom of expression has a special place among the freedoms in the democratic regime; because, thanks to the freedom of expression, people can reveal their ideas which are the productions of mind and can present their own opinions and criticisms about various public problems. In this sense, the freedom of expression is also of central importance in democratic regimes in the process of people's participation in administration and supervision over the party in power.

The freedom of expression has a special place in the constitutions in Turkey as well. Particularly, this freedom was designed in a more detailed way in the Constitutions of 1961 and 1982 and the freedom of religion and conscience, the right to form association, the right to assembly and demonstration, the freedom of press and the freedom of political parties, as diverse dimensions of this freedom, have been regulated in separate articles. While these freedoms were being drawn up in the relevant constitutions, the features corresponding to the fundamental characteristics of these constitutions were taken into consideration and the requirements thereof were included in the texts of the articles. In particular, the ideological-statist aspect of the Constitutions of 1961 and 1982 was correspondingly considered in the articles where these freedoms were regulated as well, and for this reason, major problems were faced with regard to implementation of these freedoms.

Its most important reflection is on both the exercise of the freedom of expression in the individual sense and the appearance of the freedom of political parties, which is the typical exercise of

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the freedom of political expression, in daily political life. Moving from these provisions in the Constitution, some crimes of thought were encountered with regard to implementation and again, actions for dissolution of many political parties were brought and the Constitutional Court decided in most of these cases that sanctions be imposed on the respondent parties.

Along with that, especially after the constitutional and legal reforms realized after the 1990s, the purpose of further approximation to the universal standard in time came to the forefront.

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However, the resistance coming from the judiciary in particular against the reforms carried out should be mentioned here. It is possible to say that this resistance decreased more relatively especially after the constitutional amendment in 2010.

Here in this presentation, I will try to cover the outlook of the freedom of expression and political organization in Turkey in the scope strived to be presented above. In this connection, first of all, what the scope and limits of the freedom of expression and political organization are will be pointed out and afterwards, I will particularly endeavour to examine in what way the implementation on the party bans meaning restriction of the freedom of political parties has taken place and the attitude of the Constitutional Court in this respect.

I. The Freedom of Expression in the Constitution of 1982

The Freedom of Thought and The Freedom of Dissemination of Thought

As it is known, the freedom of expression can be mentioned with different names. The freedom of thought and the freedom of speech can also be basically used with a view to implying the freedom of expression. Besides, in the Constitution of 1982, the freedom of thought and the freedom of dissemination (expression) of thought were drawn up in separate articles. While the freedom of thought

and faith was being regulated in Article 25 of the Constitution; it was expressed that everyone has the right to freedom of thought and opinion and no one shall be compelled to reveal his thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused on account of his thoughts and opinions.

In the next article, the freedom of expression and dissemination of thought was drawn up. In the first paragraph of this article, it was stated that everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively and that this right includes the freedom to receive and impart information and ideas without interference from official authorities. In the subsequent paragraphs, the points related to restriction of the exercise of this freedom were drawn up.

In the Constitution of 1982, the freedom of expression, like many other freedoms, is in fact subjected to a regime of restriction beyond the universal standard. In this sense, although no restriction has been provided for in article 25 with regards to the freedom of thought (it should be indicated that it is not possible even if it were provided for), major restrictive points have been included about restriction of the freedom of expression of thought in article 26. In respect of restriction of the freedom of expression of thought, the situation until 2001 and the new situation arising with the constitutional amendment realized in 2001 should be expressed separately. However, it should be primarily stated that in both cases, the freedom of expression of thought can be subjected to some restrictions beyond the universal standard. It should be noted that the situation after the constitutional amendment in 2001 provides for a less restriction in comparison with the previous one.

According to the situation before the constitutional amendment in 2001, the freedom of expression of thought can be restricted by law for the purpose of protection of indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, public peace, public interest, public morality and public health, as nine reasons specified in article 13

of the Constitution, and also based on any of the special reasons prescribed in the relevant articles of the Constitution. In article 26, it was considered that it could be restricted with a view to "preventing crimes, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law or ensuring the proper functioning of the judiciary", as special reasons for restriction. Moreover, in the next paragraph of the same article, regulations were included about the impossibility of any language forbidden by law to be used in expression and dissemination of thoughts, and the way to have written and printed papers, records, audiovisual tapes and other tools and materials of expression against this ban collected.

The form before the amendment in 2001 indicates that both the general reasons of restriction included in article 13 and particularly in article 26 the constitutional provisions providing that any language forbidden by law cannot be used in the expression and dissemination of thoughts, cause the freedom of expression in the Constitution of 1982 to fall rather behind the universal standard and provide the legislator with the opportunity to restrict this freedom quite much. It fundamentally shows how differently a rule of law providing and forbidding by law that a language cannot be used in expression of thoughts which are the productions of human mind approaches the freedom of thought in this Constitution.

Hence, the Constitution-maker made a series of amendments in the relevant articles of the Constitution of 1982 mainly on human rights in 2001 upon impact of the problems which these backward regulations bring about in the implementation and the bans in this scope getting out of date. Some of these amendments have been made in the articles related to the freedom of expression. Within the scope of the amendments made in 2001, first of all, nine general reasons of restriction in article 13 of the Constitution were removed and the freedom of expression, like each kind of freedom, has acquired a more guaranteed state as well. Yet, while removing these general reasons for restriction, in addition to the special reasons for restriction included in the article related to the freedom of expression

and dissemination of thought, points regarding "protection of indivisible integrity of the State with its territory and nation, fundamental features of the Republic, public security, public order, and national security" were also added. Here, it is conspicuous that the phrase of "fundamental features of the Republic", being among the new reasons for restriction having been introduced, is rather problematic. Based on this special reason for restriction, the legislator, when necessary, can restrict the freedom of expression and dissemination, even on the basis of the principle of social state included among the features of the Republic. Thus, the new provision having been introduced is fundamentally problematic in terms of human rights as well.

At the same time, removal of the ban that any language forbidden by law cannot be used in expression and dissemination of thoughts through the amendments in 2001was quite right. Particularly, it should be stated that with this amendment, removal of bans on language having no logical basis in Turkey is an important reform.

Besides, moving from the provisions related to the freedom of expression and dissemination of thought in the Constitution, it has been observed that in practice, some crimes of thought continue to exist and give rise to major violations of human rights. It should be mentioned that not only the special reasons for restriction in Article 26 but also the abstract expressions and concepts with political content included especially in the preamble of the Constitution take place among the constitutional grounds for this. For instance, since the expression "No protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and modernism of Atatürk and sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism" is still included in the Constitution, the constitutional basis of the laws restricting freedoms still continues its existence.

Other Freedoms Related to the Freedom of Expression in the Section in the Constitution about Rights of the Person

The Constitution of 1982 has also regulated some other freedoms regarded as being related to the freedom of expression in the section "Rights and Duties of the Person" beside "Freedoms of Expression and Dissemination of Thoughts". In this section, the freedom of religion and conscience in article 24, the freedom of science and art in article 27, the freedom of press between articles 28-32 with diverse dimensions, the freedom of association in article 33 and the right to assembly and demonstration in article 34 have been covered. These rights can be considered as other versions providing the exercise of the freedom of expression individually or collectively.

With regard to the exercise of these rights in the Constitution, there are problems of approach exactly similar to the ones in Article 26 where the freedom of expression was set out. The Constitution of 1982 has indicated its basic approach and characteristic features related to the human rights-based approach in almost each article, where each freedom was drawn up. Thus, we are often faced with these problems in the constitutional framework regarding the freedoms of intellectual nature.

In order not to digress from the topic, here I will not touch upon the regulations related to the right to assembly and demonstration, association and press, but I will take a glance at the approach in the article on the freedom of science and arts and the freedom of religion and conscience.

While setting out the freedom of religion and conscience in Article 24 of the Constitution, following the expression in the first paragraph that everybody has the freedom of conscience, religious belief and faith, in the second paragraph the phrase "Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14" was included. In this view, Article 14 of the Constitution, under the heading of the ban on abuse of human rights, fundamentally includes the reasons for restriction, which can be considered as general restriction for almost all the freedoms. For this reason, it is obvious that it is possible to restrict the freedom of worship easily.

One of the most important guarantees of Article 24 in the context of human rights has perhaps been expressed in the third paragraph as such "No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions." Hence, the privileged position of religious beliefs and convictions has been expressed and again, the standard concerning participation in worship and religious rites and ceremonies has been guaranteed as the constitutional provision.

At the same time, as for the subsequent two paragraphs, it is possible to say that they take place among the most problematic articles of the constitution related to the freedoms of intellectual nature. As a matter of fact, the fourth paragraph ensures that religious and moral education and instruction shall be conducted under state supervision and control; instruction in religious culture and moral education shall be one of the compulsory lessons in the curricula of primary and secondary schools; other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives. This situation explicitly reveals the monopolistic, statist, and authoritarian approach of the constitution towards the freedom of religion and conscience.

Likewise, the last paragraph of the article is a provision which can rather restrict the freedom of religion and conscience. This paragraph is as such:" No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets." Although an article in this manner is perceived as a requirement of the principle of secularism at first sight in terms of the way it was regulated, basically it has an extremely problematic nature and through the interpretation of this paragraph, almost all the exercises of religious freedom can be deemed as abuse and can be forbidden. This article is essentially in the form of a typical view of understanding of militant secularism not being libertarian

envisaged by the Constitution of 1982. Thus, this paragraph can be seen as the most problematic paragraph regarding the freedom of religion and conscience, since in the way specified in this paragraph, there can be no objective standard of abuse and exploitation of religion and religious feelings or the things enshrined as religious.

In the article related to the freedom of science and art, following the expression that everyone has the right to study and teach freely, express and disseminate science and arts, and to carry out research in these fields, it was provided in the second paragraph that the right to disseminate shall not be exercised for the purpose of changing the provisions of articles 1, 2 and 3 of the Constitution. The regulation in this way is completely in harmony with the philosophy of the Constitution of 1982, which adopts the ideological/ statist approach. The fact that a freedom, such as the freedom of science and arts, needed to be less restricted does not allow for dissemination of a scientific study proposing a change in any of the characteristics of the Republic in the second article of the Constitution essentially summarizes the approach of this constitution towards the freedom of expression. For instance, restriction of dissemination of a scientific study arguing for the liberal state by changing the social state is indefensible in principle.

II. Freedom of Political Organization

The most important right that comes to mind in the context of freedom of political organization is the freedom of political parties. The issues related to this matter are regulated under the following headings in Article 68 and 69 of the Constitution as "Forming parties, membership and withdrawal from membership in a party" and "Principles to be observed by political parties".

Similar to the freedom of expression, the freedom of political organization has many problematic aspects in 1982 Constitution. While the Constitution defines the political parties as indispensable elements of democratic political life, the same Constitution aims to restrict in many aspects the statutes and programmes, as well as the activities of political parties. The practices about the freedom of political organization revealed that 1982 Constitution aims

to standardize the political parties with an ideological-statist perspective. This situation deeply affected the freedom of political organization in Turkey.

a. Forming Political Parties and Membership in a Political Party

The second paragraph of Article 68 in the Constitution states that political parties are indispensable elements of democratic political life. The same Article prescribes that the citizens have the right to form political parties and duly join and withdraw from them and that one must be over eighteen years of age to become a member of a party. Accordingly, the Constitution grants the political right of forming political parties and membership in a political party only to the citizens who are the holders of the sovereignty and it also requires that citizens may enjoy these rights only if they are over eighteen years of age. This requirement to be over eighteen years of age was not included in the original text of 1982 Constitution. The original criteria of twenty one years of age was amended to eighteen and this amendment may be considered an important change as it equalizes the age of legal majority and the age criteria to become a member to political parties.

In addition to these, the Constitution imposes some other limitations as to those to become a member to political parties. Accordingly, "Judges and prosecutors, members of higher judicial organs including those of the Court of Accounts, civil servants in public institutions and organizations, other public servants who are not considered to be labourers by virtue of the services they perform, members of the armed forces and students who are not yet in higher education institutions, shall not become members of political parties." As this provision suggests, there is no obstacle to the labourers' becoming a member to the political parties. However, the public servants can not become members of political parties in principle. Nevertheless, the same Article prescribes that the membership of the teaching staff at higher education to political parties is regulated by law and this law shall not allow those members to assume responsibilities outside the central organs of the political parties.

The Constitution also states that the principles concerning the membership of students at higher education to political parties are regulated by law. The students at universities are subject to a different regime than that of students at pre-university schools or military schools.

The same article also provides that political parties shall be formed without prior permission. Thus, the negative attitude of the state comes to the forefront in the exercise of freedom of political organization in the form of establishing political parties. In addition this, the Constitution states that political parties shall pursue their activities in accordance with the provisions set forth in the Constitution and laws. Indeed, this provision may harm the essence of the freedom of political parties as it may cause all political parties to adopt the constitution as if it were their common party programme. Under such circumstances, the existence of more than one political party in the political arena may lose its meaning.

As a matter of fact, when we look at the principles and limitations to be observed by political parties which we will examine below, we see that the political parties' field of activity is considerably restricted on the basis of constitutional provisions.

b. State Aid to Political Parties[1]

As per the provision added to 1982 Constitution in the constitutional amendments in 1995, "The State shall provide the political parties with adequate financial means in an equitable manner. The principles regarding aid to political parties, as well as collection of membership dues and donations are regulated by law." Thus, the state aid to political parties was provided with a constitutional guarantee.

As there was no constitutional provision on this issue in the previous period, the Constitutional Court ruled some conflicting judgments during both the periods of 1961 and 1982 Constitution on the regulations enacted by the legislative organ (parliament).

1 Under this heading, the paper hereinafter includes precise excerpts from the publication Yusuf Şevki HAKYEMEZ, Anayasa Mahkemesinin Yargısal Aktivizmi ve İnsan Hakları Anlayışı, Yetkin Publishing., Ankara, 2009, p. 306-310.

The Constitutional Court delivered its first judgment on the financial aid to political parties in 1969. This judgment examined the allegations of unconstitutionality against the Law numbered 1017, dated 22.2.1968, which regulated the state aid to be provided to political parties in proportion to the percentage of valid votes they received in the previous general elections.

As the issue of state aid to political parties was not explicitly regulated under 1961 Constitution, the Court first examined whether the state aid to political parties is constitutional or not. Pursuant to the Court's judgment, although the Turkish Constitution does not directly define the political parties as public law institutions and a state organ, it is evident that political parties are not considered private entities, but a superior importance is evidently attached to these parties. This significance attached to political parties by the Constitution is proportionate to their function in the political life. Political parties are institutions that work constantly to manage, supervise and influence the social and state order and public activities as in the cases of elections to Turkish Grand National Assembly and local administrative bodies (municipalities). Besides, the political parties are guided by the public and they mediate and facilitate the shaping of political will. From this aspect, political parties serve almost like a school for training and maturing of the public in the field of democracy. Acting on the basis of their important role in political life, the Constitutional Court noted that the political parties which cannot sustain its activities with the ordinary contributions of its members may face the danger of being exposed to the influence and pressure by some persons or organizations of financial wealth and, thereby, being degenerated. The Court, noting that such a threat may be averted through state aid, acknowledged that there is public interest in the said state aid. According to the Constitutional Court, as it is self -evident that the financial aid to be provided by the state to the political parties must be deemed a public expenditure, financial aid to be provided by the state to the political parties can not be considered unconstitutional in principle.[2]

2 See.: E.S. : 1968/26, K.S. : 1969/14, K.T. : 18, 19.2.1969.

Later on, the Court examined the constitutionality of the law provision that regulates the conditions and calculation criteria for the state aid. The law provision subject to constitutionality review divides the political parties into two categories with regards to benefiting from state aid: "those who participated in previous parliamentary elections" and "those who have not participated in a parliamentary election yet". For the political parties which participated in previous parliamentary election, they must have received at least five percent of the valid votes in order to benefit from state aid. The political parties which have not participated in a parliamentary election, yet may benefit from the state aid provided that such party's number of deputies is at least five percent of the total number of deputies in the parliament and that party has established organizations in at least one-third of the country's provinces and in one-third of the districts within those provinces in accordance with the provisions of the Law on Political Parties and the statute of that political party.

The Constitutional Court ruled that the said provision of law is unconstitutional on the following grounds:

"The provision of law subject to constitutionality review divides the political parties into two categories according to certain criteria and provides State aid to some of the political parties while depriving the others of such means. If the State aid to political parties is the result of a necessity, such necessity applies to not only some of the political parties but all of them. Depriving some of them of the State aid contradicts the principles of justice and equity. The Constitution defines the political parties as indispensable elements of democratic political life, regardless of their being the ruling or opposition, large or small, strong or weak parties. Making discrimination among the political parties with regards to the State aid to be provided for them reduces the ones deprived of State aid to a position of dispensable element of democratic political life. Such an attitude is incompatible with the principle laid down in the Constitution (Art. 56).

If discrimination is made among the political parties with regards to the State aid to be provided for them, then there arises a difficulty of coming up with fixed objective criteria or the inclination to avoid such criteria and the efforts to invent new criteria according to the time and needs. Although

the second paragraph in provisional Article 4 of the Law numbered 648 requires that the political parties which have not yet participated in a parliamentary election must have a parliamentary group in the Turkish Grand National Assembly to benefit from the State aid, Law numbered 1017 puts this principle aside and introduces a new principle by stating these political parties may benefit from the state aid, provided that their number of deputies is at least five percent of the total number of deputies in the Turkish Grand National Assembly and they have established organizations in at least one-third of the country's provinces and districts. Such criteria which are not fixed and objective allow the political party holding the majority in the Turkish Grand National Assembly to favor or disfavor a certain political party at their own will or to accomplish both intentions at the same time, thereby, causes arbitrariness in the State aid. It is evident that such a situation contradicts the Constitution, which does not make discrimination among the political parties in general"[3].

After this ruling of the Court for annulment, a new case for constitutionality review of the Law reformulating the State aid to political parties was filed to the Constitutional Court. This time, the Constitutional Court ruled that State aid to political parties is unconstitutional in principle. Therefore, this ruling of the Constitutional Court completely changed the previous opinion of the Court on the State aid to political parties. According to the new ruling of the Court, the political parties are not institutions of public service or public interest and the State aid to be provided to political parties can not be included in the public expenditures. As Article 61 of the Constitution states that everyone is under obligation to pay taxes according to his financial resources in order to meet public expenditure, there is no constitutional basis for the State aid to political parties from the financial resources collected from the citizens through the financial obligations imposed on the basis of this Constitutional provision. Therefore, State aid to political parties is unconstitutional in principle[4].

In the Court's opinion, the Constitutional provision that prescribes the formation of public opinion and will freely without the State's

3 See.: E.S. : 1968/26, K.S. : 1969/14, K.T. : 18, 19.2.1969.

4 See.: E.S. : 1970/12, K.S. : 1971/13, K.T. : 2.2.1971.

impact prevents the qualification of political parties as a State organ and inclusion of these parties into organized state structure on the grounds of their activities to this end. Although a political party's works to manage, supervise and influence the social and state order and public activities in line with certain political opinions have the characteristics of a public service, the performance of such service starts when the members of that political party enter the Turkish Grand National Assembly, to the Government and the relevant bodies of local administrations formed by elections. On the other hand, the Constitution defines the political parties as indispensable elements of democratic political life, regardless of their being the ruling or opposition parties (Article 56/3) and the bitter experiences of past times teach us in principle that the political parties in opposition are not under sufficient guarantees. Therefore, this principle has no meaning and scope beyond the purpose of protecting the political parties against the legal and actual attacks of the governments, i.e. ruling parties, and to provide constitutional guarantee to existence of these political parties[5].

As the financial aid to political parties was blocked with this ruling of the Constitutional Court, a new paragraph added to Article 56 of the Constitution with the constitutional amendment in 1971 ensured that State aid shall be provided to political parties that have received at least five percent of the valid votes in the previous parliamentary elections or that have gained sufficient number of seats in the parliament to form parliamentary group. The original text of the 1982 Constitution did not have any provisions on the state aid to political parties; however, this issue was regulated under law. With the constitutional amendment in 1995, a provision was added to Article 68 of the Constitution which prescribes that the state shall provide the political parties with adequate financial means in an equitable manner.

In one of its judgments dated 1988 before the introduction of constitutional provision that allows state aid to political parties, the Constitutional Court ruled that the addition of phrases "as of the date this Law enters into force", "for the year of first parliamentary

5 See.: E.S. : 1970/12, K.S. : 1971/13, K.T. : 2.2.1971.

elections to be held after the effective date of this Law" and "the date on which this Law is adopted in Turkish Grand National Assembly" to Law on Political Parties nr. 2820 in respect of the state aid to political parties was not unconstitutional, thereby rejected the request for annulment. In Court's opinion, such regulations in the provisional article subject to application aim to confine the State aid only to political parties who have a parliamentary group in Turkish Grand National Assembly. However, these provisions did not cause inequality among the existing political parties. The provisional regulation provides increased financial aid for the political parties only for one election year without infringing upon the regulation that provides State aid for political parties under certain conditions and without making any distinction among the existing parties. Although this provisional regulation has some deficiencies with regards to the formation of new political parties to establish parliamentary group in TGNA, it is not unconstitutional[6].

Indeed, this ruling of the Court neglected the basic matter it emphasized in its ruling dated 1968 and accepted the constitutionality of the new regulation. However, as it is expressed in the dissenting vote, here the Constitutional Court interpreted the principle of equality in its own way and, as per our opinion, wrongly in an inappropriate manner. Although the Constitutional Court stated in its various rulings that different practices based on a justified reason do not violate the principle of equality before law, there is no justified reason for imposing deprivation of the state aid on political parties which may establish parliamentary group in Turkish Grand National Assembly after the adoption and effective date of Law numbered 3349. Therefore, when considered in this aspect, the phrases cited above in the regulations, subject to constitutionality review must be declared unconstitutional[7]. Especially, when considered with regards to formation of new political parties that establish a parliamentary group in Turkish Grand National Assembly, it is explicit that the law regulating state aid to political parties may cause some practical problems. Under these circumstances, the ruling of the Constitutional Court to this

6 See.: E.S. : 1987/14, K.S. : 1988/1, K.T. : 5.1.1988.

7 See: Mehmet Çınarlı's dissenting opinion, E.S.: 1987/14, K.S.: 1988/1, K.T.: 5.1.1988.

end is open to criticism in terms of the principle of equality and such ruling contradicts the previous rulings of the Court.

In another ruling of the Constitutional Court dated 2007, the Court rejected the application for the annulment of law that revokes Provisional Article 16 of the Law numbered 2820, which stipulates that state aid at varying rates shall be provided to political parties that are represented in the parliament through the deputies joining that party after the elections. After the annulment of the said regulation, the state aid to political parties shall be granted on the basis of the votes they have received in the elections. According to this ruling of the Constitutional Court, in the context of the phrase "in an equitable manner" in Article 68 of the Constitution which regulates the state aid to political parties, the political parties that have reached a certain level of organizational prevalence and obtained a certain degree of social approval can be provided with state aid in proportion to the level of success they achieved in the elections. The preference on the system and method to ensure a better fulfilment of public interest in this regard falls within the scope of legislator's margin of appreciation. The legislator, considering the public interest at a certain time, may terminate the state aid to political parties by bringing an exceptional and provisional regulation to the general rule and such a regulation is not unconstitutional[8].

As we can see, the Court adopted a different approach to each concrete case with regards to the regulations on the state aid to political parties during the periods of both 1961 and 1982 Constitutions and therefore, the Court does not have a well-established case law about the state aid to political parties.

c. The Regime of Ban on Political Parties and Banned Parties

1982 Constitution adopts a very restrictive approach to the regime of ban on political parties. The political parties were frequently dissolved in Turkey since the Law on Political Parties includes prohibitions that far exceed those in the Constitution and the legislation on the freedom of political parties is quite restrictive in practice. This approach resembles to that of 1961 Constitution,

8 See.: E.S.: 2007/59, K.S.: 2007/75, K.T.: 30.7.2007.

but 1982 Constitution adopts a more prohibitive model. Therefore, the issue of restricting the freedom of political parties has been considered one of the most problematic areas in 1990's and 2000's and it has been subject to many scientific works.

1. Prohibitions and Restriction on Political Parties in the Constitution

Paragraph four of Article 68 in 1982 Constitution includes the following provision on the principles to be observed by the political parties: "The statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."

This provision states that the statutes and programmes, as well as the activities of political parties shall not be contrary to the principles cited in the provision. Indeed, the principles cited in the provision can be grouped in three categories as indivisible integrity of the state with its territory and nation, secular state and democratic state. The Constitutional Court dissolved political parties on the grounds of each of these three categories during the period of 1982 Constitution. However, the indivisible integrity of the state with its territory and nation and secular state criteria were the most frequent reasons for party dissolutions.

The Constitutional Court interpreted these principles so strictly that the political parties' demands and activities relating to these principles, although they are more liberal/positive in practice than the existing legal order stipulates, were considered a reason for party dissolution and the Court decided on certain sanctions to be imposed on these political parties. For this reason, the political parties in Turkey could not make proposals appropriate to their real functions and the problems of the country could not be discussed in a healthy manner through the democratic political channels.

Moreover, Political Parties Law numbered 2820 further restricts the freedom of political parties by introducing new prohibitions that far exceed those in the Constitution. For instance, the dissolution of political parties merely because of the phrase "communist" in their title or just because they propose to remove the "Directorate of Religious Affairs" out of State's general administration were the results of prohibitions in the Law on Political Parties which exceed those in the Constitution.

2. Bringing Actions for Dissolution of Political Parties

The Constitution of 1982 has vested the Chief Public Prosecutor of the Court of Cassation with the power to bring an action for dissolution of political parties. According to Article 100 of the Law on Political Parties numbered 2820, the Chief Public Prosecutor cannot only bring the action for dissolution ex officio, but also upon the request of the Minister of Justice pursuant to the decision of the Cabinet of Ministers, and upon the request of a political party having taken part in the last parliamentary election and established a group in TGNA (Turkish Grand National Assembly). However, all the actions for dissolution brought so far have been brought by the Chief Public Prosecutor of the Court of Cassation ex officio.

The Constitution of 1982 makes a binary distinction about bringing actions for dissolution due to contradiction to bans on political parties. Accordingly, when a contradiction to the fourth paragraph of article 68 of the Constitution is in question in the statutes and programmes of the parties, the Office of the Chief Public Prosecutor of the Court of Cassation can immediately bring an action for dissolution concerning that party owing to this abstract contradiction. Besides, in order for an action for dissolution to be brought due to the actions of a political party contrary to the fourth paragraph of article 68 of the Constitution, the condition that the concerned party is the centre of those actions is sought. The condition of being the centre is embodied in this way in article 69 of the Constitution: "The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the

Constitutional Court determines that the party in question has become a centre for the execution of such activities. A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairpersonship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Grand National Assembly of Turkey or when these activities are carried out in determination by the abovementioned party organs directly."

Owing to this distinction, in order for the political parties to be dissolved due to their actions, one single action shall not be sufficient any more, instead, forbidden actions in a number so adequate as to provide them to be the centre shall be performed intensively, these actions shall be performed with certain determination, and these actions should be adopted implicitly or explicitly by the competent bodies of the head office of that party.

Although this guaranteed provision with regards to being the centre was included in the Constitution in 1995 and embodied in a more guaranteed way in the Law on Political Parties, the Court annulled this provision in the Law twice in 1998 and 2000 and thus, decided more easily on dissolution in the actions for dissolution before it.[9] This situation essentially indicates that the Constitutional Court aimed at dissolution of parties in the past, taking a more active attitude from the legislation in respect of prohibition of political parties.

With regard to dissolution of political parties due to the contradiction in their statutes and programs in the Constitution, after the judgment rendered by the European Court of Human Rights on violation regarding Turkey, the Constitutional Court continued to render decisions on dissolution only due to the actions from then on. The European Court of Human Rights considered the dissolution of the respondent parties only because of the abstract contradiction in their statutes and programmes as the punishment of

9 See.E.S:1998/2,K.S.:1998/1,K.T.:09.01.1998;E.S.:2000/86,K.S.:2000/50,K.T.:12.12.2000.

the expression of their thoughts; it emphasized that the activities of the parties should be considered in order to decide for dissolution.[10]

3. Parties on which the Constitutional Court Imposed Sanctions

As mentioned above, the Constitutional Court intensively ruled for sanctions to be imposed on the parties against which cases were filed. Within this context, the Court rendered sanction decisions on dissolution against three parties throughout the period of 1961 Constitution; as for the period of 1982 Constitution, against more than twenty parties and decided on the sanction of deprivation of state aid against one party.

Amongst the political parties on which the Constitutional Court imposed sanctions are parties from right and left wing. Furthermore; amongst dissolved political parties are parties represented by deputies in TGNA, parties represented as groups and even parties with the majority of seats in TGNA, as well as marginal ones. Dissolved in 1998, Welfare Party was the political party with the majority of seats in TGNA. Justice and Development Party, on which the sanction of partial deprivation of state aid was imposed in 2008, had three fifths of seats in TGNA and were exercising the power of governing for six years.

The Constitutional Court rendered the decision of dissolution rather on the grounds of incompliance with the principles of indivisible integrity of the state with its territory and nation and secular state. As far as the parties on which the Court has imposed sanctions up to the present are concerned, the approach adopted by the Court is as follows[11]:

The High Court dissolved Workers' Party of Turkey in its decision dated 1971 on account of defiance of the ban in Political Parties Law on creating minorities on the basis of national or religious cultural diversity or linguistic difference within the country by violating indivisible integrity of the state with its territory and nation, on

10 See: Decision of the United Communist Party of Turkey, p.58 and others.

11 The rest of this paper under this heading comprises precise excerpts from Yusuf Şevki Hakyemez, Anayasa Mahkemesinin Yargısal Aktivizmi ve İnsan Hakları Anlayışı, Yetkin, Ankara, p. 315-325.

the grounds that it transformed eastern question into an issue of Kurdish Community and voiced certain aspirations apart from constitutional citizenship in a congress it convened.[12]

Deeming the provision of education of native language and culture in the administration of the Ministry of National Education for Turkish citizens at school age as creation of minorities, the Court dissolved Labourers' Party of Turkey on that account in its decision dated 1979.[13]

The High Court maintained the same case law during the period of 1982 Constitution, even rendered dissolution decisions on a frequent basis by making use of its reasoning in the form of a "template" in its numerous decisions in 1990s. The Constitutional Court utilized the formula of "The State is 'UNITARY', the territory is 'UNIFIED', the nation is 'SINGLE'" in the majority of its dissolution decisions rendered within the context of the principle of indivisible integrity of the state with its territory and nation.[14]

One primary reason for the fact that the Constitutional Court has rendered decisions strictly safeguarding indivisible integrity of the state with its territory and nation as of 1990s is Kurdish Workers' Party terror, which arose then as a serious issue. On the other hand, the Constitutional Court even assessed matters which could be regarded as democratic demands of political parties as a reason for dissolution in its certain decisions. The Constitutional Court addressed the cases concerning dissolution by adopting the model of unitary state in the form envisaged by 1982 Constitution as the legal framework binding all political parties.[15] Moreover; according to the Constitutional Court, the principle of indivisible integrity of the state with its territory and nation should be perceived as an outcome of historical and social facts stemming from the establishment and subsequent periods of the Republic of Turkey,

12 See: E.S. : 1971/3 (Dissolution of Parties), K.S. : 1971/3, K.T. : 20.07.1971.

13 See: E.S. : 1979/1 (Dissolution of Parties), K.S. : 1980/1, K.T. : 08.5.1980.

14 For example See: E.S. : 1995/1 (Dissolution of Parties), K.S. : 1996/1, K.T. : 19.3.1996; E.S. : 1993/4 (Dissolution of Parties), K.S. : 1995/1, K.T. : 19.7.1995; E.S. : 1993/1 (Dissolution of Parties), K.S. :
1993/2, K.T. : 23.11.1993; E.S. : 1992/1 (Dissolution of Parties), K.S. : 1993/1, K.T. : 14.7.1993.

15 Yusuf Şevki HAKYEMEZ, Militan Demokrasi Anlayışı ve 1982 Anayasası, Seçkin., Ankara, 2000, p. 235.

beyond the fact that it is merely a legal principle incorporated and enshrined in the Constitution during constitution-making process. This principle performs a crucial function concerning minorities, sovereignty, language, nationalism etc., particularly during the transition from the disjointed imperial structure to the nation-state model.[16]

The Constitutional Court held in its decision concerning the dissolution of Socialist Party that this party maintained separatist activity in defiance of the Constitution and Political Parties Law by dividing Turkish nation into two as "Turkish and Kurdish Nations" on the basis of race and advocating self determination for Kurds it deems as a suffering nation and that it incited a community established and integrated throughout Turkey to uprising for the establishment of a separate state under the guise of democratic political activity. According to the High Court, divergences based upon racism and ethnic features instead of Turkish Nation concept and arguments that would change Turkish citizenship constitute contrariety to Political Parties Law. Besides, it is obviously understood from the argument "Kurdish people have free will on the path to self determination. They may establish a separate state if they wish to do so." that integrity of territory and nation provided in the Constitution is set aside and division of "Turkish and Kurdish nations" and establishment of separate states are aspired[17.]

As for the case concerning People's Labour Party, the Constitutional Court noted that the respondent party divides Turkish Nation into two as "Turkish and Kurdish nations" on the basis of race, as deduced from the meaning connoted in the speeches delivered in various activities; thus, reflects citizens of Kurdish origin as if they were struggling for freedom against oppression by inciting them against the state, deeming them as "a suffering nation" in an unrealistic manner; performed separatism in defiance of the Constitution and Political Parties Law by way of its proposal of "granting self determination" and other activities and dissolved this party[18].

16 As a sample judgment, See: E.S. : 1993/1 (Dissolution of Parties), K.S. : 1993/2, K.T. : 23.11.1993.
17 See: E.S. : 1991 /2 (Dissolution of Parties), K.S. : 1992/1, K.T. : 10.7.1992.
18 See: E.S. : 1992/1 (Dissolution of Parties), K.S. : 1993/1, K.T. : 14.7.1993.

The Constitutional Court rendered the decision of dissolution concerning its judgment on Freedom and Democracy Party, on the grounds that the respondent party fell to a disruptive position as regards indivisible integrity of the State with its territory and nation and within this context, it included the conduct of trials and education in native language in its programme on the purpose of separatism again[19]. The Constitutional Court dissolved Socialist Turkey Party in another judgment, due to similar aforementioned demands, as well as demands of conduct of trials and education in native language[20].

Regarding the judgment concerning Democracy Party, it was indicated that advocating Kurdish citizens' promotion of their own language and culture and their education in native language aims separatism and that these points seek the purpose of disrupting the integrity of nation by creating minorities within the territory of the Republic of Turkey by protecting, promoting and disseminating languages and cultures other than Turkish language and culture, which is prohibited in paragraph (b) of Article 81 of Political Parties Law. Furthermore, in a way similar to the reasoning in the other decisions of dissolution mentioned above, it was emphasized that Democracy Party seeks the separation of Turkish Nation as "Turkish and Kurdish nations" on the basis of race by way of its certain activities as well[21.] Socialist Union Party was also dissolved by the Constitutional Court on similar grounds, on the basis of the expressions included in its statute and programme[22].

The Constitutional Court dissolved Democracy and Change Party as well, on account of its claims in defiance of the principle of integrity of the state with its territory and nation. As regards the claims concerning regulations essential for free use of Kurdish language in every sphere of social life and official transactions, as the political solution could be reached in an environment where

19 See: E.S. : 1993/1 (Dissolution of Political Parties), K.S. : 1993/2, K.T. : 23.11.1993. Similar reasoning was given in the Labour party decision as well. See: E.S. : 1996/1 (Dissolution of Political Parties) , K.S. : 1997/1, K.T. : 14.2.1997.

20 See: E.S. : 1993/2 (Dissolution of Political Parties), K.S. : 1993/3, K.T. : 30.11.1993.

21 See: E.S. : 1993/3 (Dissolution of Political Parties), K.S. : 1994/2, K.T. : 16.6.1994.

22 See: E.S. : 1993/4 (Dissolution of Political Parties), K.S. : 1995/1, K.T. : 19.7.1995.

Kurdish identity is recognized along with all its consequences, being safeguarded by the Constitution and laws and that pressures on Kurdish language and culture would be relieved, necessary regulations would be put into place for usage of Kurdish language in every sphere of social life including radio-television broadcasts and in the meantime, also in official transactions, as there exists a Kurdish minority within the territory of Turkish Republic, having its own separate national and cultural identity which, together with its existence, should be preserved and maintained; the Court viewed them as reasons for dissolution[23].

Concerning the case filed against Democratic Mass Party, in the indictment of Chief Public Prosecutor's Office of the Court of Cassation, the claims made concerning amendments and new regulations for the resolution of Kurdish question, included in the party programme and based on the principle of equality; that these regulations should have a democratic content, on the basis of universal legal norms envisaging elimination of conditions giving rise to inequality with regards to Kurds and other certain segments and that within this context, Democratic Mass Party would initially make legal amendments and regulations concerning cultural identity rights were presented as evidence for dissolution. The Constitutional Court viewed these claims as the reason for dissolution. The Court assessed these claims of the respondent party as the reason for dissolution, on the grounds that they undermined national integrity by creating minorities through the protection, promotion and dissemination of languages and cultures other than Turkish language and culture, as there exists minorities based upon cultural, racial and linguistic differences within the territory of Republic of Turkey[24].

The Constitutional Court also dissolved People's Democracy Party on account of its acts and activities targeting the disruption of indivisible integrity of the state with its territory and nation. In the judgment, the opinion was held that aid and assistance was provided for the terrorist organization of Kurdish Workers' Party

23 See: E.S. : 1995/1 (Dissolution of Political Parties), K.S. : 1996/1, K.T. : 19.3.1996.
24 See: E.S. : 1997/2 (Dissolution of Political Parties), K.S. : 1999/1, K.T. : 26.2.1999.

and its leader, whose aim is to disrupt indivisible integrity of the state with its territory and nation, by the

respondent party, by noting that Kurdish community is a nation divergent from Turkish public, a policy of pressure and oppression is being pursued by the State of Turkish Republic against Kurdish community, a war was fought between the terrorist organization of Kurdish Workers' Party and the State of Turkish Republic and Kurdish community should side with the terrorist organization of Kurdish Workers' Party in this war[25].

As can be seen, the High Court addressed the cases concerning dissolution of political parties with an approach which vigorously protects indivisible integrity of the state with its territory and nation. Within the context of indivisible integrity, the Constitutional Court views the opinions having a disruptive quality in terms of territorial and national unity as views of utmost danger for the society and country, even if they have no obvious connection with violence or terror and do not constitute obvious and imminent danger in society and forms its case law towards no advocacy of such views, in contrast with the interpretation of the European Convention on Human Rights within this context[26]. In this process; democratic proposals advocated by dissolved political parties on various issues within the context of the principle of unitary state, were also assessed as the reason for dissolution. Amongst the decisions rendered, unlike other judgments, only the judgment concerning the dissolution of People's Democracy Party clearly puts forward the connection between violence and terror and the respondent party.

As Can puts it, leastways, the Constitutional Court demonstrated the will of shifting to rational, systematic and methodological arguments likely to be derived from the Constitution and Political Parties Law, thanks to its Decision on Peoples' Democracy Party by distancing itself from rigid ideological arguments based on categorical denial, within the principle of indivisible integrity of the

25 See: E.S. : 1999/1 (Dissolution of Political Parties) , K.S. : 2003/1 , K.T. : 13.3.2003.

26 Mehmet TURHAN, "Siyasi Parti Kapatma Davaları", Yeni Türkiye, Year: 3, Number: 17, September October 1997, s. 402.

state with its territory and nation[27]. Another decision in favour of this shift to a certain extent is the decision of the Constitutional Court dated 2008 concerning Rights and Freedoms Party. In this case, dissolution of the mentioned party was claimed, on the grounds that certain issues in its statute and programme did not comply with indivisible integrity of the state with its territory and nation. Within this context, objectives and assessments such as persistence in the unitary and authoritarian model of state, restructuring Turkey in a decentralized way, resolution of Kurdish question through social conciliation and definition of Kurdish question as the major issue of Turkey were put forth as the reason for dissolution.

The Constitutional Court held that the proposals of Rights and Freedoms Party in its statute and programme argued to be the reason for dissolution cannot be described as the denial of nation. Considering the fact that the dissolution case was filed very shortly after the Party's establishment, the existence of a certain problem indicated by the party in its own way and proposals for its solution should be assessed within the scope of freedom of thought and expression in a democratic regime. According to the Court, imposing the sanction of dissolution or another sanction instead, on the respondent party by depending on the expressions in its statute and programme is a grave intervention in the freedom of expression and association and cannot be regarded as a repressive measure in a democratic society[28].

The decision of the Constitutional Court concerning Rights and Freedoms Party could be deemed positive, in that it indicates a very drastic change within the context of the principle of unitary state. However, it should be noted that the majority of the Court's judges did not agree on this decision. In this case, three-fifth majority vote could not be attained and 6 judges voted for dissolution. When viewed from this aspect, the majority of judges of the Court did not agree on the new case law of the Constitutional Court, despite the fact that only five judges rendered a decision on the dismissal

27 Osman CAN, "Siyasi Partilerin Kapatılmasında Anayasal Ölçütler", Anayasa Yargısı İncelemeleri 1, (Ed.: M. Turhan/H. Tülen), Anayasa Mahkemesi, Ankara, 2006, p. 488.

28 E.S.: 2002/1 (Dissolution of Parties), K.S.:2008/1, K.T.: 29.1.2008.

of dissolution claim constituted the decision of the Constitutional Court.

In addition to the principle of indivisible integrity of the state with its territory and nation, the Constitutional Court rather "strictly" interprets political party freedom within the context of secularism principle. Anyway, with reference to the decisions of the Constitutional Court in respect thereof, it is interpreted in the doctrine that constitutional judge and the Constitutional Court are the justices of "Constitutional ideology", which includes the principle of secularism as one of the key principles of the Constitution[29].

The Court dissolved at the outset National Order Party in 1971 on account of its activities and pledges in defiance of the principle of secularism[30]. As for the decision on Peace Party, the expressions in the party programme as *the idea of education institutions and universities in Turkey being secular like those in certain socialist countries is not adopted, hence it is believed that religious education should also be conducted in universities in line with those in Western countries and introduction of an education system attaching importance to religious and moral values in accordance with the Constitution is necessary for the prevention of deviant ideologies from affecting youth"* were held by the Constitutional Court to be in contravention of the provisions banning religious exploitation within the context of secularism principle and assessed as the reason for dissolution[31].

The Constitutional Court also assessed the demand in the programme of the aforementioned party concerning the inclusion of the ninth vowel in Turkish alphabet, which has eight vowels, within the context of improving Turkish alphabet as the reason for dissolution, having found the demand at issue incompatible with the provision of the Law on Adoption and Usage of Turkish Letters dated 1 November 1928 and numbered 1553 enshrined in Article 174 of the Constitution and thus with Article 84 of Political Parties

29 Bakır ÇAĞLAR, "Türkiye'de Laikliğin Büyük Problemi", COGİTO, 3 Aylık Düşünce Dergisi, Yapı Kredi, Number: 1, Summer 1994, p. 116.

30 See: E.S. : 1971/1 (Dissolution of Political Parties), K.S. : 1971/1, K.T. : 20.5.1971.

31 See: E.S. : 1983/2 (Dissolution of Parties), K.S. : 1983/2, K.T. : 25.10.1983.

Law stipulating that political parties shall not pursue aims contrary to the provisions of this law[32].

The Constitutional Court dissolved Freedom and Democracy Party as well, on account of the view "*The State shall not interfere in religious affairs, religion shall be left to religious communities*" in the programme of the mentioned party. In Article 89 of Political Parties Law, pursuing aims in contravention of Article 136 of the Constitution envisaging the existence of the Department of Religious Affairs within general administration is deemed as reason for dissolution of political parties. According to the Constitutional Court, removing the duties of the Department of Religious Affairs whose existence is stipulated to be within the general administration and thereby ending the legal existence of this institution is contrary to Article 89 of Political Parties Law numbered 2820, particularly with regards to political parties, hence the mentioned party should be dissolved for this reason[33].

On the other hand, the Constitutional Court changed its case law in respect thereof afterwards. The High Court did not view demanding the exclusion of the Department of Religious Affairs from state institutions, which is included in the programme of Democratic Peace Movement Party, against which a dissolution case was filed, as a reason for dissolution. Yet, this explicit provision was included in Article 89 of Political Parties Law during the time of this case as well. Regarding this, with reference to the fact that the dissolution of Freedom and democracy Party was deemed as a violation of the European Convention on Human Rights by the European Court of Human Rights[34], the Constitutional Court sought ways of not dissolving the parties advocating such a view and formed a new and different case law within this context in the second case[35].

32 See: E.S. : 1983/2 (Dissolution of Parties), K.S. : 1983/2, K.T. : 25.10.1983.

33 See: E.S. : 1993/1 (Dissolution of Political Parties), K.S. : 1993/2, K.T. : 23.11.1993.

34 See: Case of Freedom and Democracy Party (OZDEP) v. Turkey, Application No.: 00023885/94, 8 December 1999.

35 See: E.S. : 1996/3 (Dissolution of Political Parties), K.S. : 1997/3, K.T. : 22.5.1997. In the Constitutional court decision, the dissolution of the named three parties was rejected with the majority of votes after because the review of the violation of Article 89 of Political Parties Law wasn't conducted and applied in this case.

As for Welfare Party, the Constitutional Court dissolved the party on the grounds that the statements and acts of the Party's Chairperson along with certain Vice Chairpersons and deputies against secularism were aimed at removing democratic rights and freedoms and democracy. In the judgment, the following facts were indicated as grounds for dissolution of the party as acts contrary to the principle of secular Republic: The visit of a deputy of Welfare Party at the position of Minister paid to a mayor in prison, who was detained on account of political demonstrations incompatible with the principle of secular Republic; the fact that nomination and election of certain persons known for their statements and acts contrary to Atatürk's principles and secularism as deputies suggested that these acts were also favoured by Welfare Party; various speeches contrary to secularism delivered by party officials; the fact that a party official sought a state order based on shariah (Islamic law) by way of his plea for the establishment of an order of justice; the fact that a person who is the Prime Minister as well as Party Chairperson invited persons dressed in contravention of Reform Laws stated in Article 174 of the Constitution targeting the actualization of secularism principle after the foundation of the Republic of Turkey, to Prime Minister's residence and made them appear as if they were persons gaining recognition at state level; the fact that a speech delivered by the Party's Chairperson was aimed at the introduction of a multiple legal system instead of unity in law, in other words, a legal system based on religion; the fact that speeches encouraging wearing turban and headscarf were delivered at government agencies and universities by disregarding the Constitution and law provisions as well as decisions of the Constitutional Court[36].

In the decision concerning Virtue Party, certain activities deemed as contrary to the principle of secularism were viewed as the reason for dissolution. Within this context, in the mentioned judgment, the following were deemed as contrariety to the principle of secular

For more information see: Yusuf Şevki HAKYEMEZ, "Anayasa Mahkemesinin Demokratik Barış Hareketi Partisi Kararı Üzerine Düşünceler", Amme İdaresi Dergisi, Band: 34, Number: 4, December 2001, p. 57-60.

36 See: E.S. : 1997/1 (Dissolution of Political Parties), K.S. : 1998/1, K.T. : 16.1.1998.

Republic: the attitudes of a deputy attempting to take oath wearing headscarf and another deputy supporting her during the oath ceremony in TGNA after the deputy elections held in April 1999; the fact that a deputy of the party enabled students resisting to the ban on turban and headscarf, hence expelled from universities, to hold a press conference; supported and encouraged acts contrary to laws, such as making visits of these students to parties possible by bringing them to the Assembly; acts supporting headscarf or turban permit a fortiori at universities, such as incitation of public to hatred and enmity, perpetrated by another deputy by making the ban on turban or headscarf imposed at government agencies and schools under laws and regulations in respect thereof appear as oppression and tyranny[37].

Finally in 2008, concerning the dissolution case filed against the ruling Justice and Development Party, the Constitutional Court penalized the mentioned party with the sanction of deprivation of state aid, by deeming the demands of respondent party concerning nullification of headscarf ban imposed at universities, age limit envisaged for Quran courses and modulus limitation imposed at Religious Vocational High Schools as acts in defiance of the principle of "democratic and secular republic" stated in paragraph four of Article 68 of the Constitution[38]. Two crucial issues are apparent in this decision of the Constitutional Court. First, the Court considered nearly thirty evidentiary materials as evidence in the dissolution case filed by Chief Public Prosecutor of the Court of Cassation by presenting more than 400 evidentiary materials. However; whereas the majority of evidentiary materials with which numerous party members were charged in the indictment were not considered as basis in the application of sanction, no explanation regarding the consideration of those belonging to only a few party members as evidence was included in the reasoning. Yet, in accordance with the Constitutional obligation stipulating Court decisions to be reasoned, the Court should have made satisfactory explanations for these matters.

37 See: E.S. : 1999/2 (Dissolution of Political Parties), K.S. : 2001/2, K.T. : 22.6.2001.
38 See: E.S.: 2008/1 (Dissolution of Political Parties), K.S.: 2008/2, K.T.: 30.7.2008.

Secondly, the assessment of the Constitutional Court in its reasoning as regards the necessity of imposing the sanction of "deprivation of state aid" instead of "dissolution" on the respondent party in according to the gravity of actions constituting the subject of case is interesting, as in this part of the justification, considering the picture painted by the Constitutional Court concerning the respondent party, the opinion that no sanctions should be imposed on this party primarily comes to mind[39]. Indeed, the sanction of

39 The following was stated in the judgment about this issue:

"Overwhelming majority of the actions determined to be functioning as evidence as stated by the Constitutional Court and with which the party was charged by the prosecution as having taken place on 22 July 2007 before the 22nd legislative year. With these words, the respondent party's actions in national and foreign politics, legislative and executive matters are within the knowledge of the public. The accused party's two-thirds were renewed during the 23.legislative period of the TGNA. It is acknowledged that the accused party received half of the votes and the voters approved of the accused party together with the alleged actions and all other actions of the party, on this basis, it is understood that the responsibility and duty of the democratic and national will the legislation and execution powers will be used by the accused party. Despite the separate situations mentioned above it is acknowledged that during the government of the accused party the accession efforts to the European Union which has been a fundamental foreign policy since the Ankara Agreement of 1963 continued and in 1999 the candidate status was achieved. Also reforms regarding justice and politics were performed rapidly and where necessary, amendments in the constitution or laws were adopted. In this framework, Articles 10., 30., 38, 90 and 101 amended in that way that provisions that lead to the death penalty were removed from the constitution even in times of war, the national applications were adjusted to international human rights standards by giving priority to the European Convention on Human Rights, the principle that under no circumstances printing houses and press tools can be restrained or confiscated on the ground of being offensive weapons was adopted, the positive discrimination that is an advanced stage of the man and woman equality is adopted as a fundamental constitutional principle. Considering that the following reforms like the election of the President directly by the citizens, the strengthening of local authorities, the decisions of the European Court of Human Rights are reason for retrial, the recognition of the International Criminal Court's judicial power, the transfer of many international fundamental freedoms and rights to the national law via the UN Covenant on Civil and Political Rights of 1966 and other cultural, economic and social rights agreements, the adoption of improved status laws of non Muslims, the adoption of an association law that contains less limitations of freedom, the transfer of equality into the Constitution giving the opportunity to modernize the patriarchal and traditional civilization structure, the start of the membership negotiations to the European Union and the active input to solve international problems in peace, the accused party is considered to be exercising its powers to align the country with Western standards of modern democracy.

After the annulment of Law on Constitutional Amendment numbered 5735 aiming to lift the ban on headscarf at universities and adopted with the proposal and plenary voting by the supporting deputies as members of certain parties represented in TGNA on account of contrariety to secularism principle, no evidence was identified concerning the exercise of political power assumed by the respondent party with the aim of encouraging its voters to demonstrations and acts of violence. In the light of these explanations, when the respondent party's objective of removal of democratic secular state order or disrupting the basic foundations of constitutional order by means of violence and intolerance, its acts concretizing this objective and findings concerning its exercise of political power for violence were not determined, these acts were not considered to so grave as to necessitate dissolution. It is obvious that the type of sanction shall be determined by the fact that the acts determined

the Court in this decision actually constitutes contrariety to ECtHR criteria and Venice criteria on dissolution of political parties, as in many dissolution decisions of the Court. Nevertheless, the Constitutional Court may persist in maintaining its own pursuance of democracy through its decisions as such.

The Constitutional Court offered a libertarian insight into the context of the principle of "democratic state" in its decision concerning Socialist Party. In the case concerning Socialist Party, the High Court rejected the request for dissolution of the party after explaining and assessing concepts such as socialism, class conflict, class dictatorship. According to the Constitutional Court, methods such as class struggle and attempts for dictatorship over other classes by grabbing political power through revolution are methods adopted by socialist pro-revolution or communist parties. Besides such parties, socialists advocating parliamentary democratic reform convinced of achieving class power by way of inter-parliamentary efforts and election are also present. Today, all socialist parties agree to take part in bourgeois government. From now on, even communist parties (except in Albania and China) embrace the view that a socialist party could come into power through legal means. What is banned in the Constitution and Political Parties Law is the dictatorship of a social class over other social classes; but

to be in contrariety to paragraph four of Article 68 of the Constitution had the potential of triggering traumatic reactions exceeding the limits of social endurance, created extreme concern, anxiety and ambiguity which could grasp the majority concerning vital issues of nation-state, concretized a perception of public service in which preferences based on class or ideology gain priority, gave rise to lack of constitutional reliability in society, that society and individuals gained a worrying priority against public service and demands of freedom, acts being whether at the level of incitation, coercion and incompatible with democratic practice, whether they remain within the constitutional framework of freedom of disclosing, disseminating and transmitting thought as the vital element of democratic order of society constituting the existence and main field of activity of political parties; and finally whether the acts causing opposition are so grave as to determine the respondent party at its entirety and its basic policy. These acts, which do not square with universal values, do not pose a danger that would undermine fundamental principles of social peace, which do not explicitly aim to eliminate the belief in the rule of law and to stir up social and political turmoil, which are assessed to be far from a plea for violence are assessed together with the activities of the respondent party targeting modernization and democratization, with regards to the gravity of acts in question, which were determined to be contrary to the principles of democratic and secular Republic, the Court reached the conclusion that the respondent party should be deprived of half of the recent annual state aid in accordance with paragraph seven of Article 69 of the Constitution and paragraph two of Article 101 of the Law numbered 2820. See: E.S.: 2008/1 (Dissolution of Political Parties), K.S.: 2008/2, K.T.: 30.7.2008.

not class struggle. Within this context, it is possible for a political party to be formed on the basis of class as a fact of social life. With reference to these considerations, the Constitutional Court reached the conclusion that dissolution of Socialist Party on account of its objectives and activities based upon class concept was impossible by considering that the provision of Constitution and Political Parties Law stipulating "*a political party shall not be formed with the aim of ensuring supremacy of a social class over other social classes*", as the party could not be said to have phrases and expressions in its programme constituting contrariety to this rule[40].

Despite this positive approach it adopted, the Constitutional Court afterwards dissolved United Communist Party of Turkey in the case filed against the party under the ban in Article 96 of Political Parties Law, solely on account of the word "communist" included in its name, although it noted that this party did not target achieving class dominance[41].

4. Assessment of the Constitutional Court's Approach in Dissolution of Political Parties

The issue of banning political parties in Turkey has been basically actualized in an ideological and statist direction both at constitutional level and Constitutional Court decisions up to the present, significantly upon the will of pro-tutelage bureaucratic structure. At this point, regarding the provisions in the Constitution on freedom of political parties, the ideological preference and statist approach of the constitution enable its actualization, as well as the relevant consideration of the Constitutional Court in this direction. The Constitutional Court constantly exerted an effort for application of sanction in an overwhelming majority of the cases filed so far and rejected the request of Chief Public Prosecutor of the Court of Cassation for dissolution in few cases.

In fact, banning political parties used to receive support in democratic regimes to a certain extent on account of militant perception of democracy. It was expressed at this point that political

40 See:E.S. : 1988/2 (Dissolution of Political Parties), K.S. : 1988/1, K.T. : 8.12.1988.
41 See:E.S. : 1990/1 (Dissolution of Political Parties), K.S. : 1991/1, K.T. : 16.7.1991.

parties could be banned with the aim of safeguarding freedoms and basic liberal democratic order against destructive trends. However, Turkish practice in respect thereof has gone far beyond this. In Turkey, even proposals targeting to purge the current order from its problematic aspects and to bring it closer to libertarian democratic order were considered by the Constitutional Court as grounds for dissolution. Thus, the expression "*there exists no freedom of removal of freedom*" used as the basic argument of militant democracy transform in Turkey into *"there exists no freedom to change the current order"* and *"there exists no freedom to oppose."*

At this point, notably the problematic aspect of the Constitutional Court attracts more attention, because as is known, the Constitutional Court was actually introduced in the political system of a country for the protection of freedoms. In this respect, the willing attitude of the Constitutional Court, which should be at the status of primary guarantor of freedoms, towards dissolution of political parties causes more controversies on the Court in our country. It has even been observed that bringing cases concerning dissolution of political parties before the Constitutional Court constitutes no guarantee at all during the historical process.

The Constitutional Court started to distance from this critical attitude to a certain extent after the decisions concerning Justice and Development Party in 2008 and Democratic Society Party in 2009. Within this context, certain positive decisions rendered by the Court attract attention. However, it should be noted that there has been no new dissolution case filed by Chief Public Prosecutor of the Court of Cassation ever since.

Nevertheless, it should be emphasized that the Constitutional Court's approach towards human rights has begun to take a positive turn thanks to both the change in the court's composition and adoption of the remedy of constitutional complaint in 2010. At present, it is more difficult to say that the attitude of the Constitutional Court would be as before in a dissolution case likely to be filed from now on.

CONCLUSION

Freedom of thought is an instrument for making significant contribution in the solution of various problems confronted by persons living as a community. At this point, not restricting freedom of thought as long as it is not in the form of hatred discourse, insult, defamation, violence-rousing and obscene expression shall contribute to the real functioning of this freedom. Therefore, it is obligatory that freedom of thought be regulated in this standard at constitutional level.

One of the foremost reasons for the failure in the resolution of certain basic political issues is the legal obstacles impeding freedom of thought in these matters. Proposals of political parties with respect to these issues could be considered as a reason for banning. Therefore, political parties were almost attempted to be unified within the scope of a joint programme applying for them all. The issues arising in these matters have become more and more complicated year by year on account of the fact that constitutional provisions and approach of the Constitutional Court are problematic, notably with regards to secular state and indivisible integrity of the state with its territory and nation. The resolution of this issue is through the introduction of freedom of thought and political organization at a universal standard.

At the point achieved today, it has been understood also in Turkey that bans impeding intellectual freedoms are in vain and do not serve for protecting freedoms, as the mentioned bans do not comply with universal standards. Therefore, struggling against opposing views and trends by responding to them through democratic means with counter-arguments would be a more proper way.

THE STATE OF FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION IN ALGERIA

Hiba Khedidja AZIB - DERRAGUI

ALGERIA

THE STATE OF FREEDOM OF EXPRESSIONAND FREEDOM OF ASSOCIATION IN ALGERIA

Hiba Khedidja AZiB - DERRAGUI[*]

People have always been seeking freedom since it is a natural right. Indeed, it seems undeniable that the circle of freedom has expanded in the past few centuries, but the very concept is one of the most contested ideas in political and philosophical discourse as well as one of the most vital. The debate has always revolved around these questions: what is freedom? Who has freedom? How is freedom achieved? How is it made secure? Of course all subsequent questions depend on the answer to that first question: what is freedom?

Freedom has a history that shows that it varies with time and place. Such philosophers as John Lock and Jean-Jacques Rousseau popularized the conception of the individual as having certain natural rights that could not be denied or taken away by society, rights that Thomas Jefferson spoke of in the Declaration of Independence as "unalienable" and that were embodied in the Bill of Rights of the Constitution.

In short, the very notion of freedom has evolved throughout the centuries from the Magna Carta through which the English barons in 1215 wrested from King John certain freedoms to the national groups who sought their independence from colonialist nations.

The UN Commission on Human Rights has sought to promote the extension of political and cultural freedom throughout the world through treaties and covenants, the most important of which has been the Declaration of Human Rights.

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In fact, the need of the Universal Declaration of Human Rights was strongly felt by all those who have been affected by the events happening in Europe in the 30s and early 40s. This has irrevocably changed the way of looking at human rights and the national vision transformed into a universal concern for the rights of all human beings. It is for the first time that an organized community of nations set out a statement on the human rights and fundamental freedoms. It established the rights and freedom to which all without exception, men and women around the world are entitled.

It is not surprising that the Algerian people is the most conscious of the value and importance of liberty since they were deprived of their freedom and were denied their identity during the long period of colonization. In fact, Algerian people suffered from various forms of discrimination which led ultimately to their uprising. Accordingly, the leaders of the War of Independence proclaimed in the historical declaration that freedom referred to as "National Independence" is the goal of the Revolution and that the respect of fundamental liberties is one of its objectives. It is clear that freedom is one of the most important ideals of the Algerian Revolution, hence its inclusion in the successive Algerian Constitutions[1].

In this sense, Algeria has acceded early to the Universal Declaration of Human Rights in its first Constitution of 1963. Moreover, the Preamble of the 1989 Constitution as well as the 1996 Constitutional Review starts with the expression ***"The Algerian people are a free people, and decided to remain so"***. Algeria has also adhered to the Covenants of 1966 in 1989[2] when a wind of liberty was crossing the country and a visible democratic opening was taking place.

Besides, different Algerian Constitutions did contain provisions which consecrate clearly individual and collective freedoms, and for the first time in the political history of Algeria, the 1989 Constitution which did embrace democratic principles stated expressively in its article 31 that ***"The fundamental human and citizen's rights and liberties are guaranteed.***

1 Constitutions of 1963, 1976, 1989 and the Constitutional Review of 1996.

2 Algeria ratified the 1966 Covenants in September, 12 ,1989.

They are a common heritage of all Algerians, men and women, whose duty is to transmit it from generation to another in order to preserve it and keep it inviolable".[3]

On the other hand, the Algerian Constitutions did provide the most important guarantees to these individual and collective freedoms which constitute definitely the basis underlying the Rule of Law.

The primary thrust of this paper is a consideration of the state of Freedom of Expression and Freedom of Association in Algeria as regards constitutional provisions and legislative texts. It provides a succinct account of these freedoms in the different Algerian Constitutions through determining their scope and the restrictions linked to them, and also considering their implementation in the Algerian legislation. In parallel, it explores the scope and limitations of these freedoms in the light of the most important international instruments on Human Rights. Then, it considers the constitutional guarantees that permit to fully enjoy and exercise these rights.

Finally, our goal is to assess the actual state of Freedom of Expression and Freedom of Association in Algeria.

I-General Overview of Collective Freedoms in the Algerian Constitutions:

As mentioned earlier, Algeria is deeply committed to preserving and promoting human rights as well as guaranteeing fundamental freedoms of individuals. Firstly, Algeria acceded to the Universal Declaration of Human Rights since 1963, and with the advent of democracy, she ratified the international human rights treaties including the International Covenants of 1966 as a consequence of the adoption of the 1989 Constitution which put an end to Socialism and more significantly opened the door to democracy in Algeria.

In fact, the new Constitution is embedded with the values of Liberal democracy, i.e equality, justice, human rights, multiparty system, separation of powers and constitutional review. The 1989

3 Article 32 of the 1996 Constitutional Review.

Constitution aimed ultimately at the protection of human rights and fundamental freedoms, which are necessary in the building up of a Rule of Law.

- As far as the 1963 Constitution is concerned, the Algerian constituent interpreted the notion of freedom on the basis of Socialism; therefore, diminishing its scope, he clearly prohibited the use of rights and liberties enumerated in the Constitution to undermine the independence of the nation, the institutions of the Republic, the socialist aspirations of the people and the principle of the uniqueness of the National Liberation Front[4].

- Concerning the 1976 Constitution which embraced wholly Socialism and the one-party system, it consecrated rights and freedoms contained in the Constitutions of democratic nations; however, most of them were followed by the expression "within the law", which deprived them of the constitutional guarantees. Thus, the rights guaranteed by the Constitution were likely to be subject to legislative restrictions.

  As a consequence, both the 1963 Constitution and the 1976 Constitution were prisoners of the Socialist view which prohibits to invoke freedom to undermine the principles of the Socialist Revolution[5].

- The 1989 Constitution constitutes a turning point in the consecration of freedoms. Indeed, this Constitution provided a new definition to freedom in accordance with the very Liberal concept of democracy cleared of all ideological bias associated with the notion of freedom in the previous Constitutions.

Then came the 1996 Constitutional Review to strengthen the notion of freedom in Algeria. It was obvious for the Algerian constituent that the establishment of a democratic State should be based on human rights and the protection of fundamental freedoms. Therefore, most of the rights and freedoms contained in

4 It was the party of the State.

5 Art. 22 of the 1963 Constitution and Art. 73 of the 1976 Constitution.

the international instruments of Human rights were included in the 1989 Constitution and renewed in the 1996 Constitutional Review.

II-Freedom of Expression and Freedom of Association:

1-The Scope of Freedom of Expression and Freedom of Association in the International Instruments:

All major international and regional human rights instruments recognize and define Freedom of Expression and Freedom of Association. Beginning with the Universal Declaration of Human Rights, those rights are accorded a great degree of importance regarding the emphasis placed on democracy.

- **Freedom of Expression** is recognized by almost all international instruments as a multi-faceted right that includes much more than merely the right to express, or disseminate information and ideas. It is defined as including the right to seek, to receive and to impart information and ideas.

  Most standards recognize the right to hold an opinion as a right directly associated with freedom of expression. Article 19 of the Universal Declaration of Human Rights recognizes the right to freedom of opinion and expression as one composite right. And so does the European Convention on Human Rights (article 10) and the American Convention on Human Rights (article 13).

  However, the International Covenant on Civil and Political Rights (article 19) recognizes a distinction between free opinion and expression. The former is recognized as an absolute right. Freedom of Expression, on the other hand, is subjected to a regime of limitations.

  All international instruments permit limitations only by law such as protecting the rights and reputations of others, national security, public order, public health or morals. Furthermore, article 20 of the International Covenants on Civil and Political Rights contains mandatory limitations on Freedom of Expression. It mandates States parties to prohibit

any propaganda for war and expression that advocates national, racial or religious hatred that constitute incitement to violence, hostility or discrimination.

Another distinct feature of freedom of expression is the recognition that the right could be exercised through any medium of one's choice (e.g, orally, in writing, or in print or through art forms).

- **Freedom of Association**

  As in the case of freedom of expression, all major international and regional human rights instruments recognize freedom of association. The right to Freedom of Association protects the right to form and join associations to pursue common goals. Most guarantees of Freedom of Association are formulated in a manner that highlights the right to form and join trade unions as an important aspect of that freedom.

The stricture in the UDHR (article 20) and also the African Charter (article 10(2)) that no one may be compelled to belong to an association, is a very significant aspect of freedom of association. The freedom denotes not only the positive right to form and join associations, but also the right to exercise one's choice in a negative manner i.e, non-belonging to an association.

The International Covenant on Economic, Social and Cultural Rights (article 8) deals exclusively with trade union rights.

It has to be noted that the right to form and join trade union is only one, albeit very important, aspect of freedom of association. The American Convention further elaborates on the scope of the right. Article 16(1) declares "Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes".

Article 22(2) of the International Covenant on Civil and Political Rights recognizes that it may be permissible to impose lawful restrictions on members of the armed forces and the police in their exercise of the right to freedom of association.

2-The Place of Freedom of Expression and Freedom of Association in the 1989 Constitution and the 1996 Constitutional Review:

• *Scope of Freedom of Expression and Freedom of Association:*

In contrast with individual freedoms which were to be found in the different Algerian Constitutions, collective freedoms were subjected to the political regime and the ideology of the time.

Although all the Algerian Constitutions included Freedom of Expression and Freedom of Association, the Constitutions of 1963 and 1976 forbade expressively to use these freedoms to undermine socialist aspirations and the one-party system. It is worth noting that the 1963 Constitution mentioned Freedom of press and other means of information[6].

On the other hand, the 1989 Constitution and the 1996 Constitutional Review did not include any limitation on these freedoms except what concerns the right to create associations of political nature. In fact, article 40 of the 1989 Constitution recognizes this right whereas article 42 of the 1996 Constitutional Review recognizes the right to create political parties. However, it is subjected to imitations.[7]

It is worth mentioning that our focus when dealing with these freedoms will be on the 1989 Constitution and the 1996 Constitutional Review which renewed the same freedoms.

Article 41 of the 1996 Constitutional Review[8] stipulates that ***"Freedom of Expression, Association and Meeting are guaranteed to the citizen".*** The wording of the article reveals a complementarity between the three concepts. Indeed, since freedom of opinion, which is included in article 36: ***"Freedom of conscious and opinion are inviolable"***, is the fundamental norm, Freedom of Expression ensures its externalization.

6 Art. 19 of the 1976 Constitution.

7 Art. 42 &2 : « This right cannot be used to violate the fundamental liberties, the fundamental values and components of the national identity, the national unity, the security and integrity of the national territory, the independence of the country and the People's sovereignty as well as the democratic and republican nature of the State.

8 Art. 39 of the 1989 Constitution.

Freedom of Opinion cannot be subject to any exception or restriction; whereas, Freedom of Expression is not an absolute right, it may be restricted on general grounds.

If we consider freedom of opinion as falling in the public domain, it needs to be protected by the law, so freedom of opinion which is linked to political or intellectual ideas needs freedom of Expression.

In order to ensure the inviolability of Freedom of Opinion as stated in article 36 of the Constitution, the Algerian constituent has included its corollary Freedom of Expression in the system of fundamental rights and freedoms. Both freedoms are granted the status of guarantor of the intellectual identity and the autonomy of the individual.

It should be noted that the President of the Republic, Abdelaziz Bouteflika has always been working for the promotion of fundamental freedoms. Indeed, in his address of April 2011, he declared that pluralism in Algeria is embodied by freedom of Expression "a tangible reality" and "a significant milestone of the Rule of Law" that "reflects the mass media by their diversity and the audacity that characterized them".

This could only be interpreted as a message of encouragement from the President towards mass media, and more significantly his message was announcing new reforms in the field of press, media and broadcasting as we shall see later on.

In this context, print media in Algeria enjoy since the 90s an extended freedom. Moreover, the new broadcasting law opened the television field to competition.

Freedom of Association has been included in all the Constitutions; however, its definition differs from one Constitution to the other. While in the 1963 and the 1976 Constitutions, Freedom of Association was restricted to non-political associations since both Constitutions discarded multipartism, the 1989 Constitution, being a democratic one par excellence, did recognize the right to create associations of political nature[9].

9 Art. 40 of the 1989 Constitution.

Then ,the 1996 Constitutional Review recognized more explicitly the right to create political parties, hence the adoption of the Organic law on political parties in 1997, even if the first law on political parties was promulgated in 1989, the law n° 89-11 of 5th July 1989 relating to associations of political nature.

In addition, article 43 of the 1996 Constitutional Review recognizes the right to create associations. It states that the State encourages the development of associative movement.

This new added constitutional provision is meant for ensuring more guarantees to the freedom of association. Its reveals clearly that the State has the obligation to participate in the development of the associative movement.

• *Limitations:*

The laws of the State are important in determining the scope of fundamental freedoms. Laws also determine the legal framework within which the fundamental freedoms are exercised.

It should be emphasized that the State has the obligation to ensure the inviolability of these freedoms because they are guaranteed by the Constitution.

In order to make sure freedom of Expression and freedom of Association are not violated, the State imposes limitations or restrictions in the interests of the rights of others and of large society. In other words, individual's freedom stops at the point where he is imposing restraints on the freedom of others.

International instruments on Human Rights emphasize the fact that restrictions on freedom of expression must be set out by law and that they are necessary in a democratic society to protect national security, territorial integrity, public safety, public order, public health or morals, or the reputation or rights of others, ort to prevent disorder or crime.

Any violation on the part of the public authorities, individuals or any other entity, is ascribed to the State because her duty is to promote Human Rights and fundamental freedoms.

III-The Legislative implementation of Freedom of Expression and Freedom of Association:

According to the first paragraph of Article 2 of the International Covenant on Economic, Social, Cultural Rights ***"Each State Party… undertakes…to take steps to achieving progressively the full realization of the rights recognized…including particularly the adoption of legislative measures"***. The 2nd paragraph of article 2 of the Covenant on Civil and Political Rights stipulates ***"Each State party… undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"***.

Therefore, the primacy of these international norms over national laws is clearly stated. Still these rights need constitutional guarantees that would ensure their application through the adoption of national laws.

This has been largely endorsed by Algeria who has engaged in a process of reforming existing legislative texts in order to extend the scope of these freedoms. It was a decision taken by the President of the Republic to reform the current legislation.These reforms affected the existing Laws adopted just after the promulgation of the 1989 Constitution and the ratification of the principal instruments on Human Rights. Indeed, an organic Law relating to Information was adopted in January,1st 2012, it was followed by a law on Associations adopted the same year and an Organic Law on Political Parties was promulgated in January, 12th 2012,too.

1l Organic Law n° 12-05 of 12 January 2012 relating to Information

This organic law sets out the principles and the rules for the exercise of the right to information and freedom of press because media freedom or press freedom is part and parcel of the right to freedom of expression. If compared with the first law on information

adopted in 1990[10], it modernizes media, opens broadcasting to the private sector and strengthens press freedom. It has also introduced a new type of media since it considers that the exercise of online information is free.

For instance, article 36 stipulates that the State shall guarantee the promotion of the distribution of the press throughout the national territory in order to allow access of all citizens to information.

Moreover, in order to promote freedom of press article 83 requires from all administrations and institutions to provide the journalist with all information that he requests to secure the citizen's right to information. In this sense, the State grants aids to promote freedom of expression.

On the other hand, the organic law introduces some restrictions, in accordance with the International Covenant on Civil and Political Rights, article 2 declares that information is a freely exercised activity within the respect of the Constitution and the laws of the Republic, the Muslim religion and other religions, national identity and cultural values of society, national sovereignty and unity, the requirements of security and national defense, public order requirements, economic interests, the rights of citizens to be informed in a comprehensive and objective way, the confidentiality of judicial investigations, the pluralistic nature of schools of thought and opinion, the dignity of the human person and the individual and collective freedoms.

Regarding the place occupied, henceforth, by broadcasting and televisual media in Algeria, a law on broadcasting activity was adopted in 2014[11]. This law aims at regulating televisual activity in a period which saw the emergence of an important number of private televisions which are given regularly the authorization to broadcast, allowing, thus, more opening in the television field.

2/ Law n° 12-06 of 12 January 2012 on Associations

This law determines the conditions and modalities of constitution, organization and functioning of associations and establishes its

10 Law n° 90-07, April 3rd, 1990.

11 Law n° 14-04 of February, 24 2014.

scope. This law facilitates the creation of associations according to constitutional provisions, it also subjects the creation and dissolution of associations to justice control.

Associations can be created for professional, social, scientific, religious, educational, cultural, sports, environmental and humanitarian purposes. However, the law requires that the purpose of an association must be for the general interest and should not be contrary to the national constants and values, to public order and morality or contrary to the laws and regulations.

This law makes also a distinction between associations and political parties. It also prohibits any relationship between them whether organic or structural; associations cannot receive any grants from political parties.

3/Organic Law n° 12-04 of 12 January 2012 relating to Political parties

This organic law revised the organic law of 1997, it foresees flexible procedures for the creation of political parties, allowing, therefore, more democratic opening. In fact, this law permits the creation, suspension and dissolution of political parties under justice control which confers a real guarantee for the protection of the right to create political parties.

IV-Constitutional and Legal Guarantees to Exercising Freedom of Expression and Freedom of Association

Being considered as the first Algerian Constitution that fully embraced the principles of democracy, the 1989 Constitution sets the guarantees that allow the exercise of fundamental freedoms. The 1996 Constitutional Review has strengthened the Rule of Law basis in a country that anticipated the end of Socialism and the one-party system in many countries of the world.

1/ Constitutional guarantees:

They concern mainly the principle of separation of powers, the independence of the judicial power, constitutional review, and less importantly multipartism.

- **Separation of Powers**

This fundamental constitutional principle is, undoubtedly, the best guarantee to exercising freedoms in a democratic State. This principle, which was totally absent in the 1976 Constitution since all powers were centered in the hands of the Head of State, was finally enshrined in the 1989 Constitution.

It is the Constitution that distributes powers and delimits the fields of their practice. Such an organization of power alone guarantees the rights of citizens against violation.

- **The Independence of the Judiciary**

It is undeniable that the independence of the Judiciary is one of the most efficient guarantee in exercising fundamental freedoms.

In this sense, article 129 of the 1989 Constitution announced expressively that ***"The judicial power is independent"***. The 1996 Constitution Review added in Article 138 ***" It is exercised within the framework of the law".***

The 1989 Constitution and the 1996 Constitutional Amendment granted the mission of protecting freedoms and guaranteeing the preservation of citizens' rights to the judicial power.

Article 139 of the 1996 Constitutional Review and article 130 of the 1989 Constitution states that ***"The Judicial power protects the society and the liberties. It guarantees, to all and everyone, the safeguard of their fundamental rights".***

To achieve this protection, judges must be independent in assuming their duties, too. This independence is guaranteed in article 147 ***"The Judge obeys to the law only"***[12], and article 148 **"The judge is protected against any form of pressure, intervention or manoeuvres which prejudice his mission or the respect of his free will".**

- **Constitutional Review:**

It is a system of preventing violation of the rights granted by the Constitution, assuring their stability and preservation.

12 The 1996 Constitutional Review.

Therefore, the establishment of a Judiciary or a specialized Court or institution, as is the case in Algeria, with the power of constitutionality review determining whether laws comply with the Constitution's provisions is a standard component of a democracy.

Indeed, the Constitutional council pronounces on the constitutionality of treaties, laws and regulations; and when the Constitutional council considers that a legislative or regulatory provision is not constitutional, this latter looses its effect from the date the decision is taken by the Council

- **Multipartism**

Multiparty system is an important component in a Liberal democracy, it helps to free opinion and expression when allowing political debates and offering multiple-choice elections.

2/Legal Guarantees:

The question is how does the law protect these freedoms guaranteed by the Constitution? And to what extent is the Judiciary protecting these freedoms?

To enjoy collective freedoms it is necessary to make a balance between individual's interest and collective's interests.

In this context, it is necessary to regulate the exercise of these freedoms while avoiding the transgression of others' freedoms and ensuring security and stability in society.

Therefore, the Constitution granted this mission of regulation to the law, it takes the form of restrictions on individual's freedom for society's benefit.

Conclusion:

Since its independence, Algeria has been totally engaged to promoting human rights and fundamental freedoms. Indeed, Algeria did inscribe in all the Constitutions she adopted the protection of Human Rights and fundamental freedoms contained in the international instruments on Human Rights beginning with the Universal Declaration of Human Rights and the 1966 Covenants.

Algeria is, indisputably, the first Arab country who wholly embraced democracy in the end of the 80s, her commitment to protecting Human Rights was perceptible since she introduced in the 1989 Constitution all the democratic principles necessary for the building up of a Rule of law.

Furthermore, by adhering to almost all the international instruments on Human Rights, Algeria adopted the necessary legislative measures essential to implementing the Human Rights and fundamental freedoms enshrined in the Constitution.

In retrospect, one would admit that much have been achieved in the field of Human rights and fundamental freedoms in Algeria; still, more progress is needed. What seems important is that constitutional and legal guarantees essential to enjoying and exercising fundamental freedoms do exist.

All in all, Algeria is the best example of an African and Arab country who strived to gain her independence and achieved a great progress in the field of freedoms, and notably freedom of expression and freedom of association.

Algeria do have a free press since the 1990s, this is a truth; more than forty newspapers exist without counting online press. Since the opening of broadcasting to the private sector, the number of private televisions is growing, more than twenty channels are broadcasting in less than three years. The number of associations is also growing, authorizations are granted by the State allowing people to gather around common interest as well as the number of political parties has increased since the promulgation of the organic law in 2012, their number exceeds today sixty parties.

To conclude, Algeria's commitment to promoting and preserving Human Rights and fundamental freedoms stems from her deep belief that no actual development could be achieved without freeing the individual from all the constraints that impede his full improvement.

CONSTITUTIONAL AMENDMENTON FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION: AN INDONESIAN EXPERIENCE

Hani ADHANI

INDONESIA

ABSTRACT

Many problems of nation and state experienced by Indonesia that occurred in the new order has led to the collapse of the pillars of the state, namely the rule of law and justice. The presence of Indonesian Constitutional Court has a very important role in organizing the life of the state. Society can finally find the rule of law and justice that had been missing in the new order era. The existence of the Constitutional Court as the guardian of the constitution and the guardian of democracy give direction in managing the life of the nation. The Constitution as the supreme law become the benchmark in determining the state policy in order to achieve the country's goal which is to achieve prosperity for the people of Republic Indonesia.

KEY WORDS: *Constitutional Court of Republic of Indonesia; amandement constitution; citizens rights and human rights; freedom of expression, assembly and association; guarding the constitutional rights of citizens; case; landmark decisions.*

CONSTITUTIONAL AMENDMENTON FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION: AN INDONESIAN EXPERIENCE

Hani ADHANI[*]

Main Article[1]

Post constitutional reform of 1998, Indonesia began to make many changes and improvements in its constitutional structure. One of the fundamental changes is amendments of the Indonesian Constitution. Various weaknesses in the previous Constitusion led the members of the People's Consultative Assembly (MPR)to amend the Indonesia Constitution. For instance, the Constitution granted very strong powers to the President (*executive heavy*), so that the President could be a decision maker for all state policies. In addition, the provisions in the Constitution were also multi interpretations that can eventually be abused to extend the powers of the President. Another thing that became the main focus of constitutional amendment was lack of protection on citizens rights and human rights.

The process of Constitutional amendment was carried out gradually, which began in 1999 to 2002. In other words, the Indonesian Constitution was amended once through four stages using the method of addendum, where the manuscript of the original Constitution should be attached into the amended provisions of the Constitution. One of the main theme in the Constitutional amendment that attracted international community is the inclusion of a special chapter on human rights into the Constitution. The

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1 Papers presented at the 3rd Summer School Program on Constitutional Adjudication of the Association of Asian Constitutional Courts and Equivalent Institutions organized by the Constitutional Court of the Republic of Turkey in Ankara, 30 August to 9 September 2015.

process of the Constitutional amendment, especially on human rights,was carried out in the second amendment in 2000. The Inclusion of human rights chapter in the amended Constitution led Indonesia as one of the countries that has a Constitution which is categorized as the modern Constitution,together with the other 120 countries around the world. In these countries, human rights become an important part in their Constitution.

The Preamble of the 1945 Constitution of Indonesia, which was not amended, has implicitly included the substance of human rights contained in paragraph (1) that states, '*Whereas, Independence is the inalienable right of every nation, and therefore, colonialism must be eliminated from the face of the earth,because it is contradictory to humanity and justice'*. It proves to the world that Indonesia is a country that uphold human rights. Indeed, the sentence had been written long before the existence of the Universal Declaration of Human Rights (UDHR) declared in 1948 by the countrymembers of the United Nations.[2]

Various human rights problems and cases experienced by Indonesian people during the Soeharto regime triggered the inclusion of additionalchapter and articles concerning human rights protection as major substances in the process of Constitutional amendment in Indonesia. Although human rights provisions already stated in the Preamble as well as in several articles in the Constitution before the amendment, but it could not accommodate any other facts that many violations of human rights were committed by the Suharto regime because the human right protection in the Indonesia Constitution was not strong enough.

The framers of constitutional amendment added human rights provisions in Chapter XA of the Constitution consisting of 10 articles starting from Article 28A to Article 28J. In addition to Chapter XA, there are several provision related to human rights protection as stated in Article 28 and Article 29 paragraph (2). These human

2 See R. Herlambang Perdana Wiratraman, 'Hak-Hak Konstitusional Warga Negara Setelah Amandemen UUD 1945: Konsep, Pengaturan dan Dinamika Implementasi' [Constitutional Citizen's Right Post the 1945 Constitutional Amendment: Concept, Regulation and Dynamics of Implementation], *Jurnal Hukum Panta Rei*, Vol. 1, No. 1 December 2007.

rights protection are not only limited to the most basic rights, but also including civil and political rights as well as economic, social and cultural rights. One of the fundamental rights set out in the amended Constitution is freedom of expression, association and assembly. During Soeharto regime, Indonesian people could not convey their aspiration and opinion freely. They were also not free to assemble and association. President Soeharto restricted the right of citizens to hold opinions and to assembly. National laws made by the President and the House of Representatives (DPR) at the time were actually used as a tool by the President to fetter the rights of citizens, especially the right to express opinions and the right to assembly and association. Many people and community leaders who were critical during the Soeharto regime in voicing the right and freedom of opinion, assembly and association were arrested, jailed and prosecuted as enemies of the state. Several pro-democracy activists who opposed President Suharto were also abducted in 1998.

The repressive efforts undertaken by the government during the Soeharto regime that put pressure and restrictions on freedom of expression, assembly and association became a major theme in the recommendations made by the community leaders and community organizations during the process of Constitutional amendment. Together with the People's Consultative Assembly (MPR), they suggested that the inclusion of right and freedom of expression, assembly and association should be an important part in the process of Constitutional amendment.

Initially, the principle of freedom of association contained in Article 28 of the Constitution (before amendment) which reads, *'The freedom of association and assembly, the freedom ofexpression of thought, both orally as well as in written form and the likeshall be stipulated by law'*. However, since Article 28 do not provide constitutional guarantees explicitly and directly, but only stated that it shall be stipulated by law, then after the constitutional reform, through the second Constitution amendment in 2000, the constitutional guaranteesare expressly specified in Article 28E paragraph (3) of the Constitution which states, *'Every person shall have the right to*

the freedom of association,assembly and expression of opinion'. Thus the current Constitution directly and expressly guarantees freedom of association,freedom of assembly, and freedom of expression, not only for every citizen of Indonesia, but also for everyone who means including foreigners residing in Indonesia.[3]

In addition, another important thing in the provision is about the regulation of freedom for each person to establish, to participate, or to be a member of organization committee in the territory of the Republic of Indonesia. The idea of freedom of expression had been debated since the pre-independence, especially in meetings of the Investigating Committee for the Preparation for Independence(BPUPKI). Normative formulation of Article 28 in the Indonesian Constitutioncan be separated from efforts from Mohammad Hatta (the first Vice-President) as a scholar, thinker and fighter of Indonesian socialism, who raised freedom of expression duringthe pre-independence in order to be included in the original Constitution. What had been thought by Hatta more than half a century ago seems true that the provisions of human rights, especially the freedom of expression, should be guaranteed to avoid the arbitrariness of the authorities. With the addition of special articles on human rights in the amended Indonesian Constitution, it gave a benchmark to members of the People's Consultative Assembly (MPR) who amended the Constitution to also establish a judicial institution that can specifically provide a protection against the rights human enforcement.

In addition to the existing institutions, namely the Supreme Court and the State Administrative Court, the process of Constitutional amendment has also successfully established a new judicial institution named the Constitutional Court that one of its duties is to protect human rights. The authority of the Constitutional Court in guarding the constitutional rights of citizens becomes very important in order to maintain the democratic life and to balance the powers between executive and legislative, especially in the process of a law making that would be binding to all citizens.

3 See Jimly Asshiddiqie, '*Mengatur Kebebasan Berserikat Dalam Undang-Undang'* [Regulating Freedom of Association in a National law].

Political races in legislation, specific legislation 'orders', or perhaps human resource deficiencies in the Parliament in creating a product of legislation can be corrected by the Constitutional Court through the constitutional review mechanism that can be lodged by all Indonesian citizens.

Since its establishment in 2003, the Constitutional Court has declared many important decisions. Several landmark decisions related to the freedom of association, assembly and expression are:

1. **Case Number 011-017/PUU-I/2003**[4]. This case was filed on 15 October 2003by Prof. Deliar Noor and others as well as families of former members of the Indonesian Communist Party (PKI) who reviewed the constitutionality of Law No. 12 of 2003 on Legislative Elections. In his petition,they argued that Article 60 paragraph g of Legislative Elections Law, especially the phrase of *'former members of the banned organization of the Indonesian Communist Party, including its mass organizations, or not the people involved directly or indirectly in G.30.S/PKI or other banned organizations'*was contrary to the Constitution. In its legal consideration, Constitutional Court ruled that a criminal responsibility can only be held accountable to the perpetrator or to the people who participate or assist. Therefore, it is an act which is contrary to the law, a sense of justice, legal certainty, and the principles of rule of law if the responsibilityis imposed to someone who is not directly involved. Thus, Article 60 paragraph g of Legislative Elections Law is a form of denial to the rights of citizens and discrimination on the basis of political belief, therefore, it is contrary to the rights guaranteed by the Indonesian Constitution.[5]

2. **Case Number 013-022/PUU-IV/2006**[6]**.** This case was filed by Eggi Sudjana who reviewed Article 134, Article 136 bis, and Article 137 of the Criminal Law concerninga special defamation against the President and the Vice-President. According to the

4 Constitutional Court of Indonesia, 15.10.2003, Case No. 011-017/PUU-I/2003.

5 See the Constitutional Court's Decision (Indonesian Language): http://www.mahkamahkonstitusi.go.id/putusan/Putusan011dan0172003tgl240204.pdf.

6 Constitutional Court of Indonesia, 11.03.2006, Case No. 013-022/PUU-IV/2006.

Constitutional Court, the existence of Article 134, Article 136 bis, and Article 137 of the Criminal Code would be a stumbling block and an obstacle to clarify whether the President and/or the Vice-President have committed any offense referred to Article 7A of the Constitution reads, *'The President and/or the Vice-President may be dismissed duringhis/her term of office by the People's Consultative Assembly upon theproposal of the House of Representative, either if it is proven that he/shehas committed a violation of the law in the form of treason, corruption,bribery, other serious criminal offense, or disgraceful conduct, or if it isproven that he/she no longer meets the requirements as Presidentand/or Vice President'*,because of efforts to make such clarifications can be interpreted as an insult against the President and Vice President. The Constitutional Court in its legal considerations stated that Article 134, Article 136 bis, and Article 137 of the Criminal Law are not relevant anymore to be implemented in Indonesia as a democratic constitutional state, a republic, and the sovereignty of the people, that uphold human rights as defined in the Constitution, because it negates the principle of equality before the law, reducing the freedom to express ideas and opinions, freedom of information, and the principle of legal certainty. Thus, as an effort to reform the Criminal Code, the new Criminal Code bill shall not contain any clauses that are identical or similar to those articles. Moreover, criminal sanction for violating Article 134 is maximum six years in prison. Thissanction can be used to inhibit the democratic process, especially access to public offices which mostly require a person who never convicted of a criminal offense punishable by imprisonment of five years or more.[7]

3. **Case No. 6-13-20/PUU-VIII/2010[8].** This case was filed by Darmawan and others who reviewedthe constitutionality of Law No. 16 of 2004 on Attorney General Office; and Law No. 4/PNPS/1963 on Securing Printed Materials that Impede

7 See the Constitutional Court's Decision (Indonesian Language) :http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan013-022ttgKUHPrev.pdf.

8 Constitutional Court of Indonesia, 1.5.2010, Case No. 6-13-20/PUU-VIII/2010.

Public Order in conjunction with Law No. 5 of 1969 on the Statement of Variety Presidential Decrees and Presidential Regulations as Law. In its judgment, the Constitutional Court stated that as a welfare state, government officials such as the prosecutor would be allowed to do oversight of the printed materials, whether the content of printed materials is not contrary or violate to a law. The phrase of *'oversight the circulation of printed materials'*, especially the word 'oversight', according to the Constitutional Court, it is not interpreted as a 'security' mentioned in Article 27 paragraph (1) of Law No. 5 of 1991 which has been repealed. It cannot be interpreted also as 'Prohibition' as referred to Article 1 paragraph (1) of Law No. 4/PNPS/1963, which has been declared contrary to the Constitution. An oversight can be a form of inquiry, investigation, seizure, search, prosecution, or trial by the competent authority in accordance with due process of law, which resulted in a court decision that have permanent legal power which is then executed by the prosecutor.

4. **Case Number 82/PUU-XI/2013**[9]**.** It was filed by the Central Board of Muhammadiyah who reviewed Law No. 17 of 2013 on the Societal Organization. In its application, the Muhammadiyah argued that the norm in the Societal Organization Law has violated the right and freedom of association as guaranteed in the Constitution. The Constitutional Court stated in its legal considerations that the empowerment of specific arrangements by the Government towards civil society organizations, although it has positive aims, but it does contradict to the essence of societal organizations which are independent and autonomous. In addition, this empowerment will actually intervene and interfere the freedom and independence of the civil society organizations, so that if the Government intends to provide assistance then it cannot be forced and should be completely handed to the community organizations to choose. According to the Constitutional Court, the state intervention in the empowerment of civil society organizations towards

9 Constitutional Court of Indonesia, 15.10.2013, Case No. 82/PUU-XI/2013.

the expression of their creativity in the community is contrary to the right and freedom of assembly and association as guaranteed in the Constitution.

THE CONSTITUTIONAL COURT AND PROTECTION OF CITIZENS' POLITICAL RIGHTS IN INDONESIA

Irfan Nur RACHMAN

INDONESIA

ABSTRACT

One of the results of constitutional amendment that happened in the period of 1999-2002 is a change on the structure of constitutional system, one example is the birth of the constitutional court. The birth of the constitutional court in IIndonesian constitutional system has brought about a meaningful change toward respect and protection of citizens' constitutional rights especially political rights which, in the past, was very much supressed by the regulation of the ruling power. One of the indicators used to see the respect and protection of citizens' political rights is by looking very closely to the awards of the constitutional court because the awards contain legal policy concerning the protection of citizens' political rights.This paper will cover a glimpse of the constitutional court decisions which are related to the protection of citizens' political rights.

KEY WORDS: *Constitutional court, political rights, human rights*

THE CONSTITUTIONAL COURT AND PROTECTION OF CITIZENS' POLITICAL RIGHTS IN INDONESIA

Irfan Nur RACHMAN[*]

Introduction[1]

The political dynamics occurred in 1998 was ended with the fall of President Soeharto from the position of national leadership. It also led to constitutional reform that brought a new chapter in the constitutional system in Indonesia, particularly concerning Indonesia's parliamentary supremacy principle embraced by the People's Consultative Assembly (MPR) as the highest state institutions. Post constitutional reform, Indonesia is no longer implementing the supremacy of parliament.[2] It was replaced by the supremacy of the Constitution. It means that the Constitution has the highest position in Indonesian constitutional system as the supreme law of the land. It provides powers to each branches of government. In addition,Indonesia also implements the principle of separation of powers, so that the position of state institutions is horizontally equal with the principle of checks and balances among them.

The implementation of checks and balances mechanism is exercised by establishing the Constitutional Court (*Mahkamah Konstitusi*) in response to the need of judicial institution that can review the constitutionality of laws. Thus, the establishment of the Constitutional Court cannot be separated from the development of thoughts and ideas concerning the importance of judicial review system in a democratic country. One of the reasons for establishing

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1 Paper delivered at the Summer School Program in the Constitutional Court of Turkey in Ankara from 30 August to 9 September 2015.

2 Jimly Asshidiqie,The Constitutional Law Of Indonesia,Sweet&Maxwell Asia 2009,p.152.

the Constitutional Court is that law as a product of politics always has a character which is very determined by political constellation. This situation could create legislations which mostly reflect the interests of dominant political forces that may not be appropriate or even contrary to the Constitution. Therefore, there shall be a clear system to anticipate or resolve these matters using judicial review mechanism.

The Constitutional Authorities of the Indonesian Constitutional Court

Based on the Article 24C paragraph (1) of the Indonesian Constitution,the Constitutional Court has four constitutional authorities and one constitutional obligation, namely: (1)to review the constitutionality of laws against the Constitution; (2) to settle disputes betwen state institutions whose authorities are given by the Constitution; (3) to dissolve political parties; (4) to settle disputes concerning election results. Moreover, under Article 7A and 7B paragraph (1) to paragraph (5) and Article 24C paragraph (2) of the Constitution, the Constitutional Court has an obligation to provide a decision on the opinion of the People Representative Council (DPR) concerning alleged violations by the President and or the Vice President through an act of treason, corruption, bribery, or other high crimes, or moral turpitude, and or that the President and or Vice President is no longer meets the qualifications to be a President and or Vice President. These authorities are also stated in Article 10 paragraph (1) letter a to d of Law Number 24 of 2003 on the Constitutional Court, as amended by Law Number 8 of 2011 on the Constitutional Court.

The Constitutional Court and Protection of Citizens Political Rights

Karel Vasak, a legal expert from France, divides human rights into three generations.The first generation of human rights is intended to protect the life of human and to respect the autonomy of each person upon himself. This generation is often referred to

represent civil and political rights. For instance, right to life, freedom of movement, freedom of thought, right of asylum,right to be free from arbitrary arrest and detention, right to be free from torture, the right to be free from retroactive laws, and right to get a fair judicial process.[3]

The second generation of human rights is represented by the protection of economic, social and cultural rights. These rightsare recognized in order to provide basic needs of everyone. The state is required to be more active, so that these rights can be fulfilled. For instance, right to obtain employment.

The third generation of human rights is represented by the demands of 'solidarity rights' from developing countries over a fair international order. Through these rights, developing countries want to create an international legal and economic order become more conducive by providing the following rights: (i) right to development; (ii) right to peace; (iii) rights over natural resources of its own; (iv) right to a good environment; (v) right to their own cultural heritage.

These three generations of human rights have been enshrined in the amended Constitution of Indonesia. However, this paper will only focus to discuss the first generation of human rights related to civil and political rights. These rights are stated in Article 27 paragraph (2), Article 28, Article 28A to Article 28J, Article 29 paragraph (2), and Article 31 paragraph (1) of the Constitution. Therefore, Indonesia becomes one of countries in the world that provides various human rights guarantees in the Constitution. In this context,the Constitutional Court has been declared many decisions since its establishment in 2003 in order to protect the citizen's political rights. Some of the landmark decisions of the Indonesian Constitutional Court that protect the constitutional rights of citizens will be discussed in following section.

3 Satya Arinanto,*Hak Asasi Manusia dalam Transisi Politik di Indonesia,* Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia 2008, p.78.

1. *Leste Majeste* articles concerning defamation against President (Decision Number 013/PUU-IV/2006 and Decision Number 022/PUU-IV/2006)

The Constitutional Court revoked Article 127, Article 136 bis, and Article 137 of the Indonesian Criminal Code that contain provisions concerning specific defamation against President and Vice-President. There are several legal consideration usde by the Constitutional Court in annuling these articles, namely:

- Implementation of Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code could cause legal uncertainty (*rechtsonzekerheid*) because it could create multiple interpretations whether a protest is a statement of opinion or thoughts is a criticism or an insult to the President and/or Vice President. These articles are decided contrary to Article 28D paragraph (1) of the Constitution concerning equality before law and Article 28F of the Constitution concerning right to information.

- Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code could also impede the freedom of thought and expression, both orally as well as in written form, because the articles can be used by law enforcers against protests and demonstrations. These articles are contrary to incompatible with Article 28 and Article 28E paragraph (2) and paragraph (3) of the Constitution.

- Indonesia as a constitutional democratic state that upholds human rights as clearly stated in the Constitution shall not have unrelevant provisions such as Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code, because these articles are negating the principle of equality before law, reducing freedom of expression, thoughts and opinions, as well as freedom of information and the principle of legal certainty.

2. All political parties should follow the verification (Decision Number 15/PUU-IX/2011)

According to the Constitutional Court, it is not fair for new political parties if the political parties participated in the 2009 Election do not need to be verified for competing in the 2014 Election. Indeed, political parties that did not meet the parliamentary threshold must follow the verification with heavier requirements. The threshold is used for determining political parties that can seat in the parliament.

Based on the principle of equality before law and government, the Constitutional Court ruled that new political parties must not be treated differently compared to the political partiesin the 2009 Election. Alternatively, if new political party shall meet certain requirement for participating in the 2014 Election, then the other political parties shall also be subject to the same requirement.For the sake of legal certainty in order to achieve equal treatment and fairness, the Constitutional Court determined that all political parties shall follow the verification process and its requirements for participating in the 2014 Election.

3. Independent candidate in local election is allowed (Decision Number 5/PUU-V/2007 on 23 July 2007)

Before the Constitutional Court delcared its decission, only political party or coalition of political parties that have a right to propose candidates in local election. After the Constitutional Court decision, it is not only political party or coalition of political parties that have a right to propose candidates, but also an independence candidate who are not nominated by political party has a same right to be a candidate in local election.

4. Elected Parliamentary candidates shall be based on majority votes (Decision Number 22-24/PUU-VI/2009 on 23 December 2008)

In the legislative election, parliament candidates used to be elected based on the ranking order of candidates list nominated by political party. In other words, number of votes gained by candidates will not determine their chance to be elected. The Constitutional Court

ruled that the basic philosophy of every election in determining elected candidates is based on majority votes. Therefore, the Constitutional Court has changed the legislative election system from the ranking order system to the majority votes system. Thus, a candidate placed on lower list will have a same chance to be elected with other candidates.

5. Voters can use their ID cards to exercise their right to vote(Decision Number 102/PUU-VII/2008 on 6 July 2009)

In the Presidential Election Law, there was a provision that expressly regulates that only people who had registered in the final voters list (DPT) that could use their right to vote in a polling station. If their name were not listed in the final voters list, they would lost their right to vote. In order to restore the rights to vote of citizens guaranteed by the Constitution, the Constitutional Court ruled that voters who had registered but not yet listed in the final voters list could show their ID Card or passport to use their right to vote. In its legal consideration, the Constitutional Court stated that the provisions requiring a citizen to be registered as voters in the final voters list was the administrative issue. Therefore, it should not rule out the right of citizens to vote (*right to vote)* which was very substantial.

6. Ex-convicts could run for the elections (Decision Number 4/ PUU-VII/2009 on 4 March 2009)

In the Regional Government Law, there was provision banning former convicts to run for the head of region. This provision was considered to have violated the principle of equal position before the law and government; the right of a person to develop himself in striving for his rights collectively for building society, nation, and country; and the legal certainty of just laws and equal treatment before the law; as well as the right of every citizen to obtain equal opportunities in the government. Therefore, the Constitutional Court declared that the provision was'conditionally constitutional'. It means that it is unconstitutional if in its implementation does not accordance with the requirements given by the Constitutional Court.

The requirements are: (1) ex-convicts could run as a candidateafter 5 years of completed serving a sentence; (2) honest to the public that that he is an ex-convict; and (3) not as a residivis.

Based on the decision discussed above, I would like to say that decisions are the Crown of the judiciary. Therefore, the achievements and the role of the Constitutional Court as a judicial institution in legal and constitutional cases will be reflected from its decission. In exercising the cases, the Indonesian Constitutional Court also often uses progressive law paradigm which gives more stressed to the importance of substantive justice rather than procedural justice. In addition, the Constitutional Court decisions do not always have to be locked with formalistic or absolute legalistic, but it must also be able to reach one of the main objectives, namely to meet the values of justice for the people.

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Decision Number 22-24/PUU-VI/2009.

Decision Number 4/PUU-VII/2009.

FREEDOM OF EXPRESSION

Nerma DOBARDŽIĆ
MONTENEGRO

ABSTRACT

The Constitution of Montenegro in the article 47 states that everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner, which may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.

This constitutional restriction has been incorporated into the quoted provision of Article 20.2 of the Law on the Media, which stipulates that if a media outlet publicises the program contents that violate legally protected interest of a person referred to in the information, or that insults the honour or integrity of individual, presents or disseminates untrue statements about his life, knowledge and abilities, all interested persons shall have the right to press legal charges with the court having jurisdiction against the author and founder of the media outlet for compensation of damages.

KEY WORDS: *Freedom of expression, Democratic society, Interference with the right of freedom of expression, Indemnification in a civil action, Case law.*

FREEDOM OF EXPRESSION

Nerma DOBARDŽIĆ[*]

I. The Constitution of Montenegro and Freedom of Expression

Article 149 of the Constitution of the Montenegro (hereinafter: the Constitution) provides that the Constitutional Court of Montenegro shall decide on the following:

1) conformity of laws with the Constitution and confirmed and published international agreements;

2) conformity of other regulations and general acts with the Constitution and the law;

3) constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all the effective legal remedies have been exhausted;

4) whether the President of Montenegro has violated the Constitution,

5) the conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units;

6) prohibition of work of a political party or a non-governmental organization;

7) electoral disputes and disputes related to the referendum, which are not the responsibility of other courts;

8) conformity with the Constitution of the measures and actions of state authorities taken during the state of war or the state of emergency;

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9) performs other tasks stipulated by the Constitution[1].

The Constitution in the article 47 states that everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner, which may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro. This constitutional restriction has been incorporated into the quoted provision of Article 20.2 of the Law on the Media[2], which stipulates that if a media outlet publicises the program contents that violate legally protected interest of a person referred to in the information, or that insults the honour or integrity of individual, presents or disseminates untrue statements about his life, knowledge and abilities, all interested persons shall have the right to press legal charges with the court having jurisdiction against the author and founder of the media outlet for compensation of damages.

Beside the Constitution, the right to freedom of expression and its realization is prescribed also by European Convention on Human Rights and Freedoms (hereinafter: the European Convention) and media laws.

II. Overview of the Right to Freedom of Expression

Everyone has the right to freedom of expression, which includes freedom to hold own opinion and to receive and communicate information and ideas without interference by public authority and regardless of restrictions. The right to freedom of expression is right that may use individuals and legal entities. Freedom of expression protects not only the substance of expressed ideas and information, but also the form in which they are delivered.

Freedom of expression constitutes one of the essential foundations of a democratic society. Its protection is of particular importance when it comes to the press, as it is the task of the press, among other things, to publicise information of public importance. However, the freedom to publish information in the press is limited by the need

1 The Constitution of Montenegro, SU-SK Ref.no. 01-514/22, October 22, 2007.
2 Law on the Media (OGM, no. 51/02, 62/02) September16, 2002.

to protect the reputation and rights of other person. It is therefore important to determine the circumstances in which state authorities take measures that could affect the operation of the press in cases which are of legitimate public interest. When assessing whether a breach of the freedom of expression made or not, it is necessary to consider each individual case in the light of all circumstances. Also is necessary to establish whether the measures taken to limit the freedom of expression are proportionate to the legitimate aim pursued by that restriction. Press has key role in communicating and sharing the information and opinions.

Any interference with the right of freedom of expression must be prescribed by the law, that any reference to the law must have a basis in domestic law. In accordance with Art.10.2 of the European Convention, the government can interfere with the exercise of freedom of expression only if the three cumulative conditions are fulfilled: a) interference is prescribed by law, b) interference aims to protect one or several specified interests or values, c) interference is necessary in a democratic society. Courts must follow these three conditions when hearing and deciding cases concerning the freedom of expression.

The European Court of Human Rights has established in its decisions a hierarchy of values protected by Article 10 of the European Convention, by giving different categories of expression diverse protection degrees. Within this hierarchy, commentaries on public matters by public figures or the media constitute the most protected forms of freedom of expression. As the Court often states, freedom of expression guaranteed by Article 10 of the European Convention represents one of the essential foundations of a democratic society and under paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb.

The right to protest and peaceful assembly is closely linked to the right to freedom of expression, which is protected by article 11 of European Convention. The right to peaceful assembly and freedom of expression are basic democratic rights, thus protection of right to

freedom of expression are basic of democracy. The right to freedom of thought and conscience which is prescribed in the article 9 of the Convention is close linked with the freedom of expression.

Law on the Constitutional Court of Montenegro[3] provides that when the Constitutional Court finds that the challenged individual act violated a human right or a freedom guaranteed by the Constitution, it shall adopt a constitutional complaint and repeal that act, entirely or partially and remand the case for repeat procedure to the authority which enacted the repealed act.

III. Case law of the Constitutional Court of Montenegro

Herein are presented cases in which the Constitutional Court of Montenegro upheld constitutional appeals, overruled the judgment and remand the case to the Court for retrial.

- ***Case S.S.versus the judgment of the High Court in Podgorica*** [4]

The appellant in the constitutional appeal stated that he has worked as an investigative journalist and the intention of the appellant who was the author of the disputed article published in the magazine Monitor was to inform the public about the existence of organized drug trafficking groups in the country. He had only literally transposed information published by another paper, in which the plaintiff was associated with members of drug trafficking groups by designating him as their protector.

The judgment of the Basic Court[5] rejected as unfounded the claim seeking to oblige the respondent (who lodged the constitutional appeal) to pay to the plaintiff the sum of €1.00 as non-pecuniary damage for mental anguish due to the injury of honour and reputation, with the corresponding statutory default interest starting from the date of adjudication, until the final payment.

The judgment of the High Court[6] reversed the first instance judgment by upholding the claim of the plaintiff to oblige the

3 Law on the Constitutional Court of Montenegro („OGM", no. 11/2015), March 12, 2015.
4 High Court in Podgorica, July 09, 2010 Decision Gž. no.3031/10-07.
5 Basic Court in Podgorica, May14, 2010 Decision P.no.1424/07.
6 See footnote no. 4.

respondent to pay to the plaintiff the amount of €1.00 as non-pecuniary damage for mental anguish due to injury to honour and reputation. The reasoning of the judgment basically stated that untrue information were presented in the actions of the respondent available to the general reading public, which injure the honour and reputation of the plaintiff; that the statement set forth in the disputed text does not represent a value judgment; that it is the right of journalists to work in the spirit of the idea to be a critical observer of people, events and phenomena, and the public's right is to expect the media to be engaged more in the life of public figures rather than ordinary citizens, which does not mean the right to degrade the honour and reputation of public figures, which are values of all human beings enshrined in the Constitution and laws. In this case, the plaintiff was inflicted mental anguish, because in his capacities of a man and a senior official of the National Security Agency he has been presented as the protector of persons who are connected with the criminal milieu, which undoubtedly affected his psychological experience of the text, due to which he suffered mental anguish.

In the proceedings that preceded the Constitutional court proceeding, the High Court upheld the claim of the plaintiff and imposed on the respondent the obligation to pay non-pecuniary damage to the plaintiff due to mental anguish and injury to honour and reputation. The Court expressed the view "that the actions of the respondent resulted in presenting false information available to the general reading public which injure the honour and reputation of the plaintiff", that this is a clear case of presentation of factual assertions that are susceptible of a potential truth verification and that the assertions from the concerned text inflicted mental anguish to the plaintiff because he had been presented, as a human being and a senior official of the National Security Agency, as the protector of persons who are connected with the criminal milieu, which undoubtedly had a harmful effect on his psychological experience of the text".

The Constitutional Court in the explanation of decision use Article 10.2 of the European Convention which prescribes cases in which government can interfere with the exercise of the freedom of expression.

Indemnification in a civil action awarded as compensation for the damage caused to a person's dignity or reputation represents a clear interference with the exercise of the right to freedom of expression. In the present case, it is undisputed, under the finding of the Constitutional Court, that the decision of the High Court constituted "interference" with the appellant's right to freedom of expression and that it was "prescribed by law" because the challenged judgment was rendered on the basis of the Law on the Media and the Law on Obligations, in a civil action launched by the plaintiff due to damage caused to his reputation.

To that effect, the Constitutional Court found that the information which concerned the public life of state official can be considered to be a matter of public interest, especially taking into account that this is a high official of the National Security Agency.

The Constitutional Court found that the interference with the right to freedom of expression of the appellant was not justified and "necessary in a democratic society" and that there was no "pressing social need" to restrict freedom of expression.

Constitutional Court of Montenegro noted that reasons given in the impugned judgment by the High Court can't be regarded as a sufficient and relevant justification for interference in the appellant's right to freedom of expression. The High Court didn't convincingly establish that there is any "pressing social need" due to which protection of individual rights should be put above the appellant's right to freedom of expression and the public interest and that this freedom (be limited) especially when it comes to matters of public interest. Interference, in the opinion of the Constitutional Court, therefore, was not "proportionate to the legitimate aim" sought to be achieved and was not "necessary in a democratic society", which is why the right of the constitutional appellant to freedom of expression referred to in the provisions of Article 47 of the Constitution and Article 10 of the European Convention was breached.

• ***Case Đ.Ć. versus the judgment of the High Court in Podgorica***[7]

The appellant stated in the constitutional complaint that judge of the Basic Court has initiated criminal proceeding against the appellant because of his public political statement published in the daily magazine "Dan", in which criticized the work of the Basic Court. Further, he stated that he was arrested twice without receiving the notice of the legal basis and the reasons for his arrest and without preparation for the defense; that he had no right to call witnesses in his favor and he consider that he was entitled to as a journalist and politician criticized the negative phenomena in society.

The Basic Court[8] found guilty the accused (appellant of the constitutional appeal) of the defamation and sentenced to a fine in the amount of 600.00 €, which will be substituted by imprisonment in the case that the same is not paid within the specified time. The Court found these facts because appellant gave comments in the daily news „Dan" to a not final judgment of the Basic Court in Herceg Novi[9] issued by the judge (private prosecutor) and he announced untrue statements that may harm her personal and professional reputation.

The High Court in Podgorica[10] confirmed the first instance judgment and reasoning of the contested judgment states, inter alia, if someone communicate certain attitudes which contains offensive or defamatory characters, such as the stated views that are taken as incrimination, and give the name of the judge who rendered such judgment, it is more than clear that the intention is to present untrue facts that should and could harm the honor and reputation of the judge as a private prosecutor and for that purpose is communicated.

Test "necessary in a democratic society" requires that in deciding whether a breach of article 10 of the Convention has done decide do "interference"of domestic authorities with the right to freedom

7 High Court in Podgorica, February 22,2010 Decision Kž. no. 2086/09.
8 Basic Court in Kotor, August 20,2009 Decision K.no.160/09.
9 Basic Court in Herceg Novi, March 29,2006 Decision K. no.31/05.
10 See footnote no.7.

of expression correspondent to "pressing social need", whether itis proportional to the legitimate aim which is going to be achieved and whether the reasons and justifications given by the courts for such interference are relevant and sufficient. In this regard, in the concrete case is necessary to determine do courts applied standards which are in conformity with principles incorporated in the article 10 of Convention, and whether their decisions based on acceptable analysis of the relevant facts.

The Constitutional Court of Montenegro found that the interference with the right to freedom of expression of the appellant was not "necessary in a democratic society" and the reasons given by the Basic and High Courts in its decisions can't be considered relevant and sufficient to justify interference.

The Court also stated that the nature and severity of the sentenced fine, which under certain conditions could be substituted by imprisonment were things of particular importance in assessing the proportionality of the interference.

• ***Case T.D. versus the judgment of the High Court in Podgorica***[11]

The appellant in the constitutional appeal stated that he published a book entitled „Carta Canta" on April 2008 in which on the literal and literary way described the part of the history of his family and also referred to the long-standing dispute with the now deceased father held in the Basic Court in Herceg Novi, regarding the returning the family's property which had been usurped by some individuals. Further, in the book he tried to explain and present a realistic view of the experienced, with no intention of anyone insult and defamation and he expressed a personal opinion about described events.

The Basic Court in Herceg Novi[12] found guilty the appellant of the constitutional appeal of committing the criminal offense of insult and defamation for which offenses sentenced on a unique fine of 1,200 € which must be paid within 3 (three) months after the

11 High Court in Podgorica, September 21, 2010 Decision Kž.no.1046/10.
12 Basic Court in Herceg Novi, March 02, 2010 Decision K.No. 259/09.

judgment, which will be substituted by imprisonment in the case that the same is not paid within the deadline. In the explanation of the judgment, inter alia, Court noted that the appellant stated in the book inaccurate statements related to the private prosecutor that may damage his honor and reputation, as well as the insults.

The High Court in Podgorica[13] reversed the judgment of the Basic Court[14] . In the explanation, inter alia, is stated that the Court Council noted that between criminal offense of insult and defamation can't exist concurrence, because it was apparent and in this concrete case the criminal offense of defamation consumed criminal offense of insult; that for those reasons the Court reversed the first instance judgment in terms of legal clasiffication of the criminal offense, finding that it was a criminal offense of defamation, for what offense was sentenced to a fine in the amount of 600.00 €, which will be substituted by imprisonment in the case that the same is not paid within the specified time.

In the proceedings that preceded the constitutional court proceedings, the Constitutional Court determined that the Basic Court found guilty the appellant for the criminal offense of insult and defamation because it was established that in the book entitled „Carta Canta" appellant stated untrue statements related to the private prosecutor and defamation words which can damage his honor and reputation. The High Court in Podgorica reversed the judgment of the Basic Court in Herceg Novi regarding the legal qualification of the offense.

According to the Article 10.2 of the European Convention government can interfere with the exercise of freedom of expression only if the three cumulative conditions are fulfilled: a) interference is prescribed by law, b) interference aims to protect one or several specified interests or values c) interference is necessary in a democratic society. Courts must follow these three conditions when hearing and deciding cases concerning the freedom of expression.

13 See footnote no. 11.

14 See footnote no. 12.

Freedom of expression is condition sine qua non of functioning and survival of every democratic society. Impugned judgment was made based on Criminal law in the criminal procedure which initiated the private prosecutor because of criminal offense of insult and defamation.

Therefore "interference is prescribed by law", aim of interference is to protect "reputation or rights of others "and "mean "is the Court order the appellant to pay damage caused to the plaintiff reputation.

In the concrete case was necessary to determine do courts applied standards which are in conformity with principles incorporated in the article 10 of Convention and whether their decisions based on acceptable analysis of the relevant facts.

Having in the mind all circumstances in this case, the Constitutional Court of Montenegro considered that interference with the appellant right to freedom of expression was not justified and not "necessary in a democratic society" and the reasons stated in the decisions of the Basic and High Court cannot consider relevant and sufficient to justify such interference. The Court also stated that the nature and severity of the sentenced fine, which under certain conditions could be substituted by imprisonment were things of particular importance in assessing the proportionality of the interference.

Conclusion

As described above, the right to freedom of expression is right that may use individuals and legal entities. Freedom of expression protects not only the substance of expressed ideas and information, but also the form in which they are delivered. Press has key role in communicating and sharing the information and opinions. Freedom of expression constitutes one of the essential foundations of a democratic society. However, the freedom to publish information in the press is limited by the need to protect the reputation and rights of other person. It is therefore important to determine the circumstances in which state authorities take measures that could affect the operation of the press in cases which are of legitimate public interest.

The Constitution of Montenegro in the article 47 states that everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner, which may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro. The European Court of Human Rights has established in its decisions a hierarchy of values protected by Article 10 of the European Convention, by giving different categories of expression diverse protection degrees. Within this hierarchy, commentaries on public matters by public figures or the media constitute the most protected forms of freedom of expression.

RIGHT TO ASSEMBLY

Murat ŞEN
TURKEY

RIGHT TO ASSEMBLY

Murat ŞEN[*]

First of all, I want to thank you for the organization because of yesterday's amazing trip. And Good Morning everyone. I hope you slept well because it was a very tiring day. I will try to wake you up with the topic of the right to assembly. I know this is a very controversial right and it is not a suitable way to wake up but I will try!

First of all, I will define the right and explain its importance. After that, I would like to explain how the Court considers the issues of this right during the process of individual application. Then, I will try to explain which restrictions are legitimate for this right and in the end I will mention about the case-law of the Court with regard to that right.

Since 2011, the right to assembly has been on the agenda throughout Europe. The democracy movement described as Arab Spring has affected Libya, Egypt, Syria and at least fourteen other countries in the region. In Europe, there have been great protests against the austerity measures imposed by the government and against sexual assault.

The right to assembly, together with the freedom of expression and freedom of association, rest at the core of functioning of the system of democracy. The freedom of association regulated in Article 34 of the Turkish Constitution lays down that "Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission." The right to assembly is a fundamental human right that can be enjoyed and exercised by individuals, groups, unregistered associations, legal

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entities and corporate bodies. It has been recognized as one of the foundations of the functioning of democracy. The right to assembly helps in ensuring that all people in a society have the opportunity to express the opinions they hold in common with others. The right to assembly facilitates the dialogue with civil society and among civil society, political leaders and government, and it is complemented by other rights and freedoms such as freedom of association, freedom of movement, freedom of expression, freedom of thought, convictions and religion. Besides, freedom of assembly is of fundamental importance for the person's development, dignity and improvement of every individual and welfare of the society. The protection of the right to assembly is crucial in creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together. Turkey has regional and international conventions that enshrine the freedom of assembly such as European Convention on Human Rights and the UN International Covenant on Civil and Political Rights. Additionally, Article 90 of the Constitution recognizes the pre-eminence of international treaties over national law. Therefore, not only for individual application scope but also including the Constitution, the Court must make good use of the Convention. Article 11 of the European Convention on Human Rights and the Turkish Constitution is very similar in terms of the scope of that right. On the other hand, the main difference between them is that Article 11 of the Convention involves the right to association.

You know Articles 8 – 11 of the Convention are about the right to respect for private and family life, freedom of thought, conscience, religion and freedom of expression, freedom of assembly and association, which are similarly structured with Articles of the Turkish Constitution.

Regarding individual application, under the standard approach, the Court sets out some questions. The first question is related to the condition of whether or not there has been a violation of the Constitution. The second question is related to the condition of whether or not the issue falls within the scope of one of the substantive articles of the Constitution. The third question is related

to the condition of whether or not there has been any interference with the right. The fourth question is related to the condition of whether or not any interference was "prescribed by law". The fifth question is related to the condition of whether or not there has been any interference with the particular constitutional right. The last question is related to whether or not any interference (or restriction) is necessary in a democratic society. The word "necessity" itself implies that the legitimate aim that is pursued by the interference cannot be achieved by less restrictive measures. This is in a way the most complex and open-ended, potentially the most subjective test. In practice, the Court examines whether there was a pressing social need for interference and if so, whether the interference was reasonably proportionate to the fulfilment of that need in a democratic society.

The margin of appreciation which is a doctrine to interpret a certain convention provision should also be taken into account. It generally refers to the amount of the discharge of the national authorities in fulfilling their obligations under the Convention. The margin varies according to the importance of a particular right. For example, the courts in the States are given more discretion with respect to restriction of the right to property; conversely, in case of the right to assembly, margin of appreciation is much narrower.

The Scope of the Right to Assembly

The Constitution and the Convention do not define what an assembly is. The only definition of assembly is that an assembly must be peaceful. On the other hand, we can make a definition from the paper on the right prepared by the Organization for Security and Venice Commission. From this paper, an assembly means the international and temporary test of a number of individuals in a public place for a common expressive purpose. Both static and moving assemblies may take place on publicly or privately on premises or in enclosed structures.

What are the elements that define the right to freedom of assembly? For instance, the intent and agenda content. It is necessary that the participants themselves would regard the activities as exercise of

the right to freedom of assembly. An assembly requires that the participant want to share a statement, a view point with the public. This means that the participant must have a common agenda. In the Turkish Law, there is a law on meeting and demonstration, regarding the right to assembly. An assembly has to take place in a public place. The participants of the assembly come together and sit.

The Restriction of the Right to Assembly

What does interference in the right to assembly mean? Such a procedure is kept with the requirements of Article 34 of the Turkish Constitution as the following:

"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission. The competent administrative authority may determine a site and route for the demonstration march in order to prevent disruption of order in urban life. Formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches, shall be prescribed by law. The competent authority designated by law may prohibit a particular meeting and demonstration march, or postpone it for not more than two months in situations where there is a strong possibility that disturbances may arise which would seriously upset public order, where the requirement of national security may be violated, or where acts aimed at destroying the fundamental characteristics of the Republic may be committed. Where the law forbids all meetings or demonstration marches in districts of a province for the same reasons such postponement may not exceed three months. Associations, foundations, labour unions, and public professional organizations may not hold meetings or demonstration marches exceeding their own scope and aims."

According to Article 13 of the Turkish Constitution;

"Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national

security, public order, general peace, the public interest public morals and public health, and also for specific reasons set forth in the relevant Articles of the Constitution. General and specific grounds for restrictions of fundamental rights and freedoms may not conflict with the requirements of the democratic order of society and may not be imposed for any purpose other than those for which they are prescribed. The general grounds for restriction stipulated in this Article apply to all fundamental rights and freedoms."

Additionally, especially the Constitutional Court requires that any justification for an interference with human rights must be compatible with the rule of law and in particular sufficiently clear. Pluralism, tolerance and broad-mindedness are all parts of a democratic society. The Court also recalls that the freedom of assembly and the right to express his/ her thoughts are among the fundamental bodies of a democratic society. Radical measures to suppress the freedom of assembly and expression of others are shocking and unacceptable. In a democratic society based on the rule of law, political ideas must afford the opportunity for expression through the exercise of freedom of assembly. In that context, an assembly must be peaceful. "Peaceful" should be understood as being without armed violence or without disturbance of use of arms. A protest is not peaceful if protestors carry weapons. An assembly organized with the intentions of violence, on the other hand, does not fall within the scope of Article 34 of the Constitution.

Proportionality

Restrictions imposed on freedom of assembly must be proportionate. The test of proportionality is one of the most effective tools of the Court rule to determine whether the State has discharged an obligation under the Constitution. The test of proportionality is a way of assessing the justifiability of the interference.

If I do not have enough time, you can find the case-law of the Court of Turkey. That is very important for the Turkish judiciary because two case-laws are about the right to assembly. One application is about the ill-treatment and the Constitutional Court decides there is a violation of the right to assembly. You can find in the papers

the details about this application. And the other application is very important because the Court defines the law against the District Courts, and the law defines nobody can make a demonstration near 1 km. of the Turkish Parliament and the Court said this is not important. It is a different and very interesting case-law. If you read them and ask anything after that, I will answer them. Thank you so much for your patience.

THE CASE LAW OF THE TURKISH CONSTITUTIONAL COURT ON BALANCING THE RIGHT TO PROTECTION OF HONOR AND REPUTATION AGAINST FREEDOM OF PRESS

Ceren Sedef EREN

TURKEY

THE CASE LAW OF THE TURKISH CONSTITUTIONAL COURT ON BALANCING THE RIGHT TO PROTECTION OF HONOR AND REPUTATION AGAINST FREEDOM OF PRESS

Ceren Sedef EREN[*]

A. Introduction

The right to protection of honor and reputation protected under article 17 of the Turkish Constitution (Constitution) and the freedom of press protected under article 28 of the Constitution are both rights which appear in the common field of protection of the Constitution and the European Convention on Human Rights (Convention), meeting the criteria that the right which is claimed to be intervened by the public force should be enshrined both in the Constitution and the Convention, with the first one guaranteed under right to respect for private and family life stipulated in article 8 of the Convention and the other one under freedom of expression in article 10 of the Convention.

Paragraph (1) of article 17 of the Constitution with the side heading of "*Personal inviolability, corporeal and spiritual existence of the individual*" is as follows:

> "Everyone *has the right to life and the right to protect and improve his/her corporeal and spiritual existence.* "

Article 8 of the Convention with the side heading of "*The right to respect for private and family life*" is as follows:

> "*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

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2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 26 of the Constitution with the side heading of "*Freedom of expression and dissemination of thought*" is as follows:

"*Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.*

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

Article 28 of the Constitution with the side heading of "*Freedom of the press*" is as follows:

"*The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the*

deposit of a financial guarantee.

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.

Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by the decision of judge issued within the limits specified by law, to ensure proper functioning of the judiciary

…."

Article 10 of the Convention with the side heading "*Freedom of expression*" is as follows:

"*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information an ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The case law of the Turkish Constitutional Court (Court) about balancing the two rights mentioned above has been established in the judgments of the applications lodged with the complaint that the applicant claiming to be the victim of a violation of his/her right to protection of honor and reputation because of the news published in press about him/her. While the Court generally accepted the principles constituted by the European Court of Human Rights (ECHR) on this subject, it has decided to evaluate the complaints about violation of the right to honor and reputation within the framework of the right to protection of inviolability, material and spiritual existence of the individual defined in article 17 of the Constitution, instead of the right to private and family life defined in article 20 of the Constitution and article 8 of the Convention which the ECHR uses to assess the mentioned complaint.

In this context, the Court states that the honor and reputation of an individual is covered by "*spiritual existence*" which is stipulated in article 17 of the Constitution. The state is obliged not to intervene in honor and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of the third parties. The intervention of the third parties in honor and reputation can also be made through visual and audio publications as well as many possibilities. Even if a person is criticized within a public debate through a visual and audio publication, the honor and reputation of that person should be considered as a part of his/her spiritual integrity (Adnan Oktar (3) App. No: 2013/1123, 2/10/2013, § 33).

According to the established case law of the Constitutional Court on individual application; the positive liability of the State within the framework of establishing effective mechanisms against the interventions of the third parties on the material and spiritual

existence of individuals shall not necessarily entail the performance of a criminal investigation and prosecution. It is also possible to protect an individual against the unjust interventions of the third parties through civil procedure. As a matter of fact, both criminal and legal protection is envisaged in our country for the interventions which are made by the third parties to honor and reputation. Defamation is considered as a crime in terms of criminal law, as an unjust act in terms of private law and can be subjected to an action for compensation. Therefore, it is also possible to ensure a remedy through a civil case with the claim that an intervention has been made by the third parties in the honor and reputation of an individual (Adnan Oktar (3), § 35).

The Court uses the criteria formed by the ECHR to decide on the 'right to protection of honor and reputation conflicting with the freedom of press' applications which are; the contribution that the expression have made to a debate of general interest which concerns public opinion, how well- known the person concerned and the subject of the news or article, his/her prior conduct as regards the subject for which a complaint has been filed and the content of the expression. The Court also uses one other criterion formed by itself which is the condition that the news or the article about the concerned person is published in.

a. Contribution to a debate of general interest

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest. The detecting of the subjects about general interests depends on the facts of the concrete case as well as the content of the article at issue. But it is undisputed that there is a matter of general interest where the publication in question includes a political theme or handles a committed crime.

b. How well-known the person concerned and the subject of the news or article

The role and function of the person concerned with the characteristics of the activity that is subject to the news, article,

interview or photograph are the other important criteria related with the one mentioned before. It is appropriate to make a distinction between ordinary people and the people exercising official functions or exercising their functions as a politician. A person who is not a public figure can request to enjoy a special protection of his/her right to respect for personal dignity and private life where as a public figure, he/she can't have a protection to that effect. For example, the news about a politician exercising his/her official functions that can contribute to a debate in a democratic society can not be considered the same as the ones about the details of private life of a person, who does not perform such acts.

Although it matches with the "*watch dog*" function of the press in the first case, it has a secondary significance in the other one. But even if the public's right to be informed can surpass some of the benefits provided by the right to respect for private lives of the publicly known figures, government officials and politicians in certain conditions, it can not be deemed as transcending when the publication of the article in question accompanied with photos and comments has the sole purpose to satisfy the curiosity of a particular readership regarding the details of the applicant's private life whether the person concerned is a public figure or not. In these conditions freedom of expression calls for a narrower interpretation.

In the cases where there is a conflict between the right to protection of honor and reputation and the freedom of press, if the person concerned is a government official, the public service performed by him/her must also be considered while balancing the two rights in question. However, it can not be said that the control over government officials rises up the same level as politicians. Government officials clearly need to have public confidence to be able to fulfil their duty which can only be secured by protecting them from ungrounded accusations.

c. Prior conduct of the concerned person as regards the subject for which a complaint has been filed

The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have

already appeared in an earlier publication are also factors to be taken into consideration.

d. The content, form and consequences of the publication

The means that a news, interview, photograph or an article published in the paper and the way the concerned person introduced there must be taken into account in the assessments. Besides, the extent of the publication also depends on whether or not the news published in a national or local paper and has a lower or higher circulation.

e. The conditions that the news or the article about the concerned person is published in

The conditions that the news or the article about the concerned person is published in should be assessed in the light of the situation of the country at the date of the events mentioned in the publication. The feature and extent of the impact coming off with the news being published must also be considered in the assessments.

B. The Case-Law of the Court

a. *İlhan CİHANER,* App. No:2013/5574, 30/6/2014

The applicant who worked as the Chief Public Prosecutor of Erzincan province before the intervention subject to application, claims to be the victim of a violation of his right to honor and reputation due to the failure of the state and judicial authorities to provide an effective protection as regards his damaged rights as a result of a decision on his compensation request upon the fact that a national paper published news targeting his professional prestige and personal rights, being rejected.

The news subject to application included information from the investigation about the applicant who was arrested on the accusation of being a member of the "*Ergenekon*" terror organisation at the time the news published, that the applicant taking place in the preparations of a coup plan against government and also some allegations that the applicant organizing a conspiracy by using his

authority as a prosecutor against a group known as "*Gülen Cemaati*". The title of this news was as "The *Prosecutor Sinked Up To His Neck*".

The Court applied the general principles mentioned above in the merits of the case to determine whether there has been a violation of the applicant's right to honor and reputation or not. In the assessment of whether the news has made a contribution to a debate of general interest, the Court stated that the news included information about the events that caused the applicant to get arrested on the accusation of being a member to "*Ergenekon*" terror organisation which is a subject argued widely among public at the time and pointed out that even if the applicant claimed the statements in the news to be falsified, he did not require the statements in the news to be compared with the evidence that caused him to get arrested or alleged that the facts given in the news have not taken place in the investigation file.

After it has been accepted that the news makes a contribution to a debate of general interest, the Court applied the second criteria mentioned above to the case in the decision. It stated that the applicant who was a high level government official as the former Chief Public Prosecutor of Erzincan province at the time of the events mentioned in the news, can not suggest to be a low profile especially after the events that happened before the news subject to application published. However, it has been reiterated that public prosecutors are the government officials whose duty is to ensure that the justice system functions properly and that they should have public confidence as should the other judiciary officials.

The Court first discussed the first instance court's justification on rejecting the applicant's compensation request and decided that a balance has been struck by the first instance court between freedom of press and right to honor and reputation by stating that the events mentioned to happen in the news are in accordance with the observable facts.

On the other hand, the Court stressed that although it can not be said that the statements are not exaggerated, as a result of the close relationship between freedom of press and democracy, it

should be accepted that the scope of the freedom of press should be interpreted broadly to allow exaggeration and provocation to a degree. It mentioned that ~~the~~ the first instance court assessed some statements that could be claimed to be exaggerated and decided the statements to be in accordance with the law.

Consequently, the Court decided that the news subject to application is not about applicant's profession as a prosecutor but includes information about an investigation that the applicant is accused of a crime and got arrested. Besides the news does not include defamation or encourage violence against the applicant and does not prevent his official duty. So, considering the assessments above and the margin of appreciation that the judiciary has balancing the opposite interests, the Court decided that there has been no violation of the applicant's right to honor and reputation.

b. *Nihat ÖZDEMİR*, App No: 2013/1997, 8/4/2015

The applicant who is a well-known businessman and also was a manager in one of Turkey's oldest sports clubs, claims to be the victim of a violation of his right to honor and reputation due to the failure of the state and judicial authorities to provide an effective protection as regards his damaged rights as a result of a decision on his compensation request upon the fact that a journalist who works for the national papers, as a columnist and hosts TV programmes, has written an article in his internet site and made some statements about him in some TV programmes, being rejected.

In the article and TV programmes, the journalist has criticized that the applicant hasn't got arrested despite the fact that there are allegations of corruption about him and his company in specific businesses and he generally criticized the tax evasions by using the term "*Tax Leeches*" for those who do not pay their taxes because they think of it as silliness before he criticized the applicant due to some allegations about him evading taxes and grafting.

In the first instance court's justification, it has been stated that there are prosecutions going on about the applicant and his company's other representatives on corruption allegations and

decided the statements subject to application are in accordance with the observable facts. About the term "*Tax Leeches*" which the applicant claims to be used specifically for himself, the first instance court accepted that the term is used generally for those who do not pay their taxes and refused to attribute to term a meaning other than the journalist specified the meaning of the term with.

The Court accepted that the statements subject to application do contribute to a debate of general interest by bringing up the issue of tax evasions and criticizing the applicant for corruption allegations about him and his company. Also it has been stated that the applicant can not claim to be a low profile in public considering that he is a well-known businessman.

Consequently, considering the assessments above and the margin of appreciation that the judiciary has balancing the opposite interests, the Court decided that there has been no violation of the applicant's right to honor and reputation.

c. *Emin AYDIN*, App. No: 2013/2602, 23/1/2014

The applicant who is a journalist, claims to be the victim of a violation of his freedom of expression and freedom of press due to the judgment that sentenced him to 7.080 TL judicial fine for one of his articles published in a local paper and 10 months imprisonment with 7.080 TL judicial fine for the other one published later in the same paper. The announcements of the verdicts were deferred in the judgment.[1]

The first published article titled "*Being Cheap*" criticizes the government officials who misuse their authority, by telling an anecdote and classifies them as "*cheap ones*". On the other hand, the applicant gives details about one of the people that he classifies as "*cheap ones*" which is the complainant in the public case that the applicant got sentenced. The other article titled "*Freaks with Motorcycles*" is about criticizing the inappropriate relationships between the members of the political party in governance and the

1 The judgment has no effect on criminal's legal status on the condition that he/she does not commit a crime deliberately for five years and it gets annulled with the dismissal of the case at the end of this period.

government officials by citing an event in which a political party member asks a government official to ignore that his son rode a motorcycle over speed with no driving licence.

In the first instance court's justification, it has been accepted that the subject of the first article contributes to a debate of general interest but considering the details given about a government official that the applicant classified as a cheap one inevitably points out the complainant and the statements took place in the article for the cheap ones such as "bland" or "*greedy*", the first instance court assessed the article to include defamation against the complainant's personal rights.

The Court also accepted that the article looked as a whole, contributes to a debate of general interest but decided that the purpose of disgracing the complainant outweighs the purpose of informing the public.

After the Court stated that imprisonment sentences for defamation crimes committed by press can lead to a self-censor on press, it declared the sanction subject to application which is a judicial fine of 7.080 TL with its announcement of verdict to be deferred is proportionate and necessary in a democratic society. So in terms of the first article, it has been accepted by the Court that there is no violation of the applicant's freedom of expression and press.

About the second article, the first instance court decided that the crimes of defamation and libel had been committed by this article and sentenced the applicant to 10 months imprisonment and 7.080 TL judicial fine with its announcement of verdict to be deferred.

The Court agreed with the first instance court's evaluation about the subject of the article to contribute to a debate of general interest but decided that the target of the article can not be specified clearly and inevitably as the complainant of the public case and the sole purpose of the article as to defame and libel about the complainant. Considering the imprisonment sentence and its possible impacts on freedom of press though its announcement of verdict got deferred, it also decided the sanction to be disproportionate and not necessary

in a democratic society. Consequently, in terms of the second article, the Court decided that there has been a violation of the applicant's freedom of expression and press.

STANDARD OF REVIEW ON FREEDOM OF EXPRESSION AND ASSOCIATION IN KOREA

Soojin KONG

KOREA

STANDARD OF REVIEW ON FREEDOM OF EXPRESSION AND ASSOCIATION IN KOREA

Soojin KONG[*]

I. The Constitution of the Republic of Korea on Freedom of Expression and Association

Article 21[1] Section 1 of the Constitution stipulates "every citizen shall enjoy freedom of speech and press, and freedom of assembly and association," providing general protection for freedom of expression. The Constitutional Court of Korea (hereinafter "the Constitutional Court") has reiterated these freedoms are the backbone of a democratic republic so that they shall be treated as having preferred positions.[2]

The reinforced position of these freedoms can be found in the express prohibition on licensing or censorship.[3]The second Section of the same Article bans licensing or censorship of speech and the press, and licensing of assembly and association. The ban on censorship was first introduced to the Constitution in the proviso of Article 28 Section 2 of the Second Republic's Constitution and was also declared by the Third Republic's, although exceptions for motion pictures and entertainment were allowed. The Fourth and Fifth Republic did not separately provide for the ban, but the present Constitution does so without exception.

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1 The Constitution of the Republic of Korea(hereinafter "the Constitution") Article 27
(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted.
(3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act.
(4) Neither speech nor the press shall violate the honor or right of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

2 Constitutional Court of Korea, 10-1 KCCR, 327, 338, 95Hun-Ka16, Apr 30, 1998.

3 Jong-Chul Kim, "Constitutional Law, "*Introduction to Korean Law*, Springer, 2011, p. 69.

On the other hand, the Constitution itself leaves room for the restriction of freedom of expression as follows. Article 21 Section 3 of the Constitution delegates to the National Assembly the power to set by statute the standard of physical facility necessary to ensure, maintain and improve on the growth and functioning of reporting and publication. Article 21 Section 4 expressly sets forth the limit of freedom of speech and the press by stipulating that "neither speech nor the press shall violate the honor of other persons nor underline public morals or social ethics."

Besides Article 21, which specifies the freedom of association, the Constitution includes several provisions which are directly or indirectly related to that of association. For instance, Article 8 stipulates "the establishment of political parties shall be free," and provides a heightened protection on the association of political parties, providing that "if the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court." Article 33 provides that "to enhance working conditions, workers shall have the right to independent association."

II. Standards of Review on Freedom of Expression and Association

A. Overview

In reviewing the constitutionality of government actions restricting freedom of expression and association, the Constitutional Court has developed a couple of substantive standards. The principle against excessive restriction, derived from Article 37 Section 2 of the Constitution provides a unified standard through which the relationship between the legislative end and means is reviewed. The principle of clarity which requires every law to be expressed in a clear and concrete way, demands an increased degree of clarity regarding laws restricting freedom of expression. Lastly, the principle of prohibition of censorship, derived from Article 21

Section 2 of the Constitution calls for the absolute prohibition on governmental censorship on expression and association. The first two standards of review are universally applied, while the last one is specific to freedom of expression and association.

As the above-mentioned principles are mutually complementary rather than exclusive, the Constitutional Court has often applied multiple standards in reviewing the constitutionality of laws as seen in the following chapter.

B. Principle against Excessive Restriction

Article 37 Section 2 of the Constitution prescribes the principle against excessive restriction or the principle of proportionality by stating that "freedoms and rights of citizens may be restricted by statute only when such restriction is necessary for national security, maintenance of order or for public welfare. Even when such restriction is imposed, no essential aspect of freedom or rights shall be violated." Since the Constitution itself finds basic rights not entitled to absolute protection, but rather subject to state restriction for the reason of public interest, restriction of basic rights by the government is not unconstitutional in and of itself, but only when it cannot be justified constitutionally.

In reviewing the constitutionality of governmental actions restricting basic rights, especially *liberty rights*, the Constitutional Court has usually employed the principle against excessive restriction as standard of review. The principle against excessive restriction provides a unified standard under which the relationship between the legislative end and its means is scrutinized in four different aspects: (1) there must be a legitimate aim (legitimacy of purpose), (2) the means must be appropriate to achieve the aim (appropriateness of means), (3) the means must be the least onerous among all equally effective options (necessity of means or the rule of the least restrictive means), and (4) the means must strike balance among competing interests concerned (balance of conflicting interests).

C. Principle of Clarity

The principle of clarity requires every law to be unequivocally expressed as a standard to be used by the executive and the judiciary. When a statute authorizes the executive to deprive people of their liberties, it must clearly demarcate the scope of the authority granted. When the statute is applied by courts, it must be sufficiently clear as a standard of law.

The requirement of clarity varies in accordance with the subject matter to be regulated and the restrictive effects on basic rights of a person thus regulated. If the concerned statute regulates a variety of subject matters or the subject matter of the statute is expected to change frequently, the requirement of clarity cannot be too demanding. As the restrictive effects on the affected people become more severe, the demand of clarity on the statute must increase. In general, if even the process of interpretation does not produce an objective standard that excludes arbitrary application of the law by administrative agencies and courts, the statute more likely violates the principle of clarity.

Regarding laws restricting freedom of expression, the Constitutional Court has demanded higher degree of clarity for the following reason. Under the current democratic society where freedom of expression is essential for the realization of the idea of people's democracy, the restriction of freedom of expression with unclear norms creates chilling effects toward constitutionally protected expressions and results in losing the original function of freedom of expression which is supposed to provide the forum for various opinions and ideas and to enable interactive verification. If what is prohibited is not clear, people abstain from making expressions because they are not sure whether their expressions are subject to restriction. Therefore, a law regulating freedom of expression shall prescribe the concept of expression to be restricted by the law in a concrete and clear manner, which is the constitutional requirement. Thus, the law restricting freedom of expression is subject to the principle of clarity in a strict level.

It is also noteworthy that concerning freedom of expression, the principle of clarity is closely linked with that against excessive

restriction. If the statute authorizes administrative agencies to restrict freedom of expression through an unclear statutory provision, it would end up regulating even constitutionally protected expressions, resulting also in the violation of the principle against excessive restriction.

D. Principle of Prohibition of Censorship

Article 21 Section 2 of the Constitution forbids censorship, stating that "licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted." Censorship stands for an administrative authority's act of deliberating on the contents of an idea or opinion and suppressing it from being published on the basis of its contents – in other words, a ban on publication of the unlicensed material. Censorship debilitates originality and creativity of people's artistic activities and poses a grievous danger to their mental functions and possibly suppresses in advance the ideas adverse to the government or the ruler, leaving at large only the opinion controlled by the government or ideas innocuous to it.

Compared to Article 37 Section 2 that allows all liberties and rights of the people to be limited by means of statutes for reason of national security, public order or public welfare, Article 21 Section 2 stands for absolute prohibition of censorship as a means at all, even if by means of statutes, when freedom of press is at stake.

The principle of prohibition of censorship does not prohibit every prior review: it only prohibits the prior review when the expression of the opinion entirely depends on the administration's permission. The Constitutional Court holds that the principle applies only if the prior review satisfies the following four elements: (1) mandatory submission of the content of a material for permission, (2) prior review by an administrative agency, (3) ban on an unlicensed material, and (4) enforcement mechanism to force compliance with the aforementioned review procedure. As the Constitutional Court applies the principle of prohibition of censorship in a limited scope, other forms of restrictive measures which do not fall into the scope of censorship will be dealt with other standards of review, such as the principle against excessive restriction or that of clarity.

III. Major Constitutional Court Decisions Regarding Freedom of Expression and Association

This chapter introduces five major Constitutional Court decisions with respect to freedom of expression and association. The first four decisions deal with freedom of expression, while the last one is related with that of association. *"Case on Identity Verification System on Internet"* (Case 1) presents a typical case where the Constitutional Court applies the principle against excessive restriction. *"Case on Presidential Emergency Decree No. 1, 2 and 9"* (Case 2) is a case where the Constitutional Court also adopts the principle against excessive restriction but concludes no legitimate purpose exists. *"Case on Criminal Penalty on False Communication"* (Case 3) concerns the principle of clarity and its close relationship with that against excessive restriction. *"Motion Pictures Pre-Inspection Case"* (Case 4) is a leading case which clarifies the principle of prohibition of censorship. Lastly, *"the Establishment and Operation of Public Employees' Union Case"* (Case 5) is the case where the Constitutional Court applies a more relaxed standard of review, respecting the discretion of the legislature.

A. Cases on Identity Verification System on Internet[4](Principle against Excessive Restriction)

1. Background of the Case

In this case, the Constitutional Court unanimously held that (1) Article 44-5 Section 1 Item 2 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, (2) Article 29 and Article 30 Section 1 of the Enforcement Ordinance of the same Act[5](hereinafter "provisions at issue"), which

4 Constitutional Court of Korea, 24-2(A) KCCR 590, 2010Hun-Ma47 et al, Aug 23, 2012.

5 Act on Promotion of Information and Communications Network Utilization and Information Protection Article 44-5(Verification of Users Identity of Open Message Boards)

(1) A person falling under any of the following subparagraphs shall, if it intends to install and operate an open message board, take necessary measures as prescribed by Presidential Decree (hereinafter referred to as "measures for verifying identity of users"), including preparation of a method and procedure for verifying identity of users of the open message board:

2. A provider of information and communications service who falls under the criteria prescribed by Presidential Decree, where the average number of users of each type of information and communications services rendered by it reaches or exceeds 100,000 persons per day.

regulated so-called "identity verification system," infringed on the complainants' basic rights such as freedom of expression, right of self-determination on private information and freedom of press in violation of the principle against excessive restriction.

According to provisions at issue, internet service providers installing and operating internet message board of a website where the average number of users reaches or exceeds 100,000 per day, should take necessary measures to verify the identity of users and store their identity information for a certain period of time. Thus, under the "identity verification system" users can upload information on internet message board only after they go through the identity verification process installed by internet service providers.

Complainants including internet users as well as internet service providers argued that the identity verification system infringed on their freedom of expression and filed these constitutional complaints.

2. Summary of the Decision

Protection under Freedom of Expression

The Constitutional Court has repeatedly ruled that freedom of anonymous expression is also protected under Article 21 of the Constitution. Internet users have freedom to express their opinion

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Enforcement Ordinance of the same Act

Article 29(Measures for Users Identity Verification) the part of "necessary measures as prescribed by Presidential Decree" of Article 44-5 Section 1 of the Act on Promotion of Information and Communications Network Utilization and Information Protection refers to all the following items:

1. Taking steps to verify the identity of message board users through ways including meeting in person, using facsimile or requesting in licensed certification authorities, other third parties or government agencies providing such identity verification service;
2. Adopting technologies for the prevention of leakage of identity verification information with respect to such verification process and information storage;
3. Maintaining identity verification information for the period from the date of information uploaded to the data when 6 months pass by after such information is deleted or removed from message board.

Article 30(Scope of Service Providers Subject to Duty to Take Measures for Identity Verification)

(1) The person "who falls under the criteria prescribed by Presidential Decree" of Article 44-5 Section 1 Item 2 of the Act on Promotion of Information and Communications Network Utilization and Information Protection shall be the provider of information and communications service where, during immediately preceding 3 months, the average number of service users reaches or exceeds 100,000 per day.

without providing their identity information to internet service providers. Also, internet service providers have freedom of press in that they can intend to form and distribute public opinions based on freely expressed opinions of users via internet message board.

Review under the Principle against Excessive Restriction

The internet verification system aims to prevent illegal acts such as defamation or slander via internet message board and, if such acts take place, easily identify perpetrators. These purposes are legitimate and measures taken according to the provisions at issue are appropriate.

The provisions at issue, however, amount to excessive restriction for the following reasons. First of all, in case of cybercrime, perpetrators can easily be identified by tracing or confirming internet addresses. Victims can get remedies through internet service providers' temporary measures to prevent distribution or diffusion of illegal information, criminal punishment against perpetrators and post-crime compensation. Second, users subject to identity verification system include not only persons with intent to upload information but also persons with intent to explorer uploaded information. The latter is not likely to commit illegal acts and thus does not need to be regulated under the identity verification system. Also the scope of internet service providers is determined according to the mere number of users, which is a vague and inaccurate criteria. Thus, by broadly expanding the scope of its application without taking account of the nature of internet communication, identity verification system leaves much room for the government to possibly make arbitrary enforcement of law. Lastly, internet service providers are required to store users' identity information until 6 month after the information uploaded by users is deleted or removed from internet message board. It means that such information can be stored for indefinite period unless it is deleted or removed.

The provisions at issue do not strike balance between conflicting interests because disadvantage against users and internet service providers cannot be considered to be less important than public interests sought by the provisions at issue. Freedom of expression

is one of the fundamental values in our Constitution and thus its limitation is allowed only when public interests to be achieved are obvious. However, it is hard to find evidence showing that the number of illegal information on the internet has been meaningfully decreased thanks to the implementation of identity verification system. Rather, the provisions at issue do not achieve public interests as various issues arose in the course of their implementation: domestic internet users have fled overseas; provisions at issue have not been easily implemented due to disputes over discriminatory enforcement of relevant laws favoring foreign entities over domestic ones. Furthermore, with the advent of new media including mobile message, SNS which are not governed by the identity verification system, the public interests of the identity verification system can only be achieved in a very limited range.

On the contrary, as being worried about the disclosure of their identities, domestic internet users are more likely to give up expressing their opinion online. Pursuant to the identity verification system, foreigners or Korean nationals residing overseas without resident registration number are blocked from using internet message board. Internet service providers operating internet message boards are unfavorably restricted in carrying out day-to-day business, compared with those engaged in new media. Moreover, there is high possibility that users' information is leaked or exploited.

Conclusion

The provisions at issue infringe on the complaints' freedom of expression in violation of the principle against excessive restriction, and are thus held unconstitutional.

3. Analysis of the Case

This case presents a typical case where the Constitutional Court applies the principle against excessive restriction. Since the principle against excessive restriction mainly concerns the relationship between the purpose and means,[6] the Constitutional Court has

6 Constitutional Court of Korea, *The First Ten Years of the Constitutional Court of Korea*, Constitutional Court of Korea Publishing, 2001, p.165.

the tendency to focus on the last two elements of the principle, i.e. the necessity of means and balance between conflicting interests. Accordingly, in most of cases concerning freedom of expression, the constitutionality of provisions at issue depends on whether they satisfy the necessity of means and balance between conflicting interests.

B.Case on Presidential Emergency Decree No. 1, 2 and 9[7][8](Principle against Excessive Restriction)

1.Background of the Case

In this case, the Constitutional Court unanimously decided that the President Emergency Decree No. 1, 2 and 9 of the 1970s, invoking Article 53 of the *Yushin*Constitution (Constitution of the Fourth Republic of Korea) are unconstitutional. The above Decrees prohibited any act of denial, opposition, distortion or slander of the *Yushin*Constitution, any act of speech, suggestion, petition for revising or repealing the *Yushin*Constitution and any act of fabrication and distribution of groundless rumors and tried any person who violated the Decrees by court-martial.[9]

The first complaint was charged of violating the Presidential Emergency Decree No. 1 at the Emergency Common Court-Martial established by the Presidential Emergency Decree No. 2 and was sentenced to imprisonment in the 1970s. He filed for a retrial and a motion to request for constitutional review of the Decrees No. 1 and 2 at the Seoul High Court. After his motion was dismissed, he filed this constitutional complaint in 2010. Other complaints were also sentenced to imprisonment for violating the Presidential Emergency Decree No. 9 and filed a retrial and a motion to request for constitutional review at regular courts. After their motions were dismissed, they filed this constitutional complaint in 2010.

7 Constitutional Court of Korea, 25-1 KCCR 180, 2010Hun-Ba70 et al, Mar 21, 2013.

8 In this case, the Constitutional Court dealt with various issues such as whether the Constitutional Court has jurisdiction over the constitutional review of presidential decrees, which Constitution should be applied as a standard. This paper does not include detailed explanation on these issues and rather focuses on the constitutional review of decrees under the principle against excessive restriction.

9 English translation of Decrees are available at the official website of the Constitutional Court (http://english.ccourt.go.kr/cckhome/eng/decisions/social/socialDetail.do).

2. Summary of the Decision

Protection under Freedom of Political Expression

The former and main texts of the Constitution suggest the constitutional democracy that is based on the principle of sovereignty and liberal democracy as its fundamental principles. The constitutional democracy derives several constitutional principles as being the standard for the constitution and laws and implies the restriction in exercising the legislative authority and direction of policy making, thereby being the paramount value to be respected by the government agencies and the People.

The search for the better Constitution through revision or repealing should be protected as the most fundamental rights of the people. It is a core of the political right protected by the Constitution to express opposite opinions against the policy, morality or legitimacy of the governing power.

Review under the Principle against Excessive Restriction: Decrees No. 1 and 2

Decrees No. 1 and 2 were enacted on the premise that any act to assert the revision of the Constitution was a crime threatening national security. However, to spread political ideas through legal assembly or demonstration or to gather people of the same mind through a signature-seeking campaign would not be a threat to national security. Rather, such act represents the essence protected by liberal democracy that is the fundamental principle of the Constitution. Any government action or law that blocks any criticism of the government, instead of using reasonable publicity activities or persuasion, should not be justified as it does not adhere to the fundamental principles of liberal democracy in the Constitution. Even assuming that opposition against the *Yushin*Constitution or radical opinion to revise the constitution was intensively and collectively being expressed during a certain period, it cannot be deemed as a national emergency warranting emergency decrees. Therefore, such legislative purpose is not justified and the appropriateness of means is not met.

Decree No. 1 prohibiting any expression negative of the *Yushin*Constitution and criminally prosecuting violation thereof is a sweeping, broad and extreme measure, thereby requiring clarity at the highest level. The measure taken by the Decree No. 1 is virtually the last resort reserved for the actual danger that is urgent, clear and substantial threat which cannot be prevented by restricting on time, place, or method of individual expression. Nevertheless, Decrees No. 1 and 2 punished any act of expression against *Yushin*Constitution, including expressing one's view on the Constitution regardless of necessity of the invocation of the national emergency rights, at the Emergency Court-Martial.

Decrees No. 1 and 2 infringe freedom of political expression in violation of the principle against excessive restriction and are held unconstitutional.

Review under the Principle against Excessive Restriction: Decree No. 9

Decree No. 9 presumed criticism against the *Yushin*Constitution as a crime threatening national security by impeding "all-out national security posture grounded on national consensus" in "national crisis where the concern North Korea may provoke war by miscalculation is enormous." However, "the increase of possibility of the North invading the South" is an abstract and subjective perception of situation and does not suffice as a national crisis that justifies emergency measures restricting right to raise issues on the *Yushin*Constitution or to assert or petition for its revision. Therefore, such legislative purpose is not legitimate.

In a diversified democratic society, guaranteeing free expression and reaching public consensus through free discussion are the way to form national consensus. Therefore, the means taken by Decree No. 9 is not appropriate to reach national consensus and harmony.

As a matter of course, resorting to rebellion or revolt to express political opinions opposing the *Yushin*Constitution cannot be allowed because it destroys the basic order of the Constitution. Nevertheless, as rebellion and revolt are prohibited under the normal constitutional order, they can be regulated by applying criminal and other related laws, without exercising the national

emergency right. Therefore, the Decree No. 9 does not satisfy the necessity of means.

Decree No. 9 infringes freedom of expression in violation of the principle against excessive restriction and is held unconstitutional.

3. Analysis of the Case

This case concludes that the very first element of the principle against excessive restriction is not satisfied as no legitimate purpose is found in Decree No. 1, 2 and 9. Compared with the previous case which applies the same principle but acknowledges the legitimacy of legislative purposes, this case presents more grave infringement on freedom of expression and is thus less likely to be justified according to the Constitution.

In this case, by exerting jurisdiction over repealed Decrees and acknowledging the severe infringement of freedom of expression in the name of "national security," the Constitutional Court takes its own role in removing the legacy of the military dictatorship in Korean contemporary history.

C. Case on Criminal Penalty on False Communication[10] (Principle of Clarity)

1. Background of the Case

In this case, the Constitutional Court held unconstitutional the Article 47 Section 1 of the Electric Telecommunication Act[11] (hereinafter "the provision at issue") which criminalizes those who transmit false communication through electric communication facility with the intent to harm the public interest on the ground that it violated the principle of clarity.

The combined cases, 2008Hun-Ba157 and 2009Hun-Ba88, arose out of motions for constitutional review by complainants who

10 Constitutional Court of Korea, 22-2(B) KCCR 684, 2008Hun-Ba157 et al, Dec 28, 2010.

11 Electrical Telecommunication Act Article 47(Penalties)

(1) A person who has publicly made a false communication through the electric telecommunication facilities and equipment with the intent to harm the public interest shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won.

were brought to the Seoul Central District Court for violating the provision at issue by allegedly transmitting false communication through electric telecommunication facility with the intent to harm the public interest. As their motions to request for the constitutional review were dismissed in the Seoul Central District Court, they filed a constitutional complaint with the Constitutional Court respectively.

2. Summary of the Decision

Majority Opinion

The provision at issue is a restrictive legislation on freedom of expression with criminal penalties and, therefore, it is subject to the principle of clarity in a strict level. While the provision at issue prohibits the false communication with "the intent to harm public interest," the "public interest" used here is such unclear and abstract that it seems to be the rewriting of the constitutional provisions which prescribe minimum conditions to restrict basic rights and the limitation of the constitutional freedom of speech and the press. Whether a certain expression violates the public interest drastically varies depending on individuals' value system and ethical standard. This is also true even when legal professionals interpret the meaning of the public interest. Further, its meaning cannot be fixed by the legal professionals' customary work of interpretation of law. Since, under the current pluralistic and value subjective society, the public interest at issue is not monolithic when a certain act becomes an issue, the balancing work of different public interests in order to find an act harmful to public interest does not always produce clear results. In conclusion, because the provision at issue does not notify ordinary citizens of what purpose of communication, among "permitted communications," is prohibited, it is unconstitutional by violating the principle of clarity applied to freedom of expression and the principle of clarity embedded in the principle of *nulla poena sine lege*.

Concurring Opinion of Four Justices on the Issue of Violation of the Principle of Clarity with Respect to "False Communication"

The legislative purpose of the provision at issue is to regulate communication under illegally used other's name (hereinafter

"communication with false pretense"). Yet, the issue on the meaning of "false communication" arises as it has recently been applied to the case involving communication with false information although the provision at issue has not been quoted for many years. Since "falsity" includes the falsity in both its content and form, its meaning should be clarified before it becomes an element of a crime. Yet, the provision at issue opens a door to the broad interpretation and application of a law because it fails to materialize the legislative purpose in its plain language as well as in the legal structure with other related provisions. In conclusion, the provision at issue does not satisfy the principle of clarity in the principle of *nulla poena sine lege* because of its latent ambiguity not only in "intent to harm the public interest" but also in "false communication."

Concurring Opinion of Five Justices on the Issue of Violation of the Rule against Excessive Restriction.

We cannot exclude a certain expression from the protection of freedom of expression only because it contains certain contents. Therefore, "expression of false communication" remains within the scope of protection of freedom of speech and the press under Article 21 of the Constitution although it could be restricted under Article 37 Section 2 of the Constitution. Yet, the provision at issue, by purporting to regulate false communication with the "intent to harm public interest," violates the principle against excessive restriction because it, due to its ambiguity, abstract and overbroad nature, ends up regulating the expressions which should not be regulated. The provision at issue will deter the expression of those who are not sure whether their expressions violate the law. If people refrain from expressing their opinion in fear of punishment, then freedom of expression is infringed. Therefore, the provision at issue infringes freedom of expression in violation of the principle against excessive restriction and thus is against the Constitution.

Dissenting Opinion of Two Justices

The provision at issue, by adding "the intent to harm the public interest" as the specific intent crime, significantly reduces the scope of elements of acts and, therefore, does not require such a high level

of clarity as the element of general intent. Legally, "public interest" is "the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens," while "intent to harm" the public interest includes the case where the major intent of an act is for harming the public interest. Therefore, it is not difficult to predict the meaning of "the intent to harm the public interest."

With respect to "false communication," it is impossible that "false communication" in the provision at issue excludes "communication with false information" because, generally, the concept of "falsity" includes both the communication with false contents and that with false pretense and other criminal law regulates the false pretense separately. Meanwhile, "false information" is something incompatible with the truth distinguishable from "opinion" and "suggestion." Therefore, "false information" in the provision at issue is clear in its meaning and not against the principle of clarity in the principle of *nulla poena sine lege*.

Although false information is not excluded from the scope of protection under freedom of expression, standard of review should be the more lenient than the principle against excessive restriction because false information is not civil and political expression. The legislative purpose of the provision at issue is legitimate and the provision at issue is an appropriate means for the purpose as it contributes to the development of democracy by preventing the disturbance of public morality and social ethics and the disorder of the public order.

The stricter restriction should be applied to the communication with palpably false information because electric telecommunication has the following features: (1) severe ramification from the dissemination of false information, (2) difficulty to correct false information by communication users in a swift manner and; (3) high social expense for lengthy discussion surrounding false information. Further, the provision at issue punishes only when an act of transmission of false information through electric telecommunication facility is committed with the intent to "harm the public interest." Therefore, the provision at issue does not violate the necessity of means or rule of the least restrictive means.

As the restriction is on freedom to disseminate palpably false information both from an objective and subjective perspective with the intent to harm the public interest, there is no gross imbalance between the protected public interest by the provision at issue and the restricted basic right.

Therefore, the provision at issue does not infringe on freedom of expression by violating the rule against excessive restriction.

3. Analysis of the Case

In this case, the Constitutional Court reiterates that the principle of clarity should be more strictly applied regarding laws restricting freedom of expression, because "the restriction of freedom of expression with unclear norms creates chilling effects toward constitutionally protected expression and results in losing the original function of freedom of expression which is supposed to provide the forum for various opinions and ideas and to enable interactive verification."

Concurring opinion of five justices on the issue of violation of the principle against excessive restriction is noteworthy in that it makes clear the relationship between "unclear restriction" and "excessive restriction." When ambiguous, abstract, and overbroad laws end up regulating the expression which should not be regulated, these laws can be challenged by both of the principle of clarity and that against excessive restriction.

D. Motion Pictures Pre-Inspection Case[12](Principle of Prohibition of Censorship)

1. Background of the Case

In this case, the Constitutional Court struck down pre-inspection by the Public Performance Ethics Committee (hereinafter "the Ethics Committee") provided under Article 12 of the former Motion Picture Act (hereinafter the Act as "MPA" and the Article as "provision at issue") on the ground that the provision at issue violated the constitutional ban on censorship. Article 12 Section 1 and 2, Article 13 Section 1, and Article 32 Item 5 of the old MPA

12 Constitutional Court of Korea, 8-2 KCCR 212, 93Hun-Ka13 et al., Oct 4, 1996.

require all motion pictures to be evaluated by the Ethics Committee before showing. The failure to do so is punishable by imprisonment of up to two years or a fine up to five million won.

The combined cases, 93Hun-Ka13 and 91Hun-Ba10, arose out of motions for constitutional review by the complainants who were brought to the Seoul District Court for violating the provision at issue by showing *Opening the Closed Gate to the School* in 1992 and *Oh, Country of Dream* in 1989 respectively without pre-inspection of the Ethics Committee. The first complainant made the motion when prosecuted and the Seoul District Court accepted, referring the case to the Constitutional Court for review. The second, already convicted and imposed a fine of one million won, made the motion in appeal of that conviction, but was denied. Accordingly, they filed a constitutional complaint with the Constitutional Court.

2. Summary of the Decision

Protection under Freedom of Expression

A motion picture is a form of expression, and its production and showing should be protected by Article 21 Section 1 of the Constitution.

Review under the Principle of Prohibition of Censorship

The Constitutional Court holds that the principle applies only if the prior review satisfies the following four elements: (1) mandatory submission of the content of a material for permission, (2) prior review by an administrative agency, (3) ban on unlicensed material, and (4) enforcement mechanism to force compliance with the review procedure.

The Pre-inspection according to the provision at issue is unconstitutional censorship because it meets the above-mentioned four elements: (1) The MPA requires all motion pictures to be submitted to and evaluated by the Ethics Committee before showing; (2) the Ethics Committee is a quasi-administrative body because it is commissioned by the Ministry of Culture and Sports, obligated to report the inspection results to the Minister through its

Chairperson, and funded from the government budget to support its own operation; (3) the MPA prohibits showing of any uninspected motion pictures and (4) any individual violating this rule can be made subject to criminal prosecution.

Conclusion

Thus, the pre-inspection under the MPA violates the principle of the prohibition of censorship and thus is unconstitutional.

3. Analysis of the Case

In this case, the Minister of Culture and Sports as an interested party argued that the Ethics Committee was an autonomous civic group because it was composed of non-governmental specialists. The Constitutional Court, however, concluded that the Ethics Committee was a quasi-administrative body, paying attention to the fact that the government might have the constant influence over the composition and operation of the Ethics Committee through appointment of commissioners, reporting procedure and budgetary support.

As Article 21 Section 2 of the Constitution declares that restricting freedom of speech and the press by means of censorship shall not be permitted even if it is based on a statute, the censorship under the MPA is held unconstitutional without any doubt. The Constitutional Court did not have to go further to review whether provisions concerned violated the principle against excessive restriction or that of clarity.

The standard of review presented in this decision was adopted in a series of decisions where censorship was at issue, especially in the field of motion pictures. For example, the Constitutional Court also held unconstitutional provisions of the Motion Pictures Industry Act which authorized the Korea Media Rating Board to withhold rating of a film for an indefinite period of time, because such rating amounts to censorship banned by the Constitution (13-2 KCCR 134, 2000Hun-Ka9, Aug 30, 2001).

E. The Establishment and Operation of Public Employees' Union Case[13] (Legislature's Discretion)

1. Background of the Case

In this case, the Constitutional Court held constitutional provisions of the Act on the Establishment and Operation of Public Officials Union (hereinafter "the Act") which put restrictions on the three basic labor rights of public officials. Under the provisions, some categories of public officials are not allowed to join any labor organizations, and even for those who are not within the categories, the way to exercise their right of collective bargaining and the effect of collective agreement are also controlled by the Act and sometimes a collective action by them is strictly limited.

The complainants, who are the Korean Government Employees' Union, the alliance of government employees' union, unit labor unions, local labor unions, government officials from Rank 5 to Rank 8, local public officials or public officials in technical service, filed a constitutional complaint, arguing that the Act infringe on their basic labor rights and the rights to equal treatment in violation of the principle against excessive restriction.

2. Summary of the Decision[14]

The Wide Discretion of the Legislature Concerning Public Officials' Labor Rights

The Article 33 of the Constitution stipulates "to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action," while adding that "only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action." According to aforementioned Article, the National Assembly as a lawmaking institution has a wide discretion to decide whether to

13 Constitutional Court of Korea, 20-2(B) KCCR 666, 2005Hun-Ma971 et al.,Dec26, 2008.

14 In this case, the Constitutional Court dealt with three basic labor rights, which are the right to independent association, collective bargaining and collective action. This paper does not introduce parts concerning the right to collective bargaining and collective action. The abbreviated version of the translated decision is available at the official website of the Constitutional Court.

allow public officials to exercise the rights of association, collective bargaining and collective action, and how to limit the type and scope of such actions through legislating relevant laws and regulations.

Review Whether the Act Is within the Scope of Legislature's Discretion

Article 6 of the Act regarding the eligibility of membership to labor union basically excludes Rank 5 public officials or higher, who are management office holders, to be members of a labor union because they are engaged in the work of making decisions on overall policies, and directing and supervising lower grade officials. In the same vein, some of Rank 6 or below public officials who hold directing and supervising authority are also prevented from participating in activities of labor unions because they are always in the position of representing the interests of employer or their works are mostly related to the public interest. Therefore, Article 6 does not depart from the legislature's discretion in enacting the law, and therefore, not violate the petitioners' right of association.

Although the Act treats differently (1) Rank 5 public officials and Rank 6 or below public officials; (2) among the Rank 6 and lower public officials, those who are responsible for certain categories of work and those who are not; and (3) Rank 6 or below public officials who are not eligible for union membership and public school teachers, such discriminations seem to be reasonable and therefore, the provisions do not infringe upon the complainants' right to equal treatment.

3. Analysis of the Case

In this case, the complaints argued that the provisions should be reviewed under the principle against excessive restriction. On the other hand, the Constitutional Court merely reviewed whether the provisions at issue remained within the scope of the legislature's discretion.

Concerning the restrictive measures on public officials' freedom of association, the Constitutional Court applies a more lenient standard of review, thus making those measures more easily justified. It is according to the Article 33 Section 2 of the Constitution which delegates to the legislature the authority to define the specific scope

of their labor rights on the assumption that certain public officials actually enjoy all three basic labor rights. Concerning most of cases on freedom of association, on the other hand, the Constitutional Court applies the principle against excessive restriction.

IV. Conclusion

As described above, the Constitutional Court has applied relatively stringent standards of review to laws restricting freedom of expression and association, taking account of the preferred positions of these freedoms in a democratic society. The principle against excessive restriction is the most frequently applied standard of review in evaluating the constitutionality of laws. The principle of clarity, often closely related with that against excessive restriction, demands a heightened degree of clarity regarding laws on freedom of expression. The Constitutional Court reiterates that a prior restraint from the government is strongly disfavored and any governmental action will be struck down if it constitutes censorship. Lastly, concerning the public officials' freedom of association, the Constitutional Court applies a more relaxed standard of review, respecting the legislature's discretion. As there are multiple ways to approach and evaluate government actions restricting freedom of expression and association, these standards of review are often closely related and applied simultaneously.

Although the current Constitution which was adopted in 1987 does not expressly mention freedom of expression via the internet, which becomes one of the largest and most important media for expression, the Constitutional Court effectively recognizes this new media as falling within the scope of protection under Article 21 of the Constitution and applies the above-mentioned standards of reviews. Among the cases presented in this paper, two cases on identity verification system and criminal penalty of false communication respectively deal with laws restricting freedom of expression on the internet. As forums of expressions continuously evolve, the Constitutional Court continues its own role in protecting freedom of expression as one of the most essential elements of a democratic republic.

FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION IN MALAYSIA

Dato' Anita binti HARUN
Tengku Shahrizam bin Tuan LAH

MALAYSIA

ABSTARCT

Freedom of expression and association is said to be a basic principle of human rights. At the international level, this principle has been enshrined in the Universal Declaration of Human Rights. Freedom of expression and association in Malaysia is provided in the Federal Constitution. Such a principle of human rights needs to be protected and preserved by everyone at all times. This paper will examine the application of the principle of freedom of expression and association in Malaysia. It will also look at the relevant laws regarding the freedom of expression and association in Malaysia. Reference will also be made to certain cases concerning the interpretation of such a principle by Malaysian courts.

KEY WORDS: *Principles of Interpretation, Doctrine of Proportionality, Sedition, Right to Association, Right to Disassociate.*

FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION IN MALAYSIA

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1.INTRODUCTION

1.1 Freedom of expression is essential to modern constitutional democracies. There are various rationales for guaranteeing such freedom. One object for this freedom is to facilitate a search for the truth, which requires free enquiry and dissent. According to John Stuart Mill, "the peculiar evil of silencing the expression of an opinion" amounts to 'robbing the human race'[1]. Another rationale includes the development of individual personality, to cultivate a tolerant community and to sustain a reason-based public culture[2]

1.2 Freedom of association empowers individuals to form groups to freely pursue their common goal, express their collective will and participate in the private and the public sphere. The right to associate is both individual and collective. It guarantees individuals the freedom to associate and disassociate. As a collective right, it promotes and advances disparate activities, whether they be social, economic, professional, religious or political in nature. This facilitates an open market and vibrant society, integral to a modern democratic state. These rights are recognized in many human rights instruments and Constitutions.

1.3 The freedom of expression and association is entrenched in Article 10 of the Federal Constitution. Article 10 indicates that

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[*] Sessions Court Judge of Kuala Lumpur.
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1 JS Mill, On liberty (New York: The Modern Library, 2002) at pp 17-19.
2 LC Balinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (New York: Oxford University Press, 1986).

Malaysia provides for qualified freedoms. The decisions of courts confirm this indication.

2. FREEDOM OF EXPRESSION: AN OVERVIEW

2.1 This topic Freedom of Expression itself covers a wide scope inclusive of:

i- Political Defamation;

ii- Sedition;

iii- Freedom of Press

2.2 This paper will focus on political defamation with emphasis on the recent developments on political defamation in Malaysia with a brief overview on relevant issues of sedition and freedom of press. Article 19 the United Nations Declaration of Human Rights reads as follows:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

2.3 In Malaysia freedom of expression is guaranteed under Article 10 (1) of the Malaysian Federal Constitution, the relevant part which reads as follows:

> *"Every citizen has the right to freedom and speech and expression…".*

2.4 At the outset it must be pointed out that freedom of speech and expression is not absolute and must rightly be so. There are restrictions and limitations placed on it for socio economic peace and prosperity purposes. Simply put freedom of speech and expression is balanced by the security justifications of the nation and the rights of individual citizens to protect themselves from being defamed or libelled unjustifiably. This can be gleaned from Article 10(2) of the Federal Constitution which provides—

> *"Parliament may by law impose….on the rights….such restrictions as it deems necessary or expedient in the interest of the*

security of the federation or part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence". [3]

2.5 In short, freedom of speech and expression means different thing to different people. This is true not only in theory but also at practical level. Hence, there is no such thing as a single definition of freedom of expression. Many factors, internal and external, comes into play in order for one to have a true picture and understanding of what freedom of expression and information means.

3. CASE ANALYSIS ON FREEDOM OF EXPRESSION

Derbyshire: To Follow or Not to Follow, That is the Question' - Governing Reputation and Democratic Accountability: Recent Developments on Political Defamation in Malaysia

OVERVIEW

3.1 Political defamation connotes a class of defamation cases where a defendant is sued for having criticized either the government and/or people with governing power. This is seen in the landmark case of ***Derbyshire County Council v Times Newspapers Ltd*** **[1993] A.C. 534** as follows:

'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech … It is of some significance to observe that a number of departments of central government in the United Kingdom are statutorily created corporations … If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments … was not also entitled to sue. But … there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can

3 Article 10 of Federal Constitution.

> *show that it is the public interest to do so. The same applies, in my opinion, to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech … The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation.'* – per Lord Keith of Kinkel in the House of Lords decision of *Derbyshire County Council v Times Newspapers Ltd* [1993] A.C. 534"

Following the House of Lords decision in *Derbyshire*, under the English law there is now an absolute bar on claims by public bodies in defamation.

3.2 In three recent important decisions the principle laid down in *Derbyshire* was considered for the first time in Malaysia. In the case of ***Lembaga Kemajuan Tanah Persekutuan ('FELDA') v Dr. Tan Kee Kwong*** **[2012] 4 MLJ 622** the Court of First Instance refused to follow *Derbyshire*. The reasoning of the First Instance judge was affirmed by the Court of Appeal[4]. In the subsequent case of ***Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS') v Tony Pua Kiam Wee*** **(2012)[5],** the Court of First Instance distinguished *Derbyshire* on facts. The appeal to the Court of Appeal was allowed on other points so the reasoning of the First Instance Court on the non-application of *Derbyshire* was not considered. Still, the Court of Appeal observed that *Derbyshire 'has not been accepted by local courts as representing the law of this country'*[6].

3.3 Meantime, in the case of ***Kerajaan Negeri Terengganu & Ors. v Dr. Syed Azman Syed Ahmad Nawawi & Ors (No.1)*** **[2013] 7 MLJ 52** the Court of First Instance applied *Derbyshire* and ruled that state

4 See both the unreported judgments of Linton Albert JCA of 6.8.2012 (pp. 4 – 6) and Sulaiman Daud JCA of 26.5.2012 (para [18]) in Civil Appeal No. N-01(NCVC)-551-10/2011.

5 See para [102] – [112] in the unreported judgment of Amelia Tee J of 8.6.2012 in Civil Suit No. S-23NCVC-4-2011.

6 See para [16] in the unreported judgment of Anantham Kasinather JCA of 1.8.2013 in Civil Appeal No. W-02(NCVC)-1464-06/2012.

government has no *locus standi* to initiate and maintain defamation action. Further, the very same judge in the First Instance ruled in the following ***Kerajaan Negeri Terengganu & Ors. v Dr. Syed Azman Syed Ahmad Nawawi & Ors (No.2)*** **[2013] 7 MLJ 145** that the principle laid down in *Derbyshire* was extended to the case of the co-plaintiff who likewise may not maintain an action of damages for defamation in his official capacity as Chief Minister of a state government.

3.4 In light of the conflicting views expressed in local courts on the applicability of the principle laid down in the English House of Lords decision in *Derbyshire*, this paper seeks to examine reasons proffered in all these cases.

3.5 *The Derbyshire Case*

3.5.1 The central issue in *Derbyshire* revolves on the question of whether a local authority is entitled to sue for libel, in particular, on false accusations in respect of the discharge of its governmental and administrative duties. Morland J. at first instance treated a local authority like any corporation and held that a local authority is entitled to sue for libel to protect its governing reputation whether or not it suffered financial loss in consequence. The Court of Appeal reversed the first instance decision essentially on grounds that to allow a local authority to sue for libel was not a necessary restriction on freedom of expression within the narrow permissible scope of article 10(2) of the European Convention on Human Rights and Fundamental Freedoms (ECHR); and that there are other remedies available to the local authority in the form of prosecution for criminal libel, action for malicious falsehood or actions by aggrieved members of the authority to sue for defamation.

3.5.2 The House of Lords upheld the decision of the Court of Appeal but offered different reasons. Lord Keith delivered the only judgment for the court. In his reasoned judgment, Lord Keith found it not necessary, unlike the Court of Appeal, to rely on the ECHR. Instead, it was held that the position under the common law was consistent with article 10 of ECHR, in that under the common law

not only was there no public interest in allowing governmental institution to sue for libel, it was held to be contrary to public interest because to admit such action would place an undesirable fetter, where it inevitably have an inhibiting or the so-called 'chilling' effect, in the context of vigorous criticism of government.

3.6 *Lembaga Kemajuan Tanah Persekutuan ('FELDA') v Dr. Tan Kee Kwong* (The 'FELDA' Case) *[2012] 4 MLJ 622.*

Facts of the case

3.6.1 In the *FELDA Case* the plaintiffs were statutory bodies established under specific Act of Parliament to carry out certain public functions. The plaintiffs were subject to the control and supervision of a cabinet Minister. The plaintiffs brought an action against the defendant, a former Minister and a Member of Parliament, for having given an interview to the press wherein he alleged improper dealing by board members of the plaintiffs. On the issue of *locus standi*, the High Court decided that though the plaintiffs were statutory bodies, they were independent of the government and as such were not strictly public authorities as envisaged in *Derbyshire*[7]. Even if the plaintiffs were to be considered public authorities, the trial judge was not prepared to adopt the principle in *Derbyshire*. Instead, the trial judge took the contrarian view that:

> *'There is the need for organs of local authorities to protect its reputation. In fact it is in the public interest to do so and the need to be able to do so is indeed real and pressing. Damage to reputation may affect the ability of local authorities to obtain loans, borrow money or tender for contracts not to mention that public may not be too keen to be part of the staff of such body, which may cripple the functions of the local authority.'*[8]

3.6.2 The trial judge took the view that *Derbyshire* was decided in compliance with UK's obligations under ECHR and therefore it should not be construed as a general development of the common

7 See para [44] of the judgment.
8 See para [35] of the judgment.

law;[9] that Lord Keith spoke of a local authority being 'democratically elected' in *Derbyshire* was feature distinguishable from other types of corporation, whether trading or non-trading[10]; that the objection of a local authority using public funds to commence libel proceedings was equally reprehensible in the case of public funds used to finance defamation action taken by individual members of the local authority[11]; that freedom of expression, be it in the ECHR or the Singapore context, is not unlimited and can be restricted in the wider interests of the public order so as not to impinge on or affect the rights of others[12]; that following the dissenting judgment of Mahoney JA in the Australia case of ***Ballina Shire Council v Ringland***[13], the effect of *Derbyshire* is that the power of the media in respect of public authorities is to be uncontrolled and that the trial judge held could not be the position in Malaysia[14].

3.6.3 Quite apart from the above, the trial judge also said in passing that since the plaintiffs were given the right to sue, and be sued, under the statute as a body corporate, the trial judge opined that *'until and unless Parliament says otherwise, it is not for the courts to restrict that right'*[15].

Comments

3.6.4 On the judgment of the trial court, it must be observed at the outset that the preliminary issue on applicability of the *Derbyshire* principle could have been proceeded in a different manner. The facts as summed up by the trial judge clearly show that the impugned defamatory remarks were directed specifically at certain officers of the statutory body, and not the statutory body itself. In fact, that was one of the pleaded defences of the defendant. So, really, the starting point to consider should have been whether the plaintiff is the right party to sue, instead of asking whether the *Derbyshire* principle is applicable to debar the action by the statutory body.

9 See para [51a] of the judgment.
10 See para [51b] of the judgment.
11 See para [51c] of the judgment.
12 See para [51d] of the judgment.
13 (1994) 33 New South Wales Law Report 680 (CA).
14 See para [51e] of the judgment.
15 See para [55] of the judgment.

3.6.5 Alternatively, in the instant case, even if one were to consider the issue of *locus standi* of the statutory body to maintain a defamation action, one could not escape the question of whether, on the facts disclosed, the statutory body is the right party to sue. Of course it is undoubtedly true that one of the justifications for prohibiting the pursuit of defamation action in *Derbyshire* is that individual member of an offended public authority may seek vindication, but the result would be different if the court, as in the instant case, comes to the finding that the corporation concerned is not strictly a public authority. A clear illustration could be seen in a recent case in the Queen's Bench[16] brought by a University to obtain an injunction against criticisms levelled at its Chancellor and Vice Chancellor. While Eady J held that a University is not a public authority envisaged in *Derbyshire*[17], the court nonetheless reminded that '*it is for the court to be wary, in cases where a corporate entity is suing for libel, to ensure that it is not being "put up" or used as a protective shield when the real gravemen of the defamatory words is to reflect upon the reputation of an individual or individuals'*[18].

3.6.6 Thus, the issue of compliance of UK's obligations under the ECHR is simply not in the formulation of Lord Keith in the House of Lords decision in Derbyshire. It is also apparent in the trial judge's reasoning that Derbyshire was distinguished on ground that in the instant case the statutory body concerned lacked the characteristic of being 'democratically elected', as opposed to in the case of Derbyshire. It is submitted that the reasoning is misconceived. As it has been observed elsewhere that statement in a judgment can rarely be detached from its context without distorting or exaggerating its significance[19]. The judicial approach to case law, it was argued, is to extract the ratio not from isolated generalities but from expression of principle applied to the particular issues which arise for decision[20]. In Derbyshire the identifying feature

16 *Duke v University of Salford* [2013] EWHC 196 (QB) {High Court Queen's Bench].

17 Citing Litton VP's decision in the Hong Kong Court of Appeal case of *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1997] 7 HKPLR 286, at p. 291.

18 *Ibid*, at para [8].

19 Patrick Milmo, 'Book Reviews: Political Libels: A Comparative Study' *International & Comparative Law Quarterly* 50, 2001 p 1002-1005.

20 *Ibid*.

propounded by Lord Keith does not depend on whether a body or corporation being democratically elected, but instead, whether the legal nature and functions of the body in questions would satisfy that of a governmental body. The principle laid down in Derbyshire is intended to cover 'any governmental body'—

> *'There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.' (emphasis added).*

3.6.7 Ultimately, it would appear that the unwillingness of the trial court to accept the principle in *Derbyshire* is due to its failure to recognize that *Derbyshire* has not decided that a local authority or a governmental corporation had not a governing reputation to safeguard, which was the previous position under common law established in the case of ***Bognor Regis Urban DC v Campion***[21]. Rather, the consideration finds its root in public interest, i.e. the public interest which exists in the freedom in a democratic society to criticise those who govern[22]. In other words, the main concern is the likely chilling effect on free speech of granting a right of action to a governmental body for defamation[23] as can be seen from the following:

> *'I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.'* (emphasis added).

21 [1972] Queen's.Bench. p.169.

22 Fiona Patfield, 'Corporate Public Authorities and Freedom of Speech' *Company Lawyer* 1993, p.98.

23 Whether the public interest consideration in *Derbyshire* is 'principle' consideration or 'policy' consideration, and whether it is desirable, see discussion in Richard Mullender, 'Defamation, Fair Comment and Public Concerns' *The Cambridge Law Journal* 69 (2010), pp. 443-445.

3.6.8 That the overriding consideration in *Derbyshire* rests upon public interest (and not on the hair-splitting argument of whether a body in question is or is not a democratically elected public authority) is fortified when the principle was applied in ***British Coal Corporation v National Union of Mineworkers & Ors***.[24] to a corporation which was strictly not a democratically elected body but it was under the close control of a minister of a democratically elected government. Again, in the case of ***Goldsmith v Bhoyrul & Ors***.[25] the principle laid down in *Derbyshire* was extended to cover a political party.

3.6.9 The trial court's decision was strongly influenced by its stand that '*there is the need for organs of local authorities to protect its reputation. In fact it is in the public interest to do so and the need to be able to do so is indeed real and pressing. Damage to reputation may affect the ability of local authorities to obtain loans, borrow money or tender for contracts not to mention that public may not be too keen to be part of the staff of such body, which may cripple the functions of the local authority.*' Whether these commercial interests identified by the trial court are sufficient to weigh up as competing public interest as highlighted in *Derbyshire* remains unclear. It has been argued that Lord Keith's judgment in *Derbyshire* does not involve such weighing up and *'leaves no scope for future courts to weigh up competing public interests'*[26].

3.6.10 Quite apart from the above economic interest, public interest was vaguely mentioned in the trial court's judgment, but it was said in a totally irrelevant context:

> *'Echoing what has been said in the judgment above, we, the local courts have the 'margin appreciation' based upon local knowledge of the needs of the society to which we belong. This means that we do not and should not 'copy and paste' the practice of other jurisdictions without considering the legal provisions, special needs and multi-racial sensitivities of our society, not to mention that the other jurisdiction has different provisions with regard to freedom of expression and speech.'*[27] (emphasis added).

24 QBD, 28 June 1996, unreported.
25 [1998] Q.B. 459.
26 *Ibid*, n[23].
27 See para [51a] of the judgment.

3.6.11 The *'special needs and multi-racial sensitivities of our society'* mentioned by the trial court is the closest resemblance of public interest. Yet it was said in relation to local courts having the 'margin of appreciation' in reference to what the trial court perceived as having been endorsed by the House of Lords in *Derbyshire*. But that, again, has misconstrued *Derbyshire*. That part of judgment in *Derbyshire* which the trial court 'echoed' was actually a summary by the House of Lords of the reasoning underlying the decision of the Court of Appeal. Discussion on 'margin of appreciation' only assumed relevance when considering, as the House of Lords has summarized it in *Derbyshire*, *'the words "necessary in a democratic society" in connection with the restriction on the right to freedom of express which may be properly be prescribed by law'* under the European Convention[28]. Against that backdrop, it is rather peculiar to note that the trial court having first advocated that local courts should not *'copy and paste the practice of other jurisdiction'* did just that, by adopting the 'margin of appreciation' argument which concerned interpretation of the European Convention. The *'special needs and multi-racial sensitivities of our society'* raised by the trial court may well be a valid argument to depart from *Derbyshire*[29]. Unfortunately, this aspect was not explored or deliberated by the trial court.

3.6.12 On the other hand, of the three grounds relied upon by the Court of Appeal in affirming the decision of the trial court, the first and third grounds are covered in the preceding discussion. As for the second ground, the Court of Appeal opined that '*even section 3(a) of the Civil Law Act which allows for the application of English common law does not contemplate its application beyond that which is administered on the 7th day of April, 1956*.' If that statement of the Court of Appeal is regarded as the final embodiment of law on the subject matter of application of English common law in local courts, it seems to suggest that local courts are to apply only fossilized position under the English common law, as of 7.4.1956. Giving that rationale of

28 See e.g. *Lombardo & Ors. V Malta* (7333/06) (unreported, April 24, 2007)(ECHR) and discussion of the same case in 'Case Comment – Article Published by Councilors Criticizing Local Council' *European Human Rights Law Review* 2007, p.460.

29 See similar discussion in the concluding paragraphs in Ian Loveland 'Sullivan v the New York Times Goes Down Under' *Public Law* 1996, pp. 126 – 139.

the Court of Appeal its fullest effect, it would also mean that the common law position prior to 7.4.1956 is to be considered. In the 1891 case of ***Manchester Corporation v Williams***[30], Day J rejected a claim for libel by the municipal corporation on ground that a corporation may sue for libel affecting property but could only sue in libel for imputations attacking its political reputation if the allegations made against it amounted to a crime[31]. The case of *Manchester*[32], which is a pre-1956 common law case, was not however considered by the Court of Appeal. In fact, quite evidently the Court of Appeal did not consider any case law in coming to its conclusion.

3.7 *Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS') v Tony Pua Kiam Wee (The SYABAS Case) [2013] 1 LNS 1433*

Facts of the case

3.7.1 In the case of *SYABAS*, the plaintiff was a corporation set up to undertake the privatization of the supply and distribution of water in an entire state from the state government. The plaintiff was the sole supplier and distributor of water under a Water Concession. Both the Federal and the state governments have a stake in the shareholding of the plaintiff. The plaintiff's functions and duties under the Concession Agreement were subject to approval, control and supervision of both the Federal and state governments.

3.7.2 The plaintiff brought actions in defamation against the defendant, a Member of Parliament, who had reportedly gave a press interview where he was critical of the plaintiff's competency in managing the water supply in the state, its ability to repay its debts, and the increase in the water tariffs by 37% which was said to benefit the plaintiff alone to the unfair detriment of the public.

3.7.3 On issue of *locus standi*, the trial judge held that the plaintiff was not a public authority. The court said:

30 [1891] 1 Q.B. 94.

31 See commentary of the case in Ian Loveland, *Political Libels: A Comparative Study* (Hart Publishing, 2000) *pp.34-35.*

32 The decision in *Manchester* was not followed in the subsequent case of *National Union of General and Municipal Workers v Gillian* [1946] K.B. 81. and *Bognor Regis Urban DC v Campion* [1972] 2 Q.B. 169.

"The Court finds that notwithstanding the important role played by the plaintiff in the supply and distribution of water in the Concession Area, the plaintiff is in the final analysis NOT a public authority. Neither is it a democratically elected or government body which should be open and ready to receive public criticism. The plaintiff is a body corporate which was incorporated to undertake the privatization of water supply services. Whilst the Court accepts without qualification that water and the supply of water is a basic necessity, the Court is unable to accept that the provision of these services for the benefit of the public in the Concession Area by a body corporate would remove it from the realm of being a body corporate to being a public authority."'[33]

"The Court is of the view that notwithstanding that (i) both the Federal and the state government have a stake in its shareholdings; (ii) many of its functions and duties are subject to the approval, control or assistance from both the Federal and state government; or (iii) any proposed increase in tariffs would be subject to the approval of both the Federal and the state government, the plaintiff, not being a democratically elected government or government body, has a right to protect its reputation, especially where the damage to the said reputation could have far reaching effects. The Court is of the view that damage to the plaintiff's reputation may well affect its ability to raise loans, to borrow monies or even to attract suitable staff and employees into the company. Damage to its reputation may severely affect its ability to carry out its functions efficiently. As such, this Court is of the view that the plaintiff has the necessary locus to commence this action against the defendant … the case of Derbyshire is distinguished on the facts."'[34]

3.7.4 In the Court of Appeal, the defendant's appeal was allowed on the defence raised. Given that the appeal was allowed on other grounds, the appellate court found it unnecessary to interfere with the decision of the trial judge on the issue of *locus*:

33 [2012] 1 LNS 1377 (paragraph 110).
34 {2012] 1 LNS 1377 (paragraph 111-112).

> *"The local authorities recognize the right of private companies involved in the provision of public services to sue in defamation. The reasons advanced by English authorities such as Derbyshire in denying this right to a company performing a similar role to the plaintiff in the United Kingdom to institute proceedings for defamation, has to date not been accepted by our Courts as representing the law of this country. As we do not consider the impugned words to be defamatory, we do not propose in this judgment to interfere with the ruling of the learned trial judge that the plaintiff enjoyed the necessary locus to institute the claim for defamation against the defendant"'*[35]

Comments

3.7.5 The decision in *SYABAS* underscores the confusion and difficulty to find the characteristic of 'governmental body' in the body in question. The tension lies in whether 'governmental body' should admit a broad or narrow meaning. Similar problem was encountered in other jurisdictions, notably in the Canada Supreme Court case of ***McKinney v University of Guelph & Ors***.[36] In *McKinney*, a number of tests were suggested to determine the status of a body in question, namely the 'government control' test, the 'government function' test, and the 'government entity' test[37].

3.7.6 In spite of the trial judge having recognized the important role played by the plaintiff in the supply and distribution of water and other crucial factors, as highlighted by the trial judge, that *'(i) both the Federal and the state government have a stake in its shareholdings; (ii) many of its functions and duties are subject to the approval, control or assistance from both the Federal and state government; or (iii) any proposed increase in tariffs would be subject to the approval of both the Federal and the state government'*, the bare assertions of the trial judge that the plaintiff was not a governmental body compares poorly with the more sensible and substantial grounds as in *McKinney*.[38]

35 [2012] 1 LNS 1433 (paragraph 16).

36 (1990) 76 DLR (4th) 545.

37 See discussion in Dr Sze Ping-Fat 'Universities and Public Authorities' *Criminal Law and Justice Weekly* 167(2003) p.91.

38 *Ibid.*

3.7.7 The same comments made in the case of *FELDA (supra)* in relation to undue emphasis placed by local court on the characteristic of a body in question being democratically elected apply here to the judgment of trial court in *SYABAS*. Likewise, the submission that *Derbyshire* rests upon public interest also applies to the case of *SYABAS*. The only additional comment in relation to the decision in *SYABAS* is this: that *Derbyshire* actually upheld the proposition that a corporation could maintain an action for defamation. Lord Keith in fact held that *'a trading corporation is entitled to sue in respect of defamatory matters which can be seen to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it'*.

3.7.8 Therefore, on the right of corporation to maintain a defamation action, *Derbyshire* was consistent with the common law position laid down in the leading case of ***South Hetton Coal Company Ltd v North-Eastern News Association Ltd***[39].It is quite obvious that the effects of damage to a corporation's reputation alluded to by the trial court found support in the examples illustrated by the Lord Keith. So in this sense, *Derbyshire* is actually not at variance with the stance taken by the trial court[40].

3.7.9 Of interest to *SYABAS* is the House of Lords decision in ***Jameel v Wall Street Journal Europe SPRL***[41]. In *Jameel* the House of Lords considered the question of whether a large corporate body could bring an action in defamation without pleading or providing evidence of special damage. The House of Lords held by majority that a trading company could pursue a remedy in a defamation action in the absence of substantive and identifiable loss[42], if the

39 [1893] 1 Q.B. 133. (CA)

40 Cf: In Australia a uniform defamation law has come into effect in 2006 where limitation on corporations' right to sue for defamation was introduced. See discussion in David Rolph, 'Corporations' Right to Sue for Defamation: An Australian Perspective' *Entertainment Law Review*, 2011, pp.195-200.

41 [2007] 1 A.C. 359.

42 However note that the latest section 1(1) of the Defamation Act 2013 provides that *'A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation*

defamation the company is suing has a tendency to damage its business. In case where it had not suffered any losses, the House of Lords put in place a procedural safeguard that the award of damages should be kept within modest bound. The case of *Jameel* was not referred to in *SYABAS*. Yet, in dealing with the quantum of damages, the trial court in *SYABAS* adopted a similar caveat:

> *"Whilst the plaintiff may be encountering cash flow issues, the Court does not believe that it is looking to this case to replenish its coffers. With a decision in its favour, the plaintiff would herewith be vindicated and the defamatory words shown to all and sundry as being defamatory. In the circumstances, the Court is of the view that a sum of RM200,000.00 as damages would be a fair award of general damages."*[43](emphasis added)

3.7.10 It appears that though the trial court in *SYABAS* distinguished *Derbyshire* on facts and refused to treat the plaintiff as a governmental body so as to be completely debarred from action in defamation under the *Derbyshire* principle, yet by capping the award of damages to a modest bound, that could be a sensible way to accommodate the countervailing interests in free speech and at the same time to address any possible chilling effect had on the public right to know. This very same argument also found support in the dissenting judgment of Baroness Hale in *Jameel:*

> *"by requiring a corporate claimant to prove special damage] would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organizations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise government."*[44](emphasis added)

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of the claimant'. And in the case of a corporation or organization trading for profit, section 1(2) provides that *'harm [to such company] is not serious harm unless it has caused or is likely to cause the body serious financial loss'*. See discussion in Peter Coe 'The Value of Corporate Reputation and the Defamation Act 2013: A Brave New World or Road to Ruin?' *Communications Law* 2013, pp.113-118.

43 See para [142] of the judgment.

44 *Ibid.* n[31] at para [158] of the judgment.

3.8 *Kerajaan Negeri Terengganu & Ors. v Dr. Syed Azman Syed Ahmad Nawawi & Ors (No.1) {2013] 7 Malayan Law Journal MLJ 52*

Facts of the case

3.8.1 The proceeding in *TERENGGANU (NO.1)* concerned an application to strike out the 1st plaintiff's claim on ground that the 1st plaintiff, being a state government, pursuant to the principle established in *Derbyshire*, had no *locus standi* to sue in action of damages for defamation. The fact in brief was that the 1st plaintiff took umbrage at certain article written and published by the defendant, who was a member of the state legislative assembly, in relation to a state funded programme aiming at assisting poor students in the state. The impugned article, it was said, had given a less than glowing, or rather defamatory review of the programme.

3.8.2 In the First Instance, the trial judge declined to follow the earlier First Instance decision in *FELDA*. In departing from the reasoning in *FELDA*, it is worth noting that the trial judge in the instant case made two important observations: first, with reference to article 160 of the Federal Constitution the trial judge came to the conclusion that *'a statutory body or statutory authority is a public authority'*; second, with reference to section 2 and 13 of the Local Government Act 1976 the trial judge concluded that a local authority is a corporation or body corporate. These are two important distinctions not considered in *FELDA*.

3.8.3 On issue of *locus*, the trial judge adopted the principle in *Derbyshire* and held that the 1st plaintiff, being the state government, is undoubtedly a public authority and as such it should not be allowed to institute or maintain any actions for defamation. The trial judge reasoned that:

> *"I hold that the test on whether the state government can maintain an action for defamation should be stricter and higher than that which is for a local authority … Derbyshire held that such local authority cannot be allowed to maintain an action for defamation. Therefore, in the case of a state government, it is even more compelling that the courts should take the position that such*

government should certainly not be allowed to maintain an action for defamation."'[45]

"Thus far, while Parliament has enacted various Acts which it deems necessary or expedient to restrict the freedom of speech and expression … However, nowhere [in any statute] contains any provisions on the issue whether a state government should be allowed to maintain an action for defamation. In view of the absence of express statutory provisions, it can be safely concluded that we have resort to common law. The common law position is spelt out in very clear and precise terms by the House of Lords in Derbyshire. Accordingly, I adopt the principles laid down in Derbyshire, and hold that the first plaintiff, which is the [state government], is a public authority. As such it does not have a personal reputation to protect. Neither does it have a governing reputation, as in the case of a corporation or statutory body / authority, to protect. The state government is duly elected by the members of the public through the democratic process and it should be transparent and accountable to the electorate. There should be freedom of speech and expression by members of the public in order to act as a check and balance on the executive and the government. It is therefore not in the interest of the public that the state government be allowed to institute or maintain any action for libel and slander against any person. Otherwise, it would stifle constructive queries or comments which can contribute to and ensure good governance of the subjects by the state government. There can be no financial loss suffered by the state government even if defamatory statements are made against it by any person. In a situation where there is evidence of defamation, the offender can be prosecuted by the public prosecutor for criminal defamation under the Penal Code."'[46]

Comments

3.8.4 As said in the foregoing, having referred to relevant provisions in the Federal Constitution and the Local Government Act, the trial judge in *TERENGGANU (NO.1)* made two important observations not otherwise considered in *FELDA* that *'a statutory*

45 See para [19] of the judgment.
46 See para [27] – [29] of the judgment.

body or statutory authority is a public authority' and that *'a local authority is a corporation or body corporate'*. While these two observations based on local statutory provisions are crucial to overcome the reasoning in *FELDA*, yet, as submitted in *FELDA*, the overriding consideration in *Derbyshire* rests upon public interest. In *TERENGGANU (NO.1)*, the trial judge subscribed to similar public interest argument on the perceived chilling effect had on freedom of free speech if the right to commence defamation action is allowed to the governmental body, but the court did not consider the equally forceful argument identified in *FELDA* (though argued in different perspectives) of the concern for *'special needs and multi-racial sensitivities of our society'*.

3.8.5 The sharp divergence between *Derbyshire* and the local decision in *FELDA* could very well represent the common law in each country to reflect and respond to differing social attitude and public values prevailing in each country[47]. This argument remains contentious. Therefore, the question of whether the public interest underpinning Lord Keith's reasoning in *Derbyshire* is reconcilable with the *'special needs and multi-racial sensitivities of our society'* must be regarded as open.

3.9 *Kerajaan Negeri Terengganu & Ors. v Dr. Syed Azman Syed Ahmad Nawawi & Ors (No.2) [2013] 1 CLJ 124*

Facts of the case

3.9.1 *TERENGGANU (NO.2)* is a sequel of *TERENGGANU (NO.1)*. In this later case, the defendant applied to strike out the 2nd plaintiff's claim. The 2nd defendant was then the Chief Minister of the state government. The 2nd plaintiff was said to have commenced the same defamation suit in his official capacity. In issue before the Court of First Instance was whether the 2nd plaintiff can sue the defendant in his official capacity as the Chief Minister. The trial judge answered that question by saying that the 2nd plaintiff can maintain the action in his personal capacity, but not in his official capacity. The trial judge held:

47 Patrick Milmo, 'Book Reviews: Political Libels: A Comparative Study' *International & Comparative Law Quarterly* 50, 2001 p 1002-1005.

"Following the rationale in my decision [in TERENGGANU (NO.1)], it also means that by applying the same rationale, the second plaintiff has no capacity, according to law, to sue the defendant in his official capacity as the [Chief Minister]. This is premised on the fact that the [Chief Minister], being the chief executive of the state government, and being conferred by law with the executive authority of the state, should not be allowed to use his official position to sue any member of the public regarding any question or comment raised regarding his administration within the state government."'[48]

"In conclusion, due to strong public interest considerations, this court is of the opinion that any person, whether he is a Chief Minister, Minister or Prime Minister or any other person in a government executive position, can maintain an action for defamation in his personal capacity, but not in his official capacity. To allow such person to do so would tantamount to intimidating members of the public and striking fear in them, thereby stifling or discouraging constructive public criticism or question of government administration in situations where such criticism or question is necessary for the public good … Any threat of civil action for libel by a Chief Minister or any other Minister, in the official capacity, would have a "chilling effect" and be detrimental to the constitutional right of freedom of speech in a civil and progressive society."'[49]

Comments

3.9.2 The decision in *TERENGGANU (NO.2)* calls into question whether the *Derbyshire* principle was correctly extended to cover the situation where the individual member of a governmental body may not sue in his 'official capacity'. One can hardly think of such distinction as official and personal capacity in the instant case: the 2nd plaintiff was then the Chief Minister. That was an undeniable fact.

3.9.3 The imputations leveled against him were in relation to his discharge of duties and functions as a Chief Minister. There is virtually no other way not to plead facts in his pleadings without mentioning the manner in which he had discharged his duties

48 See para [12] of the judgment.
49 [2012] 1 Current Law Journal (CLJ p 129.

and functions as a Chief Minister. Further, in a claim for political defamation, it is almost certain that the claimant is holding some official posts. Given the nature of political defamation, it is hard to distinguish between a personal as opposed to official capacity. It seems therefore inconceivable to suggest that in the case of political defamation, a claimant could only sue in his personal capacity and not his official capacity.

3.9.4 Indeed, the very fact that the trial judge in *TERENGGANU (NO.2)* recognized that *'there appears to be no direct authority on the question'*[50] lend credence to the submission that it is questionable, to say the least, for the court to draw such a fine distinction between suing in a personal and official capacity.

3.9.5 If guidance could be gleaned from US case law, the reasoning in *TERENGGANU (NO.2)* is clearly inconsistent with US jurisprudence. In the leading case of ***New York Times Co. v Sullivan***[51] it was held that a public official could only sue in defamation in relation to the claimant's official capacity if the claimant could prove actual malice on the part of the maker of the impugned defamatory statement.

3.9.6 Again, ***Curtis Publishing Co. v Butts***[52] extended the 'official capacity' to cover a more general class of 'public figures', which term was defined as *'[person] intimately involved in the resolution of important public questions or [who], by reason of their fame shape events in area of concern to society at large'*. Furthermore, following the case of ***Gertz v Robert Welch***[53]it is generally accepted there are three categories of 'public figures', namely (i) those with general fame or notoriety in the community; (ii) those who become involved in a public controversy; and (iii) those who thrust themselves into a particular public controversy. In short, unlike the decision in *TERENGGANU (NO.2)*, these case laws exemplify that claimant who took offence of imputations made against them in relation to their official duties and functions could only sue in such capacity.

50 See para [8] of the judgment.
51 376 US 254 (1964).
52 338 US 130 (1967).
53 418 US 323 (1974).

4. COURT'S ROLE IN JUDICIAL REVIEWS ON ISSUES OF FUNDAMENTAL LIBERTIES: DOCTRINE OF PROPORTIONALITY

4.1 The doctrine of proportionality is of European origin. It envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve public interest. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred.

4.2 The implication of the principle of proportionality is that the court will weigh for itself, the advantages and disadvantages of an administrative action. Only if the balance is advantageous, will the court upheld the administrative action. An administrative action can be quashed if it was disproportionate to the mischief at which it was aimed.

4.3 In United Kingdom it is viewed restrictively as can be seen in the case ***Associated Provincial Picture Houses v Wednesbury Corporation***[54] is the English law case which set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as *Wednesbury* reasonableness. The court stated three conditions on which it would intervene to correct a bad administrative decision, including on grounds of its unreasonableness in the special sense later articulated in ***Council of Civil Service Unions v Minister for the Civil Service***[55]. The basic facts of the case were that Associated Provincial Picture Houses were granted a license by the defendant local authority to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays. The claimants sought a declaration that such a condition was unacceptable, and outside the power of the *Wednesbury Corporation* to impose. The court held that it could not intervene to overturn the decision of the defendant corporation

54 1[1948] 1King's Bench (KB) 223.

55 [1984]3 All England report (ALL ER) 935.

simply because the court disagreed with it. To have the right to intervene, the court would have to form the conclusion, firstly that the corporation, in making that decision, taking into account factors that ought not to have been taken into account, or secondly that the corporation failed to take account factors that ought to have been taken into account, or lastly the decision was so unreasonable that no reasonable authority would ever consider imposing it.

4.4 The court held that the condition did not fall into any of these categories. Therefore, the claim failed and the decision of the *Wednesbury Corporation* was upheld.

4.5 The test laid down in this case, in all three limbs, is known as "**the Wednesbury test**". The term "*Wednesbury unreasonableness*" is used to describe the third limb, of being so unreasonable that no reasonable authority could have decided that way. This case or the principle laid down is cited in common law courts as a reason for courts to be hesitant to interfere into the decisions of administrative law bodies. However, in recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciaries have resiled from this strict abstention's approach, recognising that in certain circumstances it is necessary for them to undertake a more searching review of administrative decisions.

4.6 Indeed, the European Court of Human Rights now requires the reviewing court to subject the original decision to anxious scrutiny whether an administrative measure infringes a convention right. In order to justify such an intrusion, the respondents have to show that they pursued a pressing social need and that the means employed to achieve this were proportionate to the limitation of the right. Thus, it can be concluded that *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it.

4.7 Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which

requires the courts to assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the —least injurious meansor —minimal impairment test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest.

4.8 Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that *Wednesbury* has met with its death knell is too tall a statement.

4.9 The application of doctrine of proportionality is also applied here by the Malaysian Court. The Court of Appeal as well as the Federal Court took the view that it is wider than the scope of judicial review power in Britain. Edgar Joseph Jr, FCJ observed in ***Rama Chandran. R v. The Industrial Court of Malaysia and Anor***[56] that the powers of the courts in Malaysia, in the field of public remedies are not limited in the same manner as that of the courts of the United Kingdom, where there are no such equivalent provisions as in Malaysia. The learned judge expressed his view in favour of moulding relief, if the circumstances of the case so require. Both the learned judges Mohd. Eusoff Chin, CJ Malaysia and Edgar Joseph Junior FCJ observed that there are no provisions in the Courts of Judicature Act, and the Rules of High Courts that expressly or impliedly prohibits the High Courts from granting any relief. In their opinion s. 25 of the Court of Judicature Act read with paragraph 1 of the Schedule thereto provide that power of the High Court includes power to issue to any persons or authority directions, orders or including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any other for the enforcement of the rights conferred by Part II of the Constitution, or any of them or any purpose.

4.10 To what extent can the review of a case be undertaken by the courts? This question arose because of the traditional thinking is that in judicial review only the decision-making should be reviewed and not the decision itself. This is no longer applicable as decided

56 [1997] All Malaysian Report (AMR) 433 at 483.

in ***Kumpulan Peransang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh***[57]**,** the Supreme Court confirmed the decision of the High Court which has set aside an award in an Industrial Court. The High Court had examined facts of the case to determine whether the determination of Industrial Court was right that the respondent was dismissed with just cause. An argument was made by the appellant that in a certiorari in High Court is not entitle to go into the facts and merits of the case. The High Court is supposed to look into the decision making and not the decision itself. If it go into the merit of the case, it would be converting judicial review in to appeal. The Supreme Court observed:

> *"Until recently, it was generally thought that when a decision is challenged on grounds of* ***Wednesbury*** *unreasonableness'.. the court is confined to an examination of a the decision making process and not the merit of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that has addressed the subject."*

The learned judge pointed out that the current approach is by not adopting of the *"Wednesbury unreasonableness"* and the proportionality test.

4.11 The best example to illustrates the application of doctrine of proportionality can be seen in a Federal Court case; a decision by His Lordship Tun Ariffin Zakaria C.J (for the majority) in the case of ***Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri [2014] 6 CLJ 541.***

Facts of Case

This was an application for leave to appeal against the decision of the Court of Appeal in overruling the High Court and ruling that the first respondent ('the Minister'), in prohibiting the applicant from using the word "Allah" in the Malay version of its weekly publication ('the Herald') on grounds of public order or national security ('the Minister's decision'), was acting *intra vires* the law and the Federal Constitution ('the Constitution'), and further, had not

57 [1997] I Malayan Law Journal (MLJ) 787.

transgressed the rules of natural justice and fairness nor violated the *Wednesbury* principle of reasonableness or the principles of illegality, proportionality and irrationality. The facts showed that following the prohibition, the applicant applied *inter alia* for an order of *certiorari* to quash the Minister's decision.

The learned High Court Judge, upon appraising the provisions of the Constitution and the relevant statutes, ruled that the Minister's decision was illegal and unconstitutional, and so granted the orders and declarations sought for. Further, it was the view of the learned judge, in quashing the Minister's decision, that the applicant had a constitutional right to use the word "Allah" pursuant to Arts. 3(1), 10, 11 and 12 of the Constitution, and that, s. 9 of the Control and Restriction of the Propagation of Non-Islamic Religions Enactments of the States ('the impugned provision'), which effectively prohibited the use of the word "Allah" to "express or describe any fact, belief, idea, concept, act, activity, matter or thing of or pertaining to any non-Islamic religion", when read with Art. 11(4) of the Constitution, was disproportionate to its objectives and was therefore arbitrary and unconstitutional.

On appeal, the orders and findings of the High Court were however set aside by the Court of Appeal, principally on the ground that, on the facts and in the circumstances of the case, there was no plausible reason for the High Court Judge to exercise her judicial review jurisdiction and interfere with the Minister's decision. The Minister's decision to impose a condition on the Herald, according to the judges of the Court of Appeal, came squarely within the function and statutory powers of the Minister, and was *intra vires* the Constitution, the Printing Presses and Publications Act 1984 ('the Act') or the Rules made thereunder.

The applicant sought leave to appeal to the Federal Court and in the event posed a total of 28 legal questions, categorised as Administrative Law Questions (Part A), Constitutional Law Questions (Part B) and General Questions (Part C), for the due consideration of the apex court ('encl. 2(a)'). In consequence, arguments were *inter alia* raised that leave ought to be granted as:

(i) there was uncertainty as to the source of power under which the Minister imposed the conditions and prohibition in question; (ii) the Court of Appeal, in determining the reasonableness of the Minister's decision, had applied the wrong subjective test instead of the objective test;

It was held inter alia:

...

> *Even though Apandi Ali JCA had used the term "subjectively objective" in his judgment, he however referred to the case of Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors which clearly propounded the objective test. Apandi Ali JCA had also applied the principle of reasonableness as established in Associated Picture Houses Ltd v. Wednesbury Corporation and Council of Civil Service Unions & Ors v. Minister of Civil Service, and more, the principle of proportionality when he opined "when such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security".*

...

Comments

4.12 Looking at the decided cases in the field of administrative law in Malaysia, one gets the impression that the administrative law is taking long strides and replenishing its weak spots to rise to the occasion which the current pace of development requires. The judges are well aware of the stage of development Administrative law as attained in other Commonwealth Countries and they try to fill in the empty gaps in the law and enrich its various essential aspects. The Court of Appeal as well as the Federal Court took the view that is wider than the scope of judicial review power in Britain.

5. THE LAW ON SEDITION

5.1 The Sedition Act 1948 came into force on July 19, 1948 by British Colonial to combat the Communist insurgency.

This law is considered by many to be a draconian piece of Malaysian legislation because of the effect is said to restrict on freedom of speech and expression in Malaysia in particular Section 4 of the Act, which provides that:

> *"Any person who – (b) utters any seditious words; (c) prints, publishes…any seditious publication…shall be guilty of an offence"*[58]

5.2 Under the Sedition Act, words and publications are seditious if they have a 'seditious tendency' which is defined as a tendency—

(a) to bring into hatred or contempt or to excite dissatisfaction against any Ruler or against any Government;

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.

In the wake of the race riots of May 13 in 1969, a state of emergency was declared by the King and, in August the following year, an emergency law was promulgated which added to the definition of 'seditious tendency', a tendency:

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions

58 Section 4 (1), Sedition Act 1948 [Act 15].

of Part III of the Federal Constitution of Article 152, 153, or 181 of the Federal Constitution.[59]

5.3 The emergency law is also provided that if any words or publication had a seditious tendency, the intention of the accused uttering or publishing it is deemed to be irrelevant.[60]

5.4 PUBLIC PR OSECUTOR V OOI KEE SAIK [1971] 2 MLJ 108

5.4.1 In November the same year, one Dr Ooi made a speech at a political party dinner accusing the ruling party of practicing a policy of racial segregation in several areas of Malaysian life – in the army, the police, in education, public housing, land schemes, and in business and industrial concerns. For this he was charged with the offence of sedition.

5.4.2 The judge declined to follow the English common law meaning of 'sedition'. Although conceding that the greatest latitude should be given to freedom of expression, the learned judge considered that no constitutional state has seriously attempted to translate the 'right' into an absolute right, holding that—

> *"…a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of individual interest against the general security or the general morals, or the existing political and cultural institutions. Our sedition law would not necessarily be apt for other people but we ought to always remember that it is a law which suits our temperament."*[61]

5.4.3 In considering the facts of the particular case, the learned Judge held that it was the court that draws the line between the right to freedom of speech and sedition—

> *"The question arises: where is the line to be drawn; when does free political criticism and sedition begin?*

59 Emergency (Essential Powers) Ordinance No 45/1970.

60 Section 3(1), Sedition Act 1948 [Act 15].

61 Public Prosecutor v Ooi Kee Saik [1971] 2 MLJ 108 per Raja Azlan Shah J (as His Royal Highness then was) at 112E.

"...The dividing line between lawful criticism of Government and sedition is this – if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe.

"But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency to stirring up hatred, contempt, or disaffection against the Government, then it is caught within the ban [in the Sedition Act]."[62]

5.4.4 In finding Dr Ooi guilty of the offence, the learned Judge held that the speech was full of hatred and bitterness and was clearly directed against the Government—

"To accuse the Government of gross partiality in favour of one group against another is, in my opinion, calculated to inspire feeling of enmity and disaffection among the people of this country. I further find that Dr Ooi's scurrilous attacks on one ethnic group and disseminating false views played a significant part in creating racial tensions that on another occasion had resulted in race riots."[63]

5.4.5 There are at least two clear principles to be drawn from the case of Dr. Ooi, namely—

i- that a meaningful understanding of the right of freedom of speech and expression must be based on the realities of the society in the particular country at the material time; and

ii- it is the court that is tasked with drawing the line between free speech and expression on the one hand and the considerations such as public security on the other.

5.5 The case of MUHAMMAD HILMAN BIN IDHAM & ORS v. KERAJAAN MALAYSIA & 0RS [2011] 6 MLJ 507

5.5.1Section 15 of the Universities and University Colleges Act 1971 ("UUCA") provides—

"No student of the University and no organization, body, or group of students of the University…shall express or do anything

62 *Ibid* at 112I-H.

63 *supra* 35 at 112I-113A.

which may reasonably be construed as expressing support for or sympathy with or opposition to…any political party…"[64]

5.5.2 Muhammad Hilman was a political science undergraduate in a Malaysian university in April 2010 when he was accused of being present in a constituency during the campaign period for a parliamentary by-election, and for having in his possession campaign materials. The Vice-Chancellor of the university issued a notice requiring him to appear before a disciplinary tribunal to answer charges of breach and offences under the UUCA. Hilman applied to the High Court to restrain the university from proceeding with the disciplinary tribunal and for a declaration that section 15 of the UUCA was unconstitutional as being in contravention of his right to freedom of speech and expression under the Constitution.

5.5.3 By a majority decision, the Court of Appeal held that section 15 was unconstitutional, one judge[65] expressing his view that section 15 did not fall within the restriction of public order and public morality, nor was it reasonable:

"…I am at a loss to understand in what manner a student, who expresses support for, or opposition against, a political party, could harm or bring about an adverse effect on public order or public morality? Are not political parties' legal entities carrying out legitimate political activities?

"The impugned provision is irrational. Most university students are of the age of majority. They can enter into contracts. They can sue and be sued. They can marry, becomes parents and undertake parental responsibilities. They can vote in general elections if they are 21 years old. They can become directors of company. They can be office bearers of societies. Yet — and herein lies the irony — they are told that legally they cannot say anything that can be construed as supporting or opposing a political party."[66]

64 Section 15 (5), Universities and University Colleges Act 1971.

65 Mohd Hishammuddin JCA.

66 Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507; [2011] 9 CLJ 50, as per Mohd Hishammuddin JCA at 524C.

5.5.4 The other judge[67] in the majority considered that the legislation imposing the restriction on freedom of speech and expression failed the test of reasonableness:

> *"I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and circumstances. But where the legislative enactment is self-explanatory in its manifest absurdity as s. 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable."*[68]

5.5.5 Legislators may wish to take into account at least two considerations when drafting a law imposing a restriction on the right of the freedom of speech—

(a) given that, as a matter of principle, the restriction will be construed narrowly, a legislative provision drafted with too wide a scope of application can make it difficult for the court to construe it as a legitimate restriction; and

(b) the legislative restriction should not be drafted in terms which make it difficult for the court to consider it as a reasonable restriction.

5.6 AMENDMENT TO S. 3 (1) (C) of the SEDITION ACT

5.6.1 Recently, Parliament has passed amendments to the Sedition Act 1948, with several changes made to the bill after the federal government took into the account views from various quarters including parliamentarians. However, the amendments are not enforceable as the amendment not been gazetted pursuant to a requirement under Article 66(5) of the Federal Constitution. In particular is the deletion of Section (3) (1)(c) that directly affected Malaysian Judiciary where it is no longer regarded as 'seditious tendency' for action to bring into hatred and contempt or to excite

67 Linton Albert JCA.

68 Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507; [2011] 9 CLJ 50, as per Linton Albert JCA at 531H-I.

disaffection against the administration of justice in Malaysia or in any state. However such action if any, can be addressed by way of contempt of court.

5.6.2 All courts have the power to punish for contempt of itself. This power may be specifically granted by statute, or from the inherent power of the courts. Therefore, this law is relevant to all courts.

5.6.3 Paragraph 26 in the Third Schedule in the Subordinate Courts Act 1948 states that the Magistrates' and Sessions Court have the power to punish for contempt of court to such an extent and in such a manner as may be prescribed by the rules of court.

5.6.4 Section 13 of the Courts of Judicature Act 1964 and Article 126 of the Federal Constitution empower the High Court, Court of Appeal and Federal Court to punish any contempt of itself. Order 23 of the Rules of the Special Court 1994 empowers the Special Court to punish any contempt of itself.

5.6.5 Section 58(1) of the Industrial Relations Act 1967 provides that the Industrial Court can punish stated forms of contempt of court. Section 25(1) of the Native Courts Enactment 1992 (Sabah) and section 23(1) of the Native Courts Ordinance 1992 (Sarawak) provides these courts with the power to punish contempt of itself. However, it would seem that these courts would still have the inherent power to punish for contempt of court.

5.6.6 Edgar Joseph Jr. F.C.J. in ***R Rama Chandran v. Industrial Court of Malaysia & Anor***. quoted I.H. Jacob's (1970) explanation of the inherent jurisdiction of courts. Jacob explained that in addition to a statutory jurisdiction, each court also has an inherent jurisdiction: "The source of the statutory jurisdiction of the court is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law …". As such, every court is granted the jurisdiction to act, by statute, and by its very nature as a court of law.

5.6.7 Jacob went on to define the scope of a court's inherent jurisdiction in the following terms: " … the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." Therefore, each court has a broad discretion in terms of its inherent jurisdiction, though this jurisdiction is limited by statute. There soon to be a comprehensive Contempt of Court legislation to be enacted.

6. FREEDOM OF PRESS

6.1 Media play an important role as a channel for conveying and disseminating information. There is therefore a need for the media to exercise self-regulation and to be a socially responsible vehicle of communication.

6.2 Self-regulation helps the media respond to legitimate complaints and therefore correct the errors and mistakes that are a genuine concern of the public. When the media act irresponsibly several things happen i.e. unnecessary harm is done to people; the media losses credibility; it weakens the media's vital role as watch dogs; the well-being of democracy suffers, etc. It is unacceptable for the media to spread lies at the disguise of press freedom while harming others reputation. Defamation law is a significant feature of social processes of news production, influencing the development and practice of responsible journalism.

6.3 Looking at the Defamation Act 1957 and the Malaysian Penal Code, it would suffice to note that we have these laws in order to protect a person's reputation regardless of the notion of press freedom since the right to publish by the media is not absolute. In Malaysia, freedom of speech which includes freedom of the press is qualified. This is by virtue of Article 10(2) of the Federal Constitution and one of the restrictions is that of defamation. Despite this restriction, the law still provides the media with some defences in case they are being sued for libel. Hence, it does not mean that every

publication that caused a person to be ridiculed by right-thinking members of the public or lower him in their estimation would result in liability for defamation.

6.4 It is therefore important that for the media to carry out their important role effectively and efficiently, the media should operate within a well-defined code of ethics while maintaining their freedom and editorial independence. Since irresponsible journalism invites restriction, robbing off the media its freedom, professional conduct and ethical practice are vital to safeguarding freedom of the media and ensuring that public trust invested in the media is sustained.

7. FREEDOM ON ASSOCIATION: AN OVERVIEW

7.1 Freedom of association can generally be described as a right of an individual to come together with other individuals and collectively express, promote, pursue and defend their common interests. Some described it as a freedom or privilege from State interference or restrictions on the formation of organizations and unions.

7.2 The fundamental right to form associations or unions means the liberty of citizens to form a legal entity in order to act collectively in a field of mutual interests. The concept of Freedom of Association and the purpose which it serves has been elucidated by the European Court of Human Rights in the case of ***James, Young and Webster v UK***[69]. This case involved the issue of permissibility of closed shops and the question arose as to whether freedom of association also involved the freedom to dissociate. Defining what is referred to as the positive freedom of association in contradistinction with the negative freedom of association, the Court declares thus:

> *"The positive freedom of association safeguards the possibility of individuals, if they so wish to associate with each other for the purpose of protecting common interests and pursuing common goals, whether of an economic, professional, political, cultural, recreational or other character and the protection consists in preventing public authorities from intervening to frustrate such common action. It*

69 [1981] ECHR (European Court of Human Right) p 4.

concerns the individual as an active participant in social activities and it is in a sense a collective right in so far as it can only be exercised jointly by a plurality of individuals"

7.3 Societies formed by individuals in the exercise of their right of association enjoyed certain freedoms with respect to their formation, purpose, organization, maintenance and activities. However, these societies may be regulated by law and the degree of regulation will depend on the nature and function of the societies in question.

7.4 The right of association in Malaysia is one of the fundamental rights guaranteed under the Federal Constitution in Malaysia as enumerated in Article 10(1)(c) of the Federal Constitution.

7.5 Article 10 of the Federal Constitution clearly states that:

1. Subject to Clauses (2), (3) and (4) —

(a) all citizens have the right to form associations.

2. Parliament may by law impose —

(a) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

3. Restrictions on the right to form associations conferred by paragraph (c) of clause (1) may also be imposed by any law relating to labor or education.

7.6 The right of Association, like other individual freedoms, is not unrestrained. As we can clearly see, Clause 2 of Article 10 of the Federal Constitution guarantees the freedom of association while at the same time permitting Parliament (The Malaysian Federal Legislative Body) to enact laws restricting such freedom for the sake of national security, public order as well as morality. As explained by the Supreme Court of India in the case of ***State of Madras v V.G Rao***[70]

"*The right to form associations or unions has such wide and varied scope for its exercise and its curtailment is fraught with such*

70 [1952] AIR All Indian Report (Supreme Court) p.196.

potential reactions in the religious, political and economic fields. That the vesting of authority in the executive government to impose restrictions on such right , without allowing grounds for such imposition, both in their factual and legal aspects to be duly tested in a judicial enquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed on the exercise of the fundamental right under Art. 19(1)(c) [of the Indian Constitution] "

7.7 It is to be noted here that the right to form associations or unions has a very wide and varied scope including all sorts of associations- political parties, clubs, societies, organizations, partnerships and so on.

This paper will discuss further about this freedom in Malaysia.

7.8 THE EXERCISE OF THE FREEDOM OF ASSOCIATION IN MALAYSIA

7.8.1 The law imposes no restriction on the freedom of individuals to associate together for political or non-political purposes. Free association has the benefit as a unifying force which facilitates individual collaboration by allowing like-minded individuals to band together to further a cause in the socio-economic or political arena[71]. Now, let us have a closer look at several areas on the application of this principle.

7.9 RIGHT TO JOIN AND FORM ASSOCIATIONS

7.9.1 This matter has been thoroughly discussed by the Court of Appeal in the case of ***Dr. Mohd Nasir Bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213***.

7.9.2 On the 15th of February 1998, the Appellant and twelve others met to form Parti Sosialis Malaysia (PSM). They formed a committee of seven. An application was then made to the Registrar of Societies (ROS) to register themselves as a political society. The ROS declined registration at the national level. However, the

71 Kevin YL Tan & Thio Li- Ann, Constitutional Law in Malaysia and Singapore, Lexis Nexis Malaysia, 2010, p.1148.

ROS was prepared to grant registration at the State level, i.e State of Selangor. Dissatisfied with the result, the Appellant appealed to the Respondent, the Minister of Home Affairs. The appeal was dismissed. ROS maintained its policy throughout the appeal not to grant national level registration unless there was representation from at least seven of the States of Malaysia in the committee of a political society. The appeal was refused by the Minister based on two grounds. Firstly, based on the above-mentioned ground as stated by ROS. Secondly, the Minister deemed the registration not in the interest of the national security based on information made available by the Police to the Minister. Judicial review was sought at the High Court level but was refused. The appellant appealed to the Court of Appeal.

7.9.3 The Appellant's argument was that his fundamental right to form PSM as guaranteed by the Federal Constitution had been infringed by the ROS and the Minister.

Gopal Sri Ram JCA (as he then was) [delivering judgment of the Court] said:

> *"Art.10(1)(c) guarantees to all citizens the right to form Associations. Art. 10(2)(c) empowers parliament by law to impose such restrictions on the Right conferred by Art. 10 as it deem necessary or expedient in the interest of the security, public order or morality"*

7.9.4 Does this mean that Parliament is free to impose any restriction however unreasonable that restriction maybe? The answer is no. The restrictions which Art.10 (2) of the Federal Constitution empower parliament to impose must be reasonable restrictions. It is to be noted here that the ROS declined the registration of the PSM because it contravenes section 7 of the Societies Act 1966.That section deals with the conditions which are required to be fulfilled before the ROS can register a local society.

7.9.5 The Court further held that:

> *"the departmental policy requiring a political party's committee to comprise of representatives from at least seven States of the*

Federation where registration is sought at the National Level is not an unreasonable exercise of the statutory power conferred upon the ROS by section 7 (1) of the Societies Act 1966. Since Malaysia has 13 States, the ROS probably had in mind that a political party seeking registration at the National Level must seek to represent 50% plus one State in the Federation. There is nothing unreasonable about this. Some policy is necessary to guide the discretion conferred by section 7. Otherwise it may become an unprincipled discretion"

7.9.6 In ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333***, the appellant, an Advocate and Solicitor and a Member of Parliament, wished to serve as an elected member on the Bar Council, the governing body of Malaysian Bar. However, section 46A of the Legal Profession Act 1976 disqualifies among others, a Member of Parliament from being a member of the Bar Council or State Bar Committee. The appellant challenged the constitutionality of section 46A on the grounds that it violated his right of association.

7.9.7 The Federal Court held that the Malaysian BAR has been created by statute and had from its inception, been governed by the statute, namely the Legal Profession Act 1976 and the subsidiary legislation made thereunder. As such, no complaint can be made on the ground that the appellant's right of freedom of association has been violated. In short, Art. 10(1)(c) does not apply to the Malaysian BAR. Accordingly, no question can arise on the right to serve in the Bar Council.

7.9.8 The Court further held that even if Malaysian Bar were an association and even if the appellant had a fundamental right to serve in the Bar Council, the disqualification imposed by section 46A was reasonable within Art.10 of the Federal Constitution.

7.9.9 Restrictions imposed by Parliament may be reasonable on the ground of morality.

7.9.10 The expression "morality" is not defined by the Constitution. However, the court refers to the case of ***Manohar***

v State of Maharashta [72] where it was held that morality in the equipollent Indian Constitution Art. 19(2) and (4):

"*is in the nature of public morality and it must be construed to mean public morality as understood by the people as a whole*"

7.9.11 Part of public morality is the proper conduct and regulation of professional bodies. Matters of discipline of the legal profession and its regulation do form part of public morality. This is because it is in the public interest that Advocates and Solicitors who serve on the governing body behave professionally, act honestly and independent of any political influence. An independent Bar Council may act morally in the proper and constitutional sense of the term of morality. The absence of political influence secures an independent Bar Council. Hence, as stated earlier, the restriction is entirely reasonable and justifiable on the ground of public morality.

7.9.12 In this case, the learned judge had clearly made the distinction between the right to form association and the right to manage it. While any citizen has the right to form associations, the right does not extend to managing them. In other words, the right to form an association implies the right to be a member of an association, though not to manage it which is regulated by statute.

7.9.13 It is thus clear here that the Court recognizes the right of any individual to form Association. However, in doing so, the Court is always guided by any laws enacted by the Parliament of Malaysia governing such a freedom as long as such a law is not unreasonable.

7.10 RIGHTS TO MANAGE ASSOCIATION

7.10.1 Judging by a literal Interpretation of Art. 10(1)(c) of the Federal Constitution as well as the above case law, every citizen has a right to form any association of his choice (subject to laws governing it). However, one issue that comes to our mind is whether that right extends to a right to manage (association)? In other words, can Parliament, make any law imposing restrictions on the management of an association or body?

72 [1984] (AIR) All India Report Bombay p. 47.

7.10.2 This position has been thoroughly discussed in the case of ***Malaysian Bar & Anor v Government of Malaysia***[73]The issue which was raised in this appeal was the constitutionality of sub-section (1)(a) of section 46A of the Legal Profession Act 1976.

7.10.3 In 1978, the Malaysian parliament amended the Legal Profession Act 1976 vide the Legal Profession (Amendment) Act 1978. Section 46A was introduced. This section disqualified lawyers of less than 7 years standing at the Bar from being elected as members of the Bar Council, State Bar Committee or any committee of the Bar Council.

7.10.4 The same prohibition was also extended to lawyers who were legislators, trade union leaders, political party leaders or leaders of any other organization, body or group which has the objectives or carries on activities which can be construed as being political in nature. The law gave power to the Attorney General to declare an organization as falling within the prohibition and at the same time, ousted the jurisdiction of any Court from entertaining a case which challenges that declaration.

7.10.5 The Malaysian Bar challenged the constitutionality of the said section 46A through this suit which it sought a declaration that section 46A was "ultra vires" Art. 10 of the Federal Constitution guaranteeing freedom of association and section 46A was therefore void under Art 4(1) of the Federal Constitution.

7.10.6 The Supreme Court held that (on the right to manage association):

> "*Art.10(1)(c) does not give right to any citizen to* ***manage any association but merely the form associations*** (emphasis added)

In support of the conclusion that the right to form association does not include the right to manage them, the Supreme Court agreed with the learned High Court judge when the latter cited the case of ***Azeez Basha v Union of India***[74] he observed that there is

73 [1987] 2 MLJ 165.
74 AIR 1968 SC 662, P. 675.

no merit in the contention that the right of association had been violated because:

> *"Art. 10 (1) (c) does not give any right to any citizen to manage any association but merely right to form association. I accordingly find that section 46A is not ultra vires of Art 10(1) (c) and therefore not void under Art. 4 (1) of the Federal Constitution"*

7.10.7 The case of ***Azeez Basha v Union of India*** was also referred to by the Federal Court in the case of ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333*** where it was held that there is no question that ***Azeez Basha v Union of India*** is certainly good law in the context of Art. 10(1)(c).

7.11 RIGHT TO DISSASOCIATE

7.11.1 The freedom to establish associations also implies the negative right of not joining associations or societies. This issue has been thoroughly discussed in the case of ***Nordin Bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Anor***[75] . The legislation in question in this case is Art. XXXIA of Part I of the Constitution of Kelantan dealing with defection of a Member of the Kelantan State Legislative Assembly from one political party to another. The relevant provision reads as follows:

> *"if any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative Assembly and his seat shall become vacant"*

7.11.2 The Plaintiffs in this case claimed that this provision was inconsistent with Art. 10(1)(c) of the Federal Constitution which guarantees the right to form association as well as the right to disassociate from it. They have resigned as member of the ruling political party in which they were elected as members of the Kelantan State Legislative Assembly and thereafter they joined the opposition party. The State Legislative Assembly declared their seats vacant pursuant to the impugned article in the Kelantan State

75 [1992] 1 MLJ 343.

Constitution and called for the State by-election. They contested in the State by-elections to fill in the vacant seats and were defeated by candidates from their former party.

7.11.3 The High Court accepted the appellant's argument, struck down the impugned provision as unconstitutional, voided the results of the State by-elections and returned them to their seats as members of the Legislative Assembly. The winners of the by-elections and the Election Commission were not joined by the suit. The Legislative Assembly appealed to the Supreme Court.

7.11.4 The Supreme Court affirmed the High Court's decision. The Supreme Court held that:

> "*The right to freedom of association in Art. 10(1)(c) of the Federal Constitution guarantees a citizen both the right to join and not to join an association. Therefore, any restriction on the right to disassociate like the type imposed by the impugned article was a derogation of the freedom and was therefore unconstitutional*"

7.11.5 The Supreme Court went on to lay down certain tests to determine the constitutionality of a particular legislation that:

> "*the legislation can be of course, struck down if it directly infringes the fundamental rights of a legislator but it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental right guaranteed under Article 10(1) of the Federal Constitution or make the exercise of that right ineffective or illusory*"

The test was adopted in Sivarasa's case by the Federal Court.

7.11.6 In other words, the Court always safeguards an individual's right to form association and to disassociate. Fundamental rights inhere in every citizen including a legislator. The right claimed by a politician to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature and character as the freedom of association so that although the object of a particular law may ostensibly be to curb defection from one political party to another, its direct and

inevitable consequence is the abridgment of that person's right of association.

7.11.7 It is clear that in Malaysia that as far as the formation and the joining of political parties are concerned, individuals should have unfettered freedom of choice. No one should be forced to belong to a political party where he does not believe in its ideology, manifesto or programme.

7.12 LAWS GOVERNING FREEDOM OF ASSOCIATION IN MALAYSIA

7.12.1 Now, let us have a look at several laws governing the Freedom of Association in Malaysia.

i. Societies Act 1966 [Act 335]

This is the most important piece of legislation regarding freedom of association in Malaysia. It provides, among others, rules, regulations, restrictions and offences with respect to associations in Malaysia.

This Act requires all societies to be registered.

Section 2 of the Act defines "societies" to include any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent but does not include companies, trade union, co-operative society and school association (including parent-teacher association)

There is an ROS who handles affairs of the societies registered under the Societies Act 1966.

It is pertinent to note that all societies must be registered with the ROS[76]. There are several requirements which have to be fulfilled before ROS can register a society and the ROS may refuse registration if such conditions are not fulfilled[77] . It is an offence for a society to contravene any condition imposed on it by the ROS[78]

76 Section 7 Societies Act 1966.
77 İbid.
78 Section 7(5) Societies Act.

ii. Education Institutions (Discipline) Act 1976 [Act 174]

The main purpose of this Act is to allow the executive to restrict student or student bodies from associating with certain other organizations.

For instance, section 10 of the Act provides for restrictions on student's society, organization, body or group.

Subsection (2) states that "a student of the institution shall not become a member of any unlawful society, organization, body or group of persons, whether in or outside Malaysia.

Students also not allowed to be involved in political party activities within the campus. This includes show of support to any political organization or any other unlawful society whether in or outside Malaysia.

Students may be liable to disciplinary action (by the University) for contravening the above prohibitions[79]

iii. Universities and Universities Colleges Act 1971 [Act 30]

Section 15 of the Act provides for certain prohibition on activities of students or students' society, organization, body or group.

A student is prohibited from becoming a member of any political or of any unlawful society, organization, body or group of persons, whether in or outside Malaysia. They are prohibited from joining any unlawful society deemed unlawful by the University.[80]

The University is also given power by the Act to regulate activities of students, societies, organizations and a body or group of students of the University within the campus.

8. CASE ANALYSIS ON FREEDOM OF ASSOCIATION

8.1 *MALAYSIAN BAR & ANOR V GOVERNMENT OF MALAYSIA [1987] 2 MLJ 165*

Facts of the case

8.1.1 The issue which arose in this appeal was the constitutionality of sub-section (1)(a) of section 46A of the Legal Profession Act

79 Section 12 Educational Institutions (Discipline) Act 1974.

80 Section 15 (3) Universities and Universities Colleges Act 1971.

1976. In 1978, Parliament amended the Legal Profession Act 1976 vide the Legal Profession (Amendment) Act 1978. Section 46A was introduced. This section disqualified lawyers of less than 7 years standing at the Bar from being elected as members of the Bar Council, State Bar Committee or any committee of the Bar Council.

8.1.2 The same prohibition was also extended to lawyers who were legislators, trade union leaders, political party leaders or leaders of any other organization, body or group which has the objectives or carries on activities which can be construed as being political in nature. The law gives power to the Attorney General to declare an organization as falling within the prohibition and at the same time, ousted the jurisdiction of any Court from entertaining a case which challenges that declaration.

8.1.3 The Malaysian Bar challenged the constitutionality of the said section 46A through this suit which it sought a declaration that section 46A was "ultra vires" Art. 10 of the Federal Constitution guaranteeing freedom of association and section 46A was therefore void under Art 4(1) of the Federal Constitution.

8.1.4 The Supreme Court (SC) [by majority] held that: the classification in subsection (1)(a) of section 46A of the Legal Profession Act 1976 is based on a reasonable criteria. There is clearly a nexus between the basis of classification and the legitimate object of the Legal Profession Act 1976 as amended and as such the classification is valid and constitutional.

8.1.5 The above classification is clearly founded on an intelligible differentia. It is important that the Malaysian Bar should be independent and managed by experienced lawyers because such a Bar ensures an independent judiciary.

Comments

8.1.6 This case talks about few areas with respect to freedom of association. First and foremost, it reiterates the law that everyone is free to form or join an association. While maintaining that such freedom is guaranteed by the Constitution, the Court has shown its willingness to declare that certain laws enacted by Parliament governing such freedom to be constitutionally valid.

8.1.7 In this case, the Court also talks about the differences between the right to form association and the right to manage them. There is no doubt that the right to association is constitutionally guaranteed. However, the same cannot be said as to the right to manage that association. In other words, the parliament can enact laws to restrict or limit the right of an individual or groups of people to manage an association. They can put restrictions as to the criteria/ conditions to be fulfilled before that person is eligible to hold certain management positions in that particular organization.

8.1.8 Then, there was another view that the fundamental rights guaranteed under part II is part of the basic structure of the Federal Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure. This a view adopted by the former Federal Court in ***Loh Kooi Choon v Govermnment of Malaysia***[81]*:*

> *"The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our Courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by* ***Lord Macnaghten in Vacher & Sons Ltd v London Society of Compositors***[82] *where his lordship noted that [some people may think that the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court and its only duty is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature]*
>
> *It is the province of the Courts to expound the law and "the law must be taken to be as laid down by the Courts. However, much their decisions may be criticized by writers of such great distinction per Roskill LJ in* ***Henry v Geopresco International Ltd***[83]

81 [1977] 2 Malayan Law Journal 187.
82 [1913] Appeal Cases 107, p.118.
83 [1975] 2 All England Report 702 p. 718.

Those who find fault with the wisdom or expediency with the impugned Act and with vexatious interference of fundamental rights, normally must address themselves to the legislature and not the courts, they have their remedy at the ballot box"

8.1.9 This view was however, commented by the later Federal Court's case of ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333*** where the Court rules that the reliance made on the Vacher's case was misplaced because the remarks were made in the context of a country whose parliament is supreme. The Federal Court refers to the judgment of Suffian LP in ***Ah Thian v government of Malaysia [1976] 2 MLJ 112*** where his Lordship said:

"*The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have written constitution. The power of Parliament and of State Legislation in Malaysia is limited by the Constitution and they cannot make any law they please*"

8.1.10 It is clear from the above case the right to associate is different from the right to manage. Yes, it is your constitutionally guaranteed right to form or join association (subject to laws) but the right to manage an association is not guaranteed. Furthermore, right to representation must be distinguished from the right to candidacy. The fact that new lawyers as a class are disqualified from serving the governing bodies, does not mean that they are without representation, unless they are also denied the right to vote at election due merely to their lack of professional experience. Since the right of voting is not affected, it is hard to see there can be a denial of the right of representation. In any event, the requirement of durational experience only delays the opportunities of new lawyers to become candidates or to be appointed to their governing bodies.

8.1.11 In addition, the seven year requirement helps to ensure that lawyers should have sufficient professional experience and should familiarize themselves with various problems faced by the Bar before they serve in the governing bodies in the legal profession. The seven year period from a date a lawyer is called to the Bar has not been shown to be patently unreasonable. As such, the classification in sub-section (1)(a) of section 46A is based on a reasonable as well as permissible criteria under Art. 10 of the Federal Constitution.

8.1.12 In England, the freedom of association is also guaranteed on its citizens. However, it is not absolute.

8.1.13 ***In R v Jordan and Tyndall***[84], the defendants were members of a fascist group, Spear-head. They exercised in military fashion and were known to be storing chemicals capable of being used for the manufacture of bombs. They were convicted under section 2(1) (b) of the Public Order Act 1936.

8.1.14 In another case of ***Director of Public Prosecutions v Whelan***[85], the defendants were charged under section 1 of the 1936 Act. Participating in Sinn Fein march in Northern Ireland, the defendants wore black berets, dark clothing and carried the Irish flag. It was held that the wearing of similar clothing could amount to a "uniform". Specific groups are proscribed, and Schedule 2 to the Terrorism Act 2000 lists such groups.

8.1.15 Therefore, it is clear though freedom to associate is guaranteed in England, there are certain laws enacted with the intention to regulate and supervise such freedom which is (to a certain extent) somewhat similar to that in Malaysia.

8.2 DEWAN UNDANGAN NEGERI KELANTAN & ANOR V NORDIN BIN SALEH & ANOR [1992] 1 MLJ 697

Facts of the case

8.2.1 The respondents were elected members of the Kelantan State Legislative Assembly at a General Election. However, pursuant to Article XXXIA (impugned Article) of the Kelantan State Constitution, the State Legislative Assembly of Kelantan passed a resolution that the first and second respondents, who had resigned from the political party which they had stood and were elected in the elections, had ceased to be members of the legislative assembly and their seats were declared vacant. A by-election was held in the constituencies concerned wherein the first and second respondent stood for election but they were defeated. Subsequently, they brought an action in the High Court seeking a declaration that the

84 (1963) Criminal Law Report p.124.
85 (1975) All ER 347 (HL).

impugned Article was invalid, null and void as it contravened Art. 10 (1)(c) of the Federal Constitution which guarantees fundamental right of freedom of Association.

8.2.2 The High Court granted a declaration in favour of the respondents that the impugned Article was void under Art. 4 of the Federal Constitution to the extent that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party. The appellants appealed against that decision. It was argued that the High Court had acted without jurisdiction in further granting the declaration that the respondents are and continue to be lawful members of the State Legislative Assembly of Kelantan for the constituencies concerned.

8.2.3 Abdul Hamid Omar LP held, in dismissing the appeals:

i- In testing the validity of the state action with regard to the fundamental rights, what the Court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.

ii- The enunciation of the right to freedom of association in Article 10(1)(c) of the Federal Constitution means a citizen's right to form, to join, not to join or resign from an association. Any restriction to disassociate from an association would make the guaranteed right ineffective and illusory.

iii-A constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

iv-In this case the Kelantan Constitution- (a State law)- by Art. XXXIA, seeks to impose a restriction on the fundamental right of a member of the legislature to

form associations, which of course includes the right to disassociate and it operates by way of disqualification once the maker exercises that right. It is inconceivable that a member of the legislature can be penalized by any ordinary legislation for exercising a fundamental right where the Federal Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, *and NO other grounds* (emphasis added)

v- The direct and inevitable consequence of the Impugned Article of the Kelantan State Constitution (which is designed to enforce party discipline) is such that such a provision does impose a restriction on the exercise by members of the legislature of their fundamental right of association guaranteed by Art. 10(1)(c) of the Federal Constitution and such a restriction does not fall within any of the grounds for disqualification specified under section (6)(1) of Pt. I of the Eight Schedule to the Federal Constitution. By virtue of Art. 4(1) of the Federal Constitution, the impugned Article of the Kelantan Constitution is that extent void.

Comments

8.2.4 The decision of the Supreme Court should be commended for the protection it affords to the right of association. There is no doubt that as far as the formation and the joining of political parties are concerned, individuals should have unfettered freedom of choice. No one should be forced to belong to a political party when the party's ideology or manifesto is not preferable to him. Politicians should be free to resign from one political party and to join another at any time they so wish. However, for the sake of discussion, there are some views pertaining to the decision[86]

8.2.5 Firstly, it was argued that it is difficult to accept the argument that a law imposing an obligation on a political defector

86 Rabiu Sani Shatsari & Kamal Halili Hassan, Constitutional Protection of Freedom of association for Trade Union Purposes, Malayan Law Journal Articles [2007] 1 (MLJ) Malayan Law Journal.

to vacate his legislative seat won under the platform of his former party, is an abridgment of his right to resign from a political party. This is because the law does not prevent him from resigning from one political party to join another. All the law requires is that after the resignation, such politician should vacate his seat for a by-election. The law does not provide for automatic vesting of the State Legislative Assembly seat in the defector's former party to be filled by the party in anyway it wants. All it does is to create a vacancy to be filled up through a by-election in which the defector's new party may contest, either by fielding him or by fielding another candidate.

8.2.6 Secondly, under a parliamentary system of government where the stability of an elected government rests heavily on the majority it has in the legislature, this approach to the problem of political defection seems fair. It is fair to the political party in which the defector has resigned whereby the support of the party has been critical to the success of the defector in winning the election in the first place.

8.2.7 Thirdly, it can also be said that the impugned legislation is fair to the electorate in the sense that if the reason for the successful election of the politician is the manifesto of his party and not his personality, a chance is now given to the electorate to elect candidate of the same party.

8.2.8 To better understand the matter, it is necessary for us to carefully examine the judgment of the Supreme Court above. The learned Supreme Court judge had made it clear that it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles so that the background events which led to the passing of the impugned legislation are irrelevant to the question of its constitutional validity.

8.2.9 The Supreme Court went on further to state that in testing the state action with regard to fundamental right, what the Court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory. Here, it is evident that the legislation in question affects the right of a person

to leave his former party and join the party of his own choice. If the legislation was held to be constitutionally valid, it would mean that not only he was not allowed to leave an association or group which he did not wish to be in anymore, he is also prevented from joining a group or political party of his choice which is totally against the freedom of association as spelt out under the Federal Constitution.

8.2.10 Another point to note here is that under Article 10(1)(c) of the Federal Constitution, only Parliament may by law impose such restrictions be it in the interest of security of the Federation, public order or morality and on no other ground. In the present case however, the impugned legislation was enacted by the State Legislature and this prompted the Court to hold that it is wrong. The Federal Constitution expressly confers the power to enact laws imposing such restriction on Parliament only and such a body can only enact law to impose restrictions on specified grounds. Therefore, even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid (and it is not), it is clear that such restriction could not be imposed by a law passed by any state legislature.

8.2.11 To this, Raja Azlan Shah FJ (as he then was) in ***Loh Kooi Choon v The Government of Malaysia***[87] said:

> "*As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships of the Privy Council in* ***Hinds v The Queen [1976] 2 WLR 366*** *took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights form part of the substantive law of the state and until amended by whatever special procedure is laid down in the Constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude of its legislative power*"

87 [1977] 2 MLJ (Malayan Law Journal) 187.

8.2.12 One of the submissions put forward by a counsel in this case was the impugned Article does not impose any restriction on the fundamental right of association of the Respondents because they were free to exercise it and it is only if they did so they would incur the disqualification from membership of the legislature.

8.2.13 The Court refers to the case of ***Gunaratne v People's Bank*** [88]. In this case, the appellant had been required to resign from a Trade Union in order to qualify, under the terms of his employment, for promotion. He refused to sign and sought a declaration from a District Court that his fundamental right to freedom of association under Art. 18(1)(f) of Sri Lanka 1972(equivalent to our Art. 10(1)(c)) had been violated. The District Court and the High Court agreed with the proposition. However, it was reversed by the Court of Appeal. The Supreme Court allowed the appeal and restored the judgment of the District Court. The Court had this to say:

> *"But, on the other hand, if a person is a member of a lawful trade union which is engaged in lawful activity, a dismissal solely on this ground would certainly violate the constitutional guarantee. It was however sought to interpret this case to mean an employee can be dismissed for exercising his fundamental right of joining or being in a union and that it would be a sufficient answer to an action challenging the dismissal to say that the order does not in fact interfere with the employee's right of association as this right still remains with him. Applying this argument to the facts of the present case, it is suggested that it would be legitimate to have a condition in the contract of employment against the employee joining a union and such a condition would not as much interfere with his right of association because he will continue to have the right and if he insists on it, he must seek employment elsewhere. This appears to me to be a misunderstanding of the language and a complete misreading of the case. Such an interpretation which strangely enough had appealed to the Court of Appeal would, if given effect to, result in nothing less than this guaranteed right being wiped out altogether from the Constitution"*

88 [1987] LR Com 383.

8.2.14 Therefore, it appears here that the Court had stood firm to the fundamental rights rooted in the Federal Constitution. The Court has refused to treat this matter lightly. Any provision which violates or seeks to violate the freedom of association will be declared void and unconstitutional.

9. CONCLUSION

9.1 To conclude, it can be safely said that the freedom of expression and association in Malaysia are constitutionally guaranteed. However, such a guarantee is qualified. Both judicial and statutory limits have been read into these freedoms in Malaysian jurisprudence. This is necessary as the right to free speech and to form associations do not exist in vacuum but jostles with competing interests and counter-values. Judges have to engage in the delicate process of balancing these rights against other competing interests.

9.2 It must be reiterated again that the courts are entrusted with a heavy responsibility in illuminating, maintaining and positioning the balance by which nations chart their course in law and policy and which ultimately determines the economic well-being, quality of life and the resilience of society in the face of global challenges of the day.

9.3 Model laws on freedom of speech and expression in other parts of the world cannot and should not be copied wholesale. They must be modified and suited to the local environment of a particular nation. There is certainly no such thing as absolute freedom of speech and expression. What we have is relative freedom that is, freedom governed by law or defined in the context in which the society exists. Freedom of expression and information is very much dictated by the local environment and to some extent the external dynamics of the nations. It differs from nation to nation depending on the varying factors underlying the nation. It is crucial therefore to strike a balance between the conflicting interests, on the one hand to allow freedom of speech and expression and the imparting of information and on the other hand respecting and observing the rights of the other affected parties be it the individuals, government or public authorities for the achievement of peace, efficiency and

productivity. The law on political defamation seeks to provide a balance between order and liberty and the right of the state and the rights of the citizens.

9.4 As for rights of association, it can be safely said that it is a feature of modern civil society. It organizes individuals into interest groups such as political parties, student bodies and other societies. In its ordinary constitutional sense, it means the freedom to work for the establishment of an association, to belong to an association, to maintain it and to participate in its lawful activity without penalty or reprisal.

9.5 In a nutshell, these freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen. But none of these freedoms is absolute or uncontrolled, for each is liable to be curtailed by laws made or enacted by Parliament to the extent mentioned in the Federal Constitution.

THE SITUATION OF THE RIGHT TO OPINION AND EXPRESSION IN MONGOLIA

Anar RENTSENKHORLOO

MONGOLIA

THE SITUATION OF THE RIGHT TO OPINION AND EXPRESSION IN MONGOLIA

Anar RENTSENKHORLOO[*]

Foreword

The Rights and freedoms of individuals and citizens promulgated in the Constitution and principle of privileges of those rights and freedoms cover legislative, executive and judicial powers imposing them certain obligations and connecting them with each other. The state has the duty to admit, implement and protect rights and freedoms of individuals and citizens. And the duty of the democratic state is to not adopt laws that contradict with abolish or violate rights and freedoms of individuals and citizens.

An implementation of law provisions concerning rights and freedoms of individuals and citizens is secured by the process of establishing of extended network, including the Constitutional Court, aimed to protect rights and freedoms of individuals and citizens from the state. Within its framework to supervise the constitutionality, the Court is an organization that owes a significant duty to protect rights and freedoms of individuals and citizens in compliance with goals, scopes and methods of its activity. This is defined by the admitting of the advantages of the institution of rights and freedoms in the fundamental structure of the constitutional system.

The Constitutional Court is to ensure the integration of the legislative and judicial practices to protect rights and freedoms of individuals and citizens. This dual duty proves the fact that security of the Constitution and protection of rights and freedoms of individuals and citizens are inseparable. This notion is stipulated in

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the legislative Act, Law on the Constitutional Court of 1992. In the contemporary world, it is common in many countries to determine the institution of human rights and freedoms in the implementation of Constitutional supervision. For example, in Austria in 1984, the Constitutional Court considered 127 acts that set legal norms as unconstitutional and, thus were invalidated, among which 16 acts were deemed as restricting fundamental human rights; and in 1985, the Court considered 33 acts as contradictory to the Constitution, among which 22 acts were invalidated on the same ground.

In Mongolia, at the first stage of the establishing and developing of the rule of law, it is obvious that the rights and freedoms of individuals and citizens will be in priority in the activity of the Constitutional Court (Tsets). They are the main criteria in determination of the constitutionality of the laws and other legal acts.

The main duty of the Constitutional Court is to protect rights and freedoms, and this is based on the principle that human rights and freedoms are not transferable, they are natural or in other word exists from the birth.

The notion about priority of the Constitutional Court in protection of human rights and freedoms has originated since 1990 when it was stipulated to establish the committee of the constitutional supervision. The abovementioned committee had not been established due to historical events until the adoption of the new Constitution of 1992.

As there was some apparent weakness of the activity of constitutional supervision system forms such as committees and unions, ideas to establish in post socialist countries the constitutional supervision institution in model and form were popular in the post-war Europe. It is essential to strengthen this institution as the Constitutional Court is an intense guarantee for protection from violation of democracy, law and human rights. An extensive experience of the constitutional courts of democratic countries has proven how important role it has played in the implementation of these achievements. The Constitutional Court ensures human

rights and freedoms when it enforces its function to supervise the constitutionality of laws.

On freedom to free expression of opinion

The right to free expression of opinion and its main means, the freedom of media, has been still in the front line of fight, because the right to free expression of opinion is usually realized through supporting or criticising of the state policy after its evaluation. Professor Sovd G. (Doctor of Jurisprudence) defined that this right as "a very strict form of expressing political rights and freedom that includes the core of human mentality freedom". Although the Constitution of 1924 proclaimed the freedom of "expression and press", all media means were put under the supervision of the ruling party and the state authority, and were the means of one party's ideas until 90s. After the acceptance (1990) and guarantee of pluralism in the new Constitution (1992), this right has become enforceable.

The right to free expression of opinion does not mean to express anything in your mind by any means. To exercise lawfully this right, one should understand the meaning of its content very prudently, have authentic attitude to things and facts, respect the others' inalienable rights, legitimate interests, dignity and reputation. This is the process of expressing issues of state and social importance that directly concern human rights and interests, which is directed from "the bottom to the top" or from people to the state (rulers) through mass media.

Thus, some gain, but others get displeased in the result of media release. In other words, "an expression of opinion is a direct expression of the relation of the individual with the society … the prerequisite of open discussion of the issues of social concerns and creating of social opinion".

INTERNATIONAL STANDARDS

The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[1]

The UDHR, as a UN General Assembly resolution, is not directly binding for States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

The *International Covenant on Civil and Political Rights* (ICCPR), a treaty ratified by over 145 States, including Mongolia,[2] imposes formal legal obligations on State Parties to respect its provisions and elaborates on many rights included in the UDHR.[3]Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

> 1. Everyone shall have the right to freedom of opinion.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),[4] which states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

Guarantees of freedom of expression are also found in the two other regional human rights systems, in Article 13 of the *American*

1 UN General Assembly Resolution 217A(III), adopted 10 December 1948.

2 Mongolia ratified the ICCPR on 18 November 1974.

3 UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Mongolia ratified the ICCPR on 18 November 1974.

4 Adopted 4 November 1950, in force 3 September 1953.

Convention on Human Rights[5]and Article 9 of the *African Charter on Human and Peoples' Rights*[6]

> Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946, the UN General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[7]The European Court of Human Rights has repeatedly stated:
>
> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[8]

Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law."[9] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the

5 Adopted 22 November 1969, in force 18 July 1978.

6 Adopted 26 June 1981, in force 21 October 1986.

7 14 December 1946.

8 *Handyside v. United Kingdom,* 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

9 *Thorgeirson v. Iceland,* 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

> preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic 20 society.

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[10] The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[11]

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them.
>
> Were it otherwise, the press would be unable to play its vital role of "public watchdog".[12]

The Court has also held that Article 10 applies not only to the content of expression but also the means of transmission or reception.[13]

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se.* However, these obligations do apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly

10 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.*

11 *Thorgeirson v. Iceland, note 19, para. 63.*

12 *See Castells v. Spain, note 20, para. 43; The Observer and Guardian v. UK, 26 November 1991,* Application No. 13585/88, 14 EHRR 153, para.59; and *The Sunday Times v. UK (II),* 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65.

13 *Autronic AG v. Switzerland,* 22 May 1990, Application No. 12726/87, 12 EHRR 485, para. 47.

bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public's right to know, and to guarantee pluralism or access, and it is therefore particularly important that they promote these rights.

Pluralism

Article 2 of the ICCPR obliges States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." This means States are required not only to refrain from interfering with rights, but also to take positive steps to ensure those rights, including the freedom of expression. Thus, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism."[14] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[15]

Broadcasting organization which gives service for public makes an important contribution to the development of pluralism. Therefore, the number of international agreements stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognize that

14 *InformationsvereinLentia and Others v. Austria,* 24 November 1993, Application Nos. 13914/88 and 15041/89, 17 EHRR 93, para. 38.

15 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 21, para. 34.*

freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 10(2) of the ECHR also recognizes that freedom of expression may, in certain prescribed circumstances, be limited:

> The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Restrictions must meet a strict three-part test.[16] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[17]

16 See, *Mukong v. Cameroon,* 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

17 See, for example, *Thorgeirson v. Iceland,* note 19, para. 63.

First, the restrictions must be provided by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[18]Second, the restrictions must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR and Article 10(2) of the ECHR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting the freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "demand of social interest" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[19]

Obligation to Adhere International Law

Mongolia is a member of the United Nations and a State Party to the ICCPR. As such, Mongolia is legally bound to protect the freedom of expression in accordance with international law.

This is formally recognized in Article 10 of the Constitution of Mongolia which states:

> (1) Mongolia adheres to the universally recognized norms and principles of international law and pursues a peaceful foreign policy.
>
> (2) Mongolia fulfills in good faith its obligations under international treaties to which it is a Party.
>
> (3) The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
>
> (4) Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.

18 *The Sunday Times v. United Kingdom,* 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.

19 *Lingens v. Austria,* 8 July 1986, Application No. 9815/82, 8 EHRR 407, paras.39-40 (European Court of Human Rights).

Therefore, both international law and the Constitution of Mongolia require domestic law and practice to be consistent with ICCPR treaty obligations of Mongolia on freedom of expression.

SITUATION IN MONGOLIA

Constitution and Other Laws

Mongolia is a member of the United Nations and a State Party to the ICCPR. As such, Mongolia is legally bound to protect the freedom of expression in accordance with international law. This has been promulgated in the Constitution of Mongolia.

Article Sixteen of the Constitution ensures the freedom of expression as follows:

> Citizens of Mongolia are guaranteed to enjoy the following fundamental rights and freedoms:
>
> 16) Freedom of thought, opinion and expression, speech, press, peaceful assembly. Procedures for organizing demonstrations and other assemblies shall be determined by law.

It can be said that these human rights are the core of the human rights and freedoms.

First of all, an individual shall have his own belief or be impartial from any ideas or pressure in making decision to believe or not believe in something. Therefore, free expression of opinion with confidence is a part of an inalienable human right.

People realize this freedom through publicizing, speech at the meeting, seeking of and obtaining information. But if the person violates the others' rights and freedoms in such ways as defamation, intentional disrespect of reputation and dignity while making speech or publicizing, he/she shall take certain legal responsibility for these acts.

The Constitution allows undertaking peaceful meetings and demonstrations. It is considered that there are no restrictions except those set forth in the laws in exercising of this right in the democratic society for the security of the state or public security, protection of

social order, health and morality of the population, or interest to protect the rights and freedoms.

No one shall be persecuted for participation in peaceful meeting or demonstration.

The adoption of a number of laws related to the right to free expression of opinion since the adoption of the new Constitution in 1992 has become one step toward the realization of this right. Some laws including the Law on Freedom of Media (1998), the Law on Public Radio and Television (2005), the Law on Transparency of Information and Right to Access to Information (2011) and several other laws have provided for regulations of media relations. The Law on Freedom of Media prohibits all forms of censorship.

The Civil Code, the Criminal Code and the laws related to election provide for regulations concerning defamation. In particular, the Law on President Election, 2012, provides for strict regulations on defamation (articles 33.5.5; 33.712; 33.11), and according to them the Agency for Fair Competition and Customers was obliged to control over the content of mass broadcasting programs during the election period. The activity of the radio or television company was to be suspended for three months if the Agency concluded their activity breached laws, which means that the Government censorship became factual. The framework covers mobile phones, news and news sites. Pursuant to the Civil Code, an author or journalist had to prove that the information was true.

Since 2011, the Government has adopted main policy instruments related to the traditional and electronic media, and more 30 regulations such as "General conditions and requirements of television and radio broadcasting regulations", "General conditions and requirements of digital content service" and regulations on issuance of license for mass media and regulations of mechanical conditions have been approved and been adhered to by the Communication Regulation Committee. Since then, the Committee has been functioning as the regulatory body.

In order to control opinions on website pages the Government adopted a Resolution numbered 01 on "Unified System of

Opinions on Website Pages" (January 5, 2013), and based on this, the Communication Regulation Committee adopted a Resolution numbered 05 on "Regulations of Relations of Opinions on Websites" (February 27, 2013). It is obvious that the state has the power to impose legal responsibility, take appropriate measures and restrict in case of breach of defamation or confidentiality infringe while exercising the right to opinion.

Electronic communication was broadly commenced when Mongolia first connected to the internet on January 17, 1994. Now there have been functioning around 200 web pages, and more than 50 of them have been functioning in active form or included into the type of news site. There are about 10 thousands of domain names, 54 thousand of twitters, more than 400 thousand face-bookers and about 70 thousand bloggers in the internet network.

Internet is an important sphere for enforcing human rights and freedoms, especially for providing the right to opinion. It plays an important role for the sustainable development and insurance of other human rights. Thus, internet must be the means which allows equal access to information for all people. People owe the duty not to defame others, infringe their reputation and interfere to the personal environment (freedom) while exercising their own right to opinion.

Some countries, for example People's Republic of China, North Korea, some countries of Latin America, Africa and Arabia, limit the expression of opinion using electronic network.

World Summit on the Information Society (WSIS)adopted the declarative principles implying "Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers". The document infers:

- No one should be required to register with or obtain permission from any public body to operate an Internet

service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.

- Filtering systems which are not end-user controlled – whether imposed by a government or commercial service provider –a real form of prior-censorship and cannot be justified. The distribution of filtering system products designed for end-users should be allowed only where these products provide clear information to end –users about how they work and their potential pit falls in terms of over-inclusive filtering.

The Report of the Special Rapporteur for Human Rights on the freedom to opinion was discussed during the UN's 17th and 20th Sessions of the Human Rights Council. As a result, the UN invoked member states to avail and provide free hourly access to internet even in time of political cluster, insisted on illegality of using censorship.

The Special Rapporteur for Human Rights of the UN stated: "It should be admitted that internet as any achievement of the technology shall not be used in excess to cause harm to others." He pointed out that there should be three aspects to take into attention in controlling over the electronic content. Firstly, be legally grounded, understandable/clear and transparent; secondly, be in compliance with the provision of the article 19; thirdly, be essential and in conformity with the goals.

As for today, 42 states joined and ratified the Convention on Cybercrime adopted by the Council of Europe in November 2001, whereby 11 states have signed it and are going to join soon. According to the Convention, if member states have obligations to cooperate in combating with such crimes as damaging software, illegal copying, fraud in the internet environment, disseminating information toward racial discrimination and child pornography,

etc., the second chapter of this document includes crimes against copyright and other intellectual rights in the definitions of the types of crimes.

There are still many cases of violation of human rights and freedoms like interference to the human dignity, intentional defamation, use of discourteous words, and disclosure of the individual's confidential information. Human rights Commission of Mongolia received and resolved around 800 complaints in 2013 and half of these complaints involve the violation of this right. For example, a journalist of electronic news network used words and expressions that led to understanding that the person could commit an offence or committed it while presenting information about the person who was suspected. Also, internet network information about the victims of domestic violence includes photos, names, details of personal information such as work place, home address and biographical data, or contains responses with defaming words.

Cases concerning the Right to Opinion and Expression

1. Disputes of Constitutional Court (Tsets) regarding the right to opinion and expression

Discussion about whether the Law on Procedure for Demonstration of Mongolia infringed the Constitutional Law of Mongolia

Laws and Other Resolutions that Infringed the Constitutional Law:

Law on Procedure for Demonstration, passed by Parliament of Mongolia in July 7, 1994:

- Article 11.3.5 "… person with mental illness and children are not allowed to participate in demonstration…"
- Article 12.1.4 "it is prohibited to participate in demonstration with children and person with mental illness"

Articles of the Constitutional law that considered to be violated:

- Article 10.2 "Mongolia shall fulfill in good faith its obligations under international treaties to which it is a party"
- Article 16.16 "freedom of thought, free expression of opinion speech, press, peaceful demonstration and meetings. Procedures for organizing demonstrations and other assembles shall be determined by law"

Statement, background and standing of the dispute parties:

1. Content of the information of citizen L:

Article 11.3.5 of the Law on Procedure for Demonstration of Mongolia is infringing article 26*"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"* of the International pact on civil and political rights and article 2.1 *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"* of that pact. Therefore, Article 11.3.5 of the Law on Procedure for Demonstration of Mongolia discriminates people by their health state which refers to other status in the pact and violates article 10.2 *"Mongolia shall fulfill in good faith its obligations under international treaties to which it is a party"* of the Constitutional law. Article 11.3.5 of the Law on Procedure for Demonstration of Mongolia violates Article 16.16 *"freedom of thought, free expression of opinion speech, press, peaceful demonstration and meetings. Procedures for organizing demonstrations and other assembles shall be determined by law"* of the Constitutional law.

Moreover, the provision 11.3.5 "*the organizer of demonstration is obliged not to have children participated in the demonstration*" of Law on Procedure for Demonstration of Mongolia and provision 12.1.4 "*participants in the demonstration has the obligation not to go with children to the demonstration*" of such law violate the provision 2.1 "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*" of the Convention on Rights of the Children. Therefore, these articles also violate the article 10.2 of the Constitutional law of Mongolia. Thus, please review my information and settle the dispute by reviewing the case within a legitimate time.

2. Statement of N, Representative of Parliament:

The Law on Procedure for Demonstration is an organized act with the purpose of letting citizens to express their opinion and expressions regarding politic, society, economy, human rights and freedom to the public. In Article 5 of this law, it is stated that organizing any activities of sports, arts, celebration and other similar activities that are organized by citizens, which is not relevant to the topics of this law, shall not be regulated by this law. So, this means children can organize demonstrations regarding the matters provided in provision 5.2 of the Law on Procedure for Demonstration, but this is not regulated by this law. If it was regulated under the law, all requirements for adults such as getting permission, carrying responsibility, enforced dismiss are also required for children. Therefore, this article is regulated like that. The purpose of prohibiting children to participate in demonstrations was not to limit the rights of the children but to protect their life, health, psychological features and their interest from any wrong impact.

a) To protect from using age, mentality, and way of thinking of the children for protest of state or certain groups;

b) To protect from damaging children's life and health while enforcing dismissal of illegal demonstration by police and domestic military force;

c) To consider the children are not subject to administrative liability.

d) To protect children from adverse impact of demonstrations because it has high possibility to lead to breach of social order and insurgency.

e) To protect manner and morality of children from any adverse impact of demonstrations.

The Article of the Law to prohibit a person with mental illness to participate in demonstrations has the purpose stated in section 2 of this statement and protects them from being used to lead to insurgency. Furthermore, we considered that the rights and duties of the person with mental illness are restricted by national legislations because they lost their civil capacity wholly or partially.

3. Content of the statement of N, Representative of Parliament, in the hearing of the Constitutional Court:

The Law on Procedure for Demonstration of Mongolia regulates the relation to organize peaceful demonstration and assembly with political purpose. We should pay attention that there is term of "assembly" in international pacts. There are some procedures that allow setting restrictions for demonstration with the purpose of protecting social order and for other purposes in international covenants and pacts. Organizers of the demonstration has the right to challenge children and persons with mental illness in the demonstration. On the other hand, we should take into consideration that whether children and persons with mental illness have the right to engage in political activity because they do not have a full legal capacity. It is not like we removed their right to attend the demonstration and assembly, but entitled the organizers of the demonstration and assembly regarding this matter. There are no provisions that directly state restriction owing to health in international pacts. The content of provision 99 of the report of

Mongolian Government sent to the Committee for Children's Right of the United Nations is inconsistent with the concept of Law on Procedure for Demonstration of Mongolia.

Content of Certification, Judgment and Resolution Parts of the Constitutional Court Decision:

1. It is confirmed that International Covenant on the Rights of Children is effective as Mongolian laws because Mongolia acceded to the Covenant in 1990 and this covenant does not conflict with the Constitutional Court of Mongolia. In consideration of that, provision 11.3.5 "*organizer of the demonstration has obligation not to get children participated in demonstration"* of the Law on Procedure for Demonstration of Mongolia and provision 12.1.4 "*demonstration participant has the obligation not to go with children to the demonstration*" of such law are deprived of the right to peaceful demonstration and assembly of the children. Therefore, part of the information of the citizen L regarding this matter is reasonable.

2. Because the person with mental illness is considered to have no legal capacity, the law regulation of Mongolia that prohibits the person with mental illness to participate in demonstrations is reasonable and it is unacceptable to receive any request regarding this matter.

Based on Article 66 of the Constitution of Mongolia and the Article 19 of the Law on Constitutional Court of Mongolia, it is CONCLUDED that:

1. The Section 11.3.5 of Article 11 of the Law of Mongolia on Demonstration in which it is stated that "*the organizer of demonstration is obliged not to have children participated in the demonstration*" and the Section 12.1.4 of Article 12 of the Law in which it is stated that "*participants in the demonstration has the obligation not to go with children to the demonstration*" are in conflict with the Articles 10 and 16 of the Constitution of Mongolia and the Article 6 of Annex of the Constitution.

2. The Section 11.3.5 of Article 11 of the Law on Demonstration stating that "*the organizer of demonstration is obliged not to allow mental patients to participate in the demonstration*" is not in breach of the Constitution of Mongolia.

3. The State Great Khural is requested to deliver a response about these conclusions within 15 days following the receipt of this Resolution.

Content of the Resolution of State Great Khural of Mongolia No. 23 dated 26 April 1996 about the Resolution No.1 of the Constitutional Court dated 1996:

Upon review and discussion on the Resolution No.1 of the Constitutional Court dated 27 March 1996 regarding the relevant articles of the Law of Mongolia on Demonstration breaching the Constitution of Mongolia, it is RESOLVED by the State Great Khural that:

It is considered impossible to accept and acknowledge the Resolution of the Constitutional Court by which it is resolved that the Article 11.3.5 "*the organizer of demonstration is obliged not to have children participated in the demonstration*" and the Article 12.1.4 "*participants in the demonstration has the obligation not to go with children to the demonstration*" of the Law on Demonstration have breached the Articles 10 and 16 of the Constitution of Mongolia as well as the Article 6 of Annex of the Constitution.

Conclusion:

1. I don't agree with the first section of resolution part of the above mentioned Conclusion of the Constitutional Court. As some rights and obligations starts after reaching certain ages (for example, the right to vote for candidates of parliament election starts from age 18 and the right to be elected for parliament member starts from age 25), it is not wrong that the right to attend some assemblies and demonstrations starts from certain ages.

2. Prohibiting children to participate in demonstrations is a regulation to protect children, which means the

right to organize activities of sports, arts, celebration or other relevant activities and organize demonstration of children regarding such matters are open in this law. It is undeniable, if there is no limitation, people might use or provoke children for making demonstration regarding political, social and economic matters and conduct children forcedly to such demonstrations.

2. ***Civil and Criminal Cases concerning the Right to Opinion and Expression***

Protection of reputation, dignity and business reputation and indemnification of the damage are regulated under Articles 21, 27, 497, and 511 of the Civil Code of Mongolia and according to Articles 110, 111 of the Criminal Code of Mongolia, insults and defamation are considered as crimes.

In 2012, 67 civil cases regarding violation of reputation, dignity or business reputation and 2 criminal cases regarding insults and defamation occurred within Mongolia. In 2013, 43 civil cases regarding violation of reputation, dignity or business reputation and 7 criminal cases regarding insults and defamation were resolved by the court and the prosecutor within Mongolia.

Thereof, in 37 civil cases settled in 2012 and 23 civil cases settled in 2013, journalists and mass media are respondent for violation of others' reputation, dignity or business reputation. In 2012, there were no criminal cases concerning journalists and mass media, but in 2013, journalists and mass media committed crimes in 3 criminal cases.

From 2001 to 2013, 58.7% of the 533 cases concerning reputation, dignity, business reputation, defamation and insults resolved by the court were against journalists and mass media.

Government high officials who submitted claims to recover their reputation, dignity and business reputation against journalists and mass media demanded up to 200 million Mongolian tugrugs in 2012 and 30 million Mongolian tugrugs in 2013, whereas the compensation amount demanded from business organizations

reached 900 million Mongolian tugrugs in 2012 and 200 million Mongolian tugrugs in 2013.

In 86.5 % of the cases resolved by the court in 2012 and 84,6% of the cases resolved by the court in 2013, it was decided journalists and mass media were guilty or parties should be conciliated.

The rise of compensation amount from journalists and mass media and the number of defeated journalists and mass media not decreasing shows that government high officials and business organizations use the Articles of the Civil code and the Criminal code as remedies to threaten journalists.

Index compared to previous years

Year	Civil case		Criminal Case	
	Total cases	Concerning to mass media	Total cases	Concerning to mass media
2001	30	-	3	3
2002	39	-	-	-
2003	31	11	4	4
2004	44	37	2	2
2005	28	18	1	1
2006	40	40	1	1
2207	29	25	1	1
2008	36	31	3	3
2009	33	33	-	-
2010	39	25	5	5
2011	44	17	1	-
2012	67	37	2	-
2013	43	23	7	3
Total	503	297	30	16

3. *Cases in cyber network*

A. *Cyber freedom*

Registration and filter

The principle of the right to opinion and expression must apply in cyber media, too. However, according to the provision 7.1 of "general condition and requirement for regulation on digital content service", in case the average number of access of the users exceeds 3000 in one month, such a website must register with Communication Regulation Committee and the owner of the website obliged to use the filter program pursuant to article 7.3 of the above mentioned act.

Totally 108 prohibited words are registered with http://www.happywebs.mn, the filter program. Among those words, 86 words are Cyrillic and 22 words are transcribed as Latin words. For example, if the user uses Latin words of sex or terror for writing a comment, those words will change into stars (***).

Registering with the news website or using the filter program for websites is an action that violates International Law which Mongolia acceded and ratified.

The Right to Conceal the Name

The above-mentioned Government Resolution numbered 01 obliged the Minister of Justice to set "United System of Opinions in Websites" which gives an opportunity to take control over the opinions on websites with the cooperation of General Intelligence Agency of Mongolia, trace someone who wrote an opinion by insulting, seducing for adultery or threatening the content and take measures pursuant to the relevant legislation. The rule passed after this resolution obliged private companies operating internet telecommunication activities to assist in finding the people who violated the law and to collect information regarding such people upon request by government authorities.

There is no law to protect source confidentiality of the whistle-blowers and journalists in Mongolia and the tendency to prohibit journalists to use pen names dominates. For example, enterprisers

show IP address of the users in their comments to be seen in public under their obligation from Communication Regulation Agency.

Content Regulation and Censorship

Communication Regulation Committee takes control over the content of enterprisers operating activities of broadcasting, website, content aggregation and content supply. Prohibited contents under the law are defined generally, too comprehensive and lacking detailed definition such as "brutal theology" and "adultery" etc.,. General Police Agency, Intellectual Property Agency and Agency for Fair Competition and Customers are authorized organizations to take control and Communication Regulation Committee has a right to halt enterprisers' activity based on notification and letter of such organizations.

Since 2011, Communication Regulation Agency has halted the access to 172 websites from Mongolia because of copyright violation. Communication Regulation Agency puts the list of such websites onwww.black-list.mn, site.

The case of criticism of "Khaan jims", company, by Prime Minister of Mongolia on the news website shows that halting the website is not only about the copyright violation, but also censorship matters. According to rules of Communication Regulation Committee, before halting the activity of the website, notification and warning shall be delivered in advance.

In July 3, 2014, amjilt.com, website, uploaded interview of Prime Minister of Mongolia with the topic of "Khaan jims, resort is pouring its drainage into Tuul river" and relevant photo. Days after that, women, officials of Communication Regulation Agency, called to the authorities of the website and said "*I am calling according to the complaint from Khaan jims resort. Delete the interview or make a reclaim on this matter. If not, we will halt access to your website one hour later*". Three hours after that call, access to the website from Mongolia has halted and it is still halted as of now.

After national non-governmental organizations of mass media expressed their protest against halting the access to the website and

OSCE released news, "Khaan Jims" resort broadcasted one hour long ordered TV program by broadcasting systems simultaneously. It seems like this action is a serious breach of the right to get true information and the freedom of media.

Sovereignty of Communication Regulation Committee and Legitimate Restrictions of the Freedom of Expression

Communication Regulation Committee has a right to issue and terminate the license for mass broadcasting program, but this procedure is closed and lacks public participation. Pursuant to international law, regulatory organization shall be independent from the State and Mongolian domestic laws regulated as such, too. However, the Government has taken control over Communication Regulation Committee in fact. This organization is under the control of Agency for Information Technology, Post and Telecommunication, Government Agency, as a structure; the chief and members are appointed and dismissed by the Prime Minister; reports its work to the Government; and totally seven members are all representatives of the government authorities.

Since there is no separate law on mass broadcasting program in Mongolia, it is regulated under national rules and procedures. Established restrictions to do so are apparently in conflict because they are inconsistent with the requirements provided in Article 19 such as enacted by law, inevitable and within norms. Therefore, in my opinion it infringes the following provisions of "Rule on Making a Decision that Sets an Administrative Norm", approved by the Government Resolution numbered 119, dated May 19, 2010: "inconsistence with norms set forth in laws"; "it is prohibited to create new obligation which doesn't set forth in law and set prohibited regulations on the matters that are not prohibited under the law"; "does not charge with responsibility"; and "making evaluation on influence" etc,. All legal acts shall be registered with the united registration of the Ministry of Justice, but Communication Regulation Committee's "conditions and requirements" which are regulatory rules weren't registered[20] with the united registration.

20 Official letter with number 4/3496 of the Ministry of Justice dated in August 29, 2014.

Thus, making censorship on content and technical conditions, halting or suspending the rights of the license holder and repressing mass media by using such conditions and requirements infringe the Constitutional Law and the Law on Freedom of Media.

Remedy to way out:

1. To void the Government Resolution numbered 01 in 2013 and remove the state control system to take control over the opinion;
2. To void the rules named as "conditions and requirements" of Communication Regulation Committee.
3. To make amendment to the relevant laws within the scope of providing independency of Communication Regulation Committee, making public participation and control, providing transparency, removing the system of appointing or dismissing the members by the Government and to report its work to the Government.
4. To stop establishing restrictions on the freedom to opinion in mass media and stop acts of using registration or filter and issuing licenses.
5. To adjust restrictions on the content to the principle of provision 16.16 of the Constitutional Law and make amendment to the relevant laws.

B. Application of Articles and Provisions of the Criminal Code regarding Defaming Reputation

According to Article 110 and 11 of the Criminal Code of Mongolia insultsg and defamation are considered as crimes and have punishment of fine with a large scale of money, detention for up to 6 months and imprisonment for 2 to 5 years. Making a regulation as such panders to the censorship. Government officials use Criminal Code with the purpose of threatening the whistle-blowers and journalists to disclose their confidential resources of the information.

The Judge of the Court of Chingeltei district decided the case on the complaint of Altankhuyag, the Prime Minister of Mongolia against the editor and journalist of "Terguun", the newspaper. The judge ruled against the editor and journalist of "Terguun", the newspaper, and sentenced to fine with about 20 million Mongolian tugrugs; in case they avoided from paying the fine, the sentence would change into imprisonment for up to 3 years. The appealed court affirmed the decision of the first instance court, but the Supreme Court decreased the amount of fine imposed on the newspaper's editor by about 7 million tugrugs and affirmed the amount of fine, 7.160.400 MNT, imposed on the journalist of the newspaper.[21]

The provisions of the Criminal Code regarding defaming the reputation have caused a heavy loss to users of the social network, too.

> In August 18, 2014, by the complaint of Gansukh.A, Minister of Road and Transportation, the first instance court decided that Bat. Ts, tweeter, is guilty for the crime provided in provision 111.2 of the Criminal Code and sentenced him with detention for 3 months and 10 days. On September 9, 2014, the appealed court decided to send the case back to first instance court for reinvestigation and bailed out Bat.Ts.

The Law Draft of the "Law on Crime" initiated by the Ministry of Justice and introduced to the Parliament was praiseworthy for removing defaming of reputation from a crime. Unfortunately, this law draft was revoked.

CONCLUSION

Since 1990, Mongolia has taken a number of essential steps directed to establish democracy and ensure the respect for human rights. The freedom of expression is implemented more than it was before in practice now. Its proof is the fact that media branches which are relatively wholesome and with diverse structures have been established. On the other hand, the laws that established

21 http://globeinter.org.mn/?cmd=Record&id=1074&menuid=367.

numerous legal restrictions on the freedom of expression are still valid and applied very actively.

The main sector that needs reform is related to the regulations of media and cyber network. A clear indication of this is the political impact. This difficulty occurs to the individuals and organizations who want to express their opinions. The most serious problem is about the provisions regarding defamation of the Criminal Code and the Civil Code is still valid and active.

In order to adjust the laws that limited the freedom of expression to international law and to ensure the respect for this fundamental right, it is essential to implement a wide ranging reforming program. Such a right is the most important part of the democratic system of the state and only upon respecting those fundamental rights by law and in practice, democracy will develop.

BRIEF INFORMATION ABOUT THE CURRENT SITUATION OF THE FREEDOM OF ASSOCIATION IN MONGOLIA AND THE CONSTITUTIONAL COURT OF MONGOLIA

Dolgormaa TSEVEENGOMBO

MONGOLIA

BRIEF INFORMATION ABOUT THE CURRENT SITUATION OF THE FREEDOM OF ASSOCIATION IN MONGOLIA AND THE CONSTITUTIONAL COURT OF MONGOLIA

Dolgormaa TSEVEENGOMBO[*]

1. The Concept of the Citizen's Right to Freedom of Association as Declared in the Constitution of Mongolia

Morphologically, the verb "to associate" described as "to conjoin voluntarily and the reconciliation of the parties which were in quarrel previously" in the descriptive dictionary of Mongolian language[1].

As stipulated in Paragraph 10 of Article 16 of the Constitution of Mongolia the citizens of Mongolia are guaranteed to enjoy the right to freedom of association in political parties or other mass organizations on the basis of social and personal interests and opinion. Political parties and other mass organizations shall uphold public order and state security, and abide by law. Discrimination and persecution of a person for joining a political party or other associations or for being their member shall be prohibited. Party membership of some categories of state employees may be suspended.

The citizens exercise their constitutional right to the freedom of association through the act of establishing and joining to distinct associations and organizations of different forms such as political parties, associations, unions, confederates and committees etc.

The independence of the activities of these associations is displayed by the way they interact with the state and its authorities.

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1 Ya.Tsevel. *Mongolian Language dictionary. UB. 1966., p.866.*

It means the authorities and the civil associations should not limit the power given by law to them and impede the actions of each other.

The voluntary civil associations can be classified into the following categories according to the purpose of their activities and functions: 1. Political 2. Socio-economic and socio-cultural. Among the political associations, the most active player in the political life of a certain society is a political party. Political-public organizations also fall into this category. On the other side, professional associations, trade unions and associations for protection of the consumer's right are classified as socio-economic and socio-cultural associations. They are mainly denominated as non-governmental organizations.[2]

2.International Treaties & National Legislation on the Right to Freedom of Association

Hence Mongolia is a member state of the United Nations, it observes the Universal Declaration of Human Rights adopted by the United Nations General Assembly. Article 20 of the Universal Declaration of Human Rights states that 'Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.'; also Article 23 the Declaration stipulates that 'Everyone has the right to form and to join trade unions for the protection of his interests'. It is specific in terms of references to the freedom of association.

Mongolia has ratified several international treaties related to the freedom of association. Particularly, the International Covenant on Civil and Political Rights[3] /Article 22/, the International Covenant on Economic, Social and Cultural Rights[4] /Article 8/, also the Convention on the Right to Freedom of Association and the Right to Organize No.87 (1948), the Convention on the Right to Organize and Collective Bargaining No.98 (1949),

2 Hanns Seidel Foundation, Legal Education Academy. Interpretation of the Constitution of Mongolia. UB. 2009., p.83-85.

3 Mongolia signed the International Covenant on Civil and Political Rights, on January 5, 1968, and ratified it on November 18, 1974.

4 Mongolia signed the International Covenant on Economic, Social and Cultural Rights, on January 5, 1968, and ratified it on November 18, 1974.

the Convention on Protection and Facilities to be Afforded to Employees' Representatives in the Undertaking No. 135[5] (1971) have been adopted by the International Labor Organization.

The right to the freedom of association protected by international law and treaties are fully reflected and ensured in the national legislation of Mongolia. The citizens are entitled to exercise their right in way of establishing trade unions, non-government organizations, political parties and other public organizations.

The Constitution of Mongolia (1992), the Law on the Rights of Trade Unions (1991), the Law of Mongolia on Non-Governmental Organizations (1997), the Law on Political Parties /2005/, the Labor Law (1999), the Civil Code (2002), the Law on the National Registration of Legal Entities (2015) and other relevant laws and legislations provide for a legal framework of the right of people to form organizations. Namely, sixteen laws define the right to freedom of association.

Regulation on the Right to Freedom of Association in the Constitution of Mongolia

It has almost been hundred years since Mongolia made transition to the constitutional society. Its first Constitution was adopted in 1924. The Article of the first Constitution of Mongolia declared that 'In order to respect the right of common people to form associations or cooperatives, the state shall provide any assistance to this matter'. Article 82 of the next Constitution of Mongolia was adopted in 1940 and it stated that 'In order to conform with the interests of the working people and their organization and to develop own activities, citizens of the Mongol People's Republic shall be guaranteed with the right to association in public organizations: trade unions, cooperative associations, youth organizations, sports and defense organizations, cultural, technical, and scientific societies. The best and politically-conscious citizens in the ranks of the working

5 Mongolia ratified the Convention on the Right to Freedom of Association and the Right to Organize No.87 and Convention on the Right to Organize and Collective Bargaining No.98, on May 10, 1969, also ratified Convention on Protection and Facilities to be Afforded to Employees' Representatives in the Undertaking No. 135, on May 29, 1995.

/herders, workers and intelligentsia/ people shall be united in the Mongolian People's Revolutionary Party, which is the main force for leading all social organizations and shall be the vanguard of the working people in their struggle to strengthen and develop the country along non capitalistic way'. This is a clear expression of the fact that one-party dominant socialist state regime existed in Mongolia. Although the Constitution proclaimed the right to freedom of association, there were restrictions in terms of the exercise of this right.

The subsequent Constitution was adopted in 1960. Article 82 of this Constitution proclaimed that 'Citizens of the MPR shall have the right to association in public organizations: trade unions, cooperative associations, youth, sports and strengthening of friendship between the nations and for the world peace. The most active and politically conscious citizens in the ranks of the working class, members of cooperatives and working intelligentsia shall unite in the Mongolian People's Revolutionary Party, which is the vanguard and leader of all the state and other mass organizations of the working people '. During that time, citizens have exercised their right to freedom of association mostly in way of establishing the Trade Union, the Union of Revolutionary Youth, artistic associations, and other various voluntary associations.[6]

In 1992, a new democratic Constitution was adopted. As mentioned above, Paragraph 10 of Article 16 of the Constitution of Mongolia declared that 'The citizens of Mongolia shall have the right to form party or other public organizations and unite voluntarily in associations according to the social and personal interests and opinion. All political parties and other public organizations shall uphold public order and State security, and abide by law. Discrimination and persecution of a person or joining a political party or other public organization or for being their member shall be prohibited. Party membership of some categories of State employees may be suspended'. This provision provided the legal basis for enjoying the right to form a public

6 The second report of the implementation of the International Covenant on Civil and Political Rights in Mongolia /1985/.

organization following one's social and personal interests and opinion.

3. Status of the Right to Freedom of Association

Citizens exercise their right to freedom of association by establishing associations and unions and for the purposes of providing a basic understanding about these types of legal entities in Mongolia, they are divided into and introduced as three main categories, including:

1. Non-Governmental organization

2. Trade union

3. Political party.

A. Non-Governmental Organization

The Mongolian Law on Non-Governmental Organization was adopted in 1997. The purpose of this law is to regulate relations concerning the association of citizens and the establishment and activities of non-governmental organizations with the aim of implementing the human rights as specified in the Constitution of Mongolia and in international treaties to which Mongolia is a party.

To ensure the sound implementation of the right to freedom of association, it is important to set up a legal framework that guarantees the protection against state interference in non-governmental organization's activities in national laws and legislations. Article 9 of the Mongolian Law on Non-Governmental Organization states that 'Non-governmental organizations shall be independent of the State.', Article 5 of the same law prescribes that 'Citizens of Mongolia and legal persons except State bodies shall have the right to establish, individually or collectively, non-governmental organizations on the basis of their interests and opinions without the permission of any State body. Illegal restriction of the rights of citizens to establish non-governmental organizations is prohibited. No person shall be forced to join a non-governmental organization. Discrimination against and/or

restriction of the rights and freedom of any person on the grounds on his/her association with a non-governmental organization is prohibited.' These are provisions that are complied with the abovementioned requirement of international law, which is to ensure the independence of non-governmental organizations from the government.

In June 2015, 20074[7], Non-Government organizations are in operation in Mongolia.

In currently effective laws of Mongolia, non-governmental or civil society organizations are articulated in several ways, which are 'public body', 'non-governmental organization', 'non-state organization'. However, relevant laws that have been approved recently describe them as 'non-governmental organization'. Non-governmental organization shall have the rights and liabilities, arising with registration on the State Registration.[8]

In Article 4 of the Mongolian Law on Non-Governmental Organization, it is mentioned that there are two types of Non-Government organization, which are public benefit non-governmental organization and mutual benefit non-governmental organization. "Public benefit non-governmental organization" means a non-governmental organization that operates for the public benefit in the fields of culture, art, education, science, health, sport, nature and environment, community development, human rights, protection of the interests of specific subsets of the population, charity and other such fields, "Mutual benefit non-governmental organization" means a non-governmental organization other than a public benefit non-governmental organization that operates primarily to serve the legitimate interests of its members.[9] The non-governmental organizations are required to indicate in their articles of association which type of organization it is and the State registration is processed in accordance therewith.

7 Legal entity registration report in July of the General Authority for State Registration of Mongolia. https://burtgel.gov.mn/index.php?option=com_content&view=article&id=2026:2015-----6---&catid=53:statistic-medee&Itemid=253.

8 J.Amarsanaa. Right to freedom of association: Standards of Non-Governmental organizations. UB. 2001., p.10.

9 Article 4.2, 4.3 of the Law on Non-Governmental Organization of Mongolia

Non-governmental organization's civil law capacity or capabilities are defined by the general provisions applied to the legal entity under the Civil Code of Mongolia.

B. Trade Union

In June 2015, 2486 trade unions were registered in the General Authority for State Registration[10].

Article 3 of the Mongolian Law on the Rights of Trade Unions clearly states principles concerning the right to freedom of association and the right to join trade unions.

-Citizens are free trade unions, acting voluntarily without any discrimination, to realize their right to labour and to protect their related legal interests;

-Demanding workers to forcefully join or quit trade unions is prohibited.

Before 1990, our previous government was a part of a socialist system. Even though it was said it is voluntary to join trade unions, every worker was forced to be a member, and they were registered and issued membership cards. Since Mongolian new democratic Constitution was adopted in 1992, workers have been enjoying their freedom to form trade unions voluntarily without any restrictions or permissions.

Under the current market economy, it is essential to be offered protection in industrial relations through joining trade unions on a voluntary basis, as it is the main guarantee for them to protect their labor and other rights.

The legislations in Mongolia do not provide any specific regulation on the issue of limitations applicable to the employee's right to serve as member of employer representative organizations. However, in Article 6.5 of the Law of Mongolia on Rights of Trade Unions, it is mentioned that 'The administration of the industry or

10 Legal entity registration report in July of the General Authority for State Registration of Mongolia. https://burtgel.gov.mn/index.php?option=com_content&view=article&id=2026:2015-----6---&catid=53:statistic-medee&Itemid=253.

organization are not permitted to do joint work with Trade union elected representative'. This provision does not apply if that person is a member of the trade union.

The number of members is the important issue on the establishment of the trade union. Mongolian legislation does not have quantitative requirement of members and it improves the human right conditions in the labour market.

The trade unions have the right to be protected from dissolution through administrative measures, suspension or suppression of their activities. The accountability system for this action is inadequate in Mongolian legislations, although there are provisions on the right to be protected from dissolution through administrative measures, suspension or suppression of their activities in the Law of Mongolia on Rights of Trade Unions.

Ensuring the employees' right to freedom of association against any acts of restrictions is crucially important in the implementation of the right to freedom of association. Paragraph 10, Article 16 of the Constitution of Mongolia declares that 'Discrimination and persecution of a person or joining a political party or other public organization or for being their member shall be prohibited'. Article 3 of the Mongolian Law on the Rights of Trade Unions states that 'Restricting citizens from joining trade unions based on discrimination is prohibited'. Also Article 134 of the Criminal code of Mongolia provides that 'Discrimination, persecution or obvious restriction of a citizen's right or legitimate interests for joining a political party or a non-governmental organization committed by an official shall be punishable by 250 to 350 hours of forced labor with deprivation of the right to hold specified positions or engage in specified business for a term of up to 3 years, incarceration for a term of more than 3 to 6 months or imprisonment for a term of up to 2 years', and this clause plays a significant role in ensuring the right to freedom of association.

C. Political Party

In the Mongolian law on the Political Parties, the concept of a political party is determined as a union of Mongolian citizens who

have consolidated voluntarily with the purpose of organizing social, personal and political activities as it is stated in the Constitution of Mongolia. In Article 3 of the same law, it is stipulated that "Mongolian citizens who have the right to elect have the right to establish a party, enter into a party, leave the party, and participate in the political activities in accordance with law, rules and platform of corresponding party voluntarily."

The minimum legal requirement to establish a political party is to have at least 801 members who have conjoined on the basis of their opinion and interests.

As of today, in Mongolia, there are 24[11] political parties registered by the Supreme Court of Mongolia. The registration of the political parties by the Supreme Court has always been a controversial issue.

The official registration of the political parties is regulated by Articles 9 and 10 of the Mongolian Law on Political parties as follows:

Article 9.1. Party shall give its application form of registration to the State Supreme Court within 10 working days after the establishment of the party as it is stated in 14.1 of the Law on the state registration of legal entities.

Article 9.4. When articles 6, 9.2-9.3 are taken into consideration, the State Supreme Court shall deliver the certificate of state registration of the party and publish it within 30 working days after the application is received.

Article 10.2. In case the State Supreme court dismisses the request of a political party registration, it shall issue the decision in the timeframe prescribed in article 9.4 and shall give the reason for the dismissal. The decision must be informed to the applicant and to the public.

Currently, there are no other law provisions regarding the registration of the political parties by the Supreme Court. However, the Supreme Court adopted "The rule on the registration of political

11 Website of the Supreme Court of Mongolia. On August 01, 2015. http://supremecourt.mn/nam

parties" /adopted by the Resolution No18, dated 2010.06.22 about amending the resolution No8 of the 2004.04.19"/

This rule regulated that the registration, dissolution, restructuring and any changes made to Statutes of the political parties are subject to deliberation by a hearing of the Supreme Court with composition of 3 judges.

I agree on the point of view of some researchers who consider the registration of political parties by the Supreme Court inappropriate. Because it gives the judicial body a power not related to legal disputes and it also restricts the possibility of the citizens to appeal in a case. The Supreme Court's decision about the registration of the political parties violates the human rights and freedoms protected by the national and international law.

The citizens of Mongolia are entitled to a judicial review if they consider that their right to freedom of association is breached. But, according to Article 50 of the Constitution of Mongolia, the Supreme Court shall be the highest judicial organ and the decision made by the Supreme Court shall be a final judiciary decision and shall be binding upon all courts and other persons. Therefore, there is no clear mechanism to review the Supreme Court's decision about the registration of the political parties. The statement in "The rule on the registration of political parties" adopted by the Supreme Court which says "The court decision which dismissed the request for a registration of a party shall be subject to judicial review" cannot ensure enough the civil right to freedom of association.

By national law, citizens are required to suspend his/her political party membership to exercise some public duties. To be clear, the Law on the suspension of political party membership for some public office was adopted in 1991. This law and the Law on Public service /2002/ restrict the right to freedom of association of the citizens for certain public offices. In Article 10.6 of the Law on Public service, it is stated that "All public officers except the political officers are prohibited to participate in the activities of any political parties and political movements during their term of office. If they have a membership of a political party, they should waive it during

their term of public service. They must make an official written notification about this waiving to their relevant authority and the party within 7 days after their appointment to the office." Article 15 also states "The Following actions are prohibited for genuine public officials: 1. To participate as a public official in the activities of the political, non-governmental and religious organizations unless such activities are related to the functions of his/her job.

The Freedom of Association of the Personnel of the Armed Forces and Police Agencies

In Article 36.2 and 36.3 of the Mongolian Law on Police Agencies which was adopted in 1993 /repealed in 2013/, it was stated that "The police officers are required to respect their duty when they exercise their right to freedom of expression, freedom of association and freedom of religion. It is prohibited to go on a strike in police agencies." But this kind of regulation was omitted in the new Law on police agencies which was adopted in 2013.

Article 29.1 of the Mongolian Law on Military, regarding the duty of the citizens and the legal status of the military personnel /1992/, also states that "The military personnel are prohibited to be a member of any associations and unions which run political activities, to associate with others for a political purpose and to participate and organize any parade and assembly unless they are prescribed by relevant military rules and ordered by their higher officials. Therefore, it is reasonable to consider that the right to freedom of association is not strictly prohibited by law for the personnel of the armed forces and police agencies.

4. Constitutional Court of Mongolia /Tsets/

State mechanisms for the protection of human rights operate in judicial and non-judicial ways. The judicial power shall be vested in the Constitutional Court and other regular courts.

In 1992, a new democratic Constitution was adopted for the first time as the mechanism of constitutional review, thus the Constitutional Court of Mongolia, named as the Constitutional Tsets, was established. Article 64 of the Constitution of Mongolia

defines that 'The Constitutional Tsets is an organ exercising supreme supervision over the implementation of the constitution, making judgment on the violation of its provisions and resolving constitutional disputes'.

The Constitutional Tsets consists of 9 members. A member of the Tsets shall be a citizen of Mongolia who has high legal and political professional standing, is without a criminal record against him and has reached 40 years of age.

The members of the Constitutional Court shall be appointed by the Parliament for a term of 6 years, with three of them to be nominated by the Parliament, three by the President, and three by the Supreme Court. The member of the Tsets shall propose from among themselves the name of the person to be elected Chairman, and elect the person, who receives the majority of votes, as the Chairman.

The Tsets shall consider the following disputes concerning the breach of the Constitution, make conclusion thereon and submit them to the Parliament; if a conclusion is rejected by the Parliament, the Tets shall reconsider the grounds for the rejection and shall make a final decision:

1. The constitutionality of laws and other decisions of the Parliament;
2. The constitutionality of decrees and other decisions of the President;
3. The constitutionality of resolutions and other decisions of the Government;
4. The constitutionality of international treaties concluded by Mongolia;
5. The constitutionality of decrees by central electoral body concerning referendum;
6. The constitutionality of decisions by the central electoral body on elections of the Parliament, its members and President.

The Tsets shall consider the following disputes concerning the breach of the Constitution, make conclusions and submit them with the Parliament:

1. Whether the President has committed a breach of the Constitution,
2. Whether the Chairman and members of the Parliament have committed a breach of the Constitution;
3. Whether the Prime minister and a member of the Government have committed a breach of the Constitution;
4. Whether the Chief Judge of the Supreme Court and the Prosecutor General have committed a breach of the Constitution;
5. Whether the legal grounds exist for the impeachment of the President or the Prime minister, or for recalling members of the Parliament.

If the Tsets decided that the laws, decrees and other decisions of the Parliament and the President, the decisions of the Government, the international treaties concluded by Mongolia, the decisions by the central electoral are inconsistent with the Constitution, the laws, decrees, decisions, and ratifications in question or the unconstitutional parts thereof become null and void. The final decisions of the Tsets shall be issued on behalf of the Constitution of the Mongolia and become effective upon adoption.

The Procedure

The member of the Tsets who has received appeals and information concerning the breach of the Constitution from citizens shall carry out the initial examination within 14 days and decide on instigating a process by his own initiative.

The member of the Tsets who has received requests from the authoritative organizations and officials shall instigate a process immediately upon the reception.

The complaints concerning a decision of a member of the Tsets on instigating of proceedings on the basis of petitions, information and requests shall be considered by a panel of three members. A decision shall be made on whether to instigate a process of examining and resolving disputes.

A panel of five members makes the first decision on all issues and disputes that Tsets has instigated before. A panel to be held for reconsideration and making a final decision shall compose of total members or not less than seven members in case some are unable to attend the session due to an acceptable reason. A session of all members will make decisions:

1. On a conclusion made on Tsets's panel which has been rejected by the Parliament;
2. When new circumstances arise on a dispute previously settled;
3. When a majority of the members of the Tsets make a proposal for reconsideration and making the final decision.

Decisions of the Constitutional Court of Mongolia

Since the establishment of the Constitutional Court of Mongolia, there have been six cases concerning the right to freedom of association. There are relatively few cases regarding Paragraph 10, Article 16 of the Constitution; few compared with other Constitutional provisions about human rights.

I have been prepared to introduce two cases relating to the right to freedom of association. For other four cases, the arguments presented by the citizens were logically not related with the right to freedom of association. Therefore, those judgments will not be presented in this presentation.

1. Decision of the Constitutional Court of Mongolia about the Unconstitutionality of Some Provisions of the Law on Political Parties

Background of the Case:

- In the claim submitted to the Constitutional Court of Mongolia by the citizen Kh.Selenge, it was stated:

'Article 6.3 of the Law on political parties specifies that in cases when party terminates its activities or is reorganized through amalgamation, or is dissolved or changed its name, newly established or other existing parties should not use its full name and abbreviation within 24 years since that date. In view of the constitutional law, a citizen should again enjoy his/her right to freedom of association in cases where his/her party terminated its activities, or united with the other party, or was dissolved. On the other hand, the name of the party is a consolidated form of an ideology and represents intellectual property of the members who are united on the basis of that ideology. So, the above provision amounts to the State intervening into the affairs of political parties, infringes this human right, imposes a time limit for the realization of this right and bars the realization of the right to the freedom of association. So, Article 6.3 of the Law on political parties leads to the violation of Paragraph 10 of Article 16 of the Constitution specifying that the citizens have the right to form a party or other mass organization and the freedom of association to these organizations on the basis of social and personal interests and opinion.'

- In the argument submitted to the medium bench of the Constitutional Court of Mongolia by D.Odbayar and D.Gankhuyag, the members of the Parliament and trusted representatives of the Parliament of Mongolia, it was stated that:

'The meaning of the statement in Article 6.1 of the Law on political parties which says "A party shall have its given name..." does not imply that such a name should reflect the consolidation of its ideology. The law prohibits the parties to have the same name. It is impossible to have the same name for even the parties of the same political orientation, be it conservative or liberal. So, there is no reason to consider that the name of the party shall reflect its ideology and the restriction on the use of the party's name infringes the possibility to exercise the right to association.

The civil rights to establish a political party, to associate on a voluntary basis, to believe and the right to freedom of expression

are guaranteed for the Mongolian people by the Constitution and other laws. However, some rights are not absolute. There is an internationally accepted democratic principle which requires the enjoyment of such rights within certain limitations prescribed by legal regulations in conformity with the Constitution.

Political parties being a certain form of a legal entity by the civil law, there was a challenge to accommodate some of its regulations to the civil law of Mongolia and the Law on the state registration of legal entities.

The relevant provision was adopted in conformity with Article 27.1 of the civil law /which requires legal entities to have a name reflecting its organization and legal formation/ Article 27.3 /which prohibits the name to be misleading or the same as any other entities/ Article 27.4 /which prohibits the illegal use of a name of a legal entity by other entities/ and Article 27.5 /which obliges legal entities to register its name under the regulation prescribed by the Law on State registration of legal entities./

Therefore, the provision in Article 6.3 does not infringe the right to association, the right to freedom of belief and freedom of expression. It is only a legal regulation for the legal relations arising from the general principles of the civil law regarding the legal entities.'

Summary of the Decision:

The Constitutional Court concluded that Article 6.3 of the Law on Political Parties specifies that in cases in which a party terminates its activities, or is reorganized through consolidation, or is dissolved or change its name, it shall be prohibited for the newly founded or for other parties to use its full or abbreviated name within 24 years ahead. This limitation has the character of infringing the fundamental human right of citizens to form parties or other public organizations and the freedom of voluntary association on the basis of social and personal interests and views.

The Constitutional Court issued the following conclusion:

'1. Article 6.3 of the Law on Political Parties specifies that in cases in which a party terminates its activities, or is reorganized

through consolidation, or is dissolved or change its name, it shall be prohibited for the newly founded or for other parties to use its full or abbreviated name within the following 24 years. This provision violates Paragraph 10, Article 16 of the Constitution which states that the citizens are guaranteed to enjoy the right to form parties or other public organizations and the freedom of association into these organizations on the basis of social and personal interests and opinion. …'

Brief Conclusion by the Author:

The provision of Article 6.3 of the Law on political parties which states "In cases in which a party terminates its activities, or is reorganized, or is dissolved or changes its name, it shall be prohibited for the newly founded or other parties to use its full or abbreviated name within the following 24 years" restricts the use of the name by the rest of its members in cases in which the party is dissolved by the Supreme Court because of illegal actions, or it contravened its ideology or its ideology and activities are changed by merging with another party, which constituted the reason to consider it unconstitutional by the Constitutional Court of Mongolia.

The Constitutional Court of Mongolia concluded that the restriction made by the relevant provision exceeded the permissible limits. According to the theory of law, any restriction on the human right must be in conformity with the constitutional principle and proportional to the circumstances.

The Parliament of Mongolia refused to accept the Conclusion /decision of the medium bench of the Constitutional Court/. Consequently, the Court deliberated again the dispute by its full bench and found that the Conclusion was reasonable and repealed the relevant provision of the Law on political parties.

2. Decision about Constitutionality of Some Provisions of the Law on Advocacy

Background of the Case:

- The Citizen T.Dolgorsuren stated in her claim and arguments submitted to the Constitutional Court of Mongolia:

'Article 6.1 of the Law on Advocacy which says the association of advocates must have the following structures: 1. Union of Mongolian Advocates 2. Regional Committee of the Advocates in the Provinces and in the Capital and Article 6.4 which states "Citizens of Mongolia who have obtained the license of legal counseling shall have compulsory membership of the Association of Advocates" breach the statement in Paragraph 10, Article 16 of the Constitution which says the citizens of Mongolia are guaranteed to enjoy the right to freedom of association in political parties or other mass organizations on the basis of social and personal interests and opinions.

- In the argument submitted to the Constitutional Court by the trusted representative of the Parliament of Mongolia, it was stated that the relevant provisions were not in breach of the constitution because of proportionality with the circumstances.

Summary of the Decision

The Constitutional Court of Mongolia reasoned that "The Union of Mongolian Advocates is a civil association with certain special characters such as state participation in its activities and the fact that the members /advocates/ get their professional license from the state. So, it is proportionate to have special legal regulations. Therefore, it is unreasonable to consider that the relevant statement in Article 6 of the Law on Advocacy is unconstitutional and dismissed the claim by the citizen Dolgorsuren."

The Constitutional Court issued the following conclusion:

'1. The Relevant statement in the Article 6 of the Law on Advocacy is not in breach of the Constitution of Mongolia. …'

Brief Conclusion of the Author

The compulsory membership of the professional associations for a certain category of occupations does not infringe the right to the freedom of association. This restriction is also related to the right to non-discrimination in respect of the employment

and the occupation. In Article 1.2 of the Convention concerning Discrimination in Respect of Employment and Occupation /adopted by the International Labor Organization in 1958/, it is stated that "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination"

The advocates must have a higher level of responsibility and strict legal regulations for their status because of their important duty of protecting human rights and freedoms, safeguarding the justice and performing for the sake of public interests. Professional mistakes of the advocates result in the infringement of civil rights and failure of justice.

Therefore, there is no reason to consider that the compulsory membership of the Association of Mongolian Advocates, which has a purpose of training the advocates, improving their knowledge and skills and imposing sanctions for ethical and professional mistakes, infringes the right to freedom of association.

As a conclusion, the guarantee of the right to freedom of association on the basis of social and personal interests and opinion is one of the main issues of the democratic society. The right to freedom of association protected by international law and treaties is fully reflected and ensured in the national law of Mongolia.

The Constitutional Court of Mongolia plays an important role in the protection of the right to freedom of association even though currently there are very few decisions regarding this right. I hope that the papers and cases which will be discussed during this Summer school will provide very useful information for the possible disputes which may arise in the future.

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION: FIVE SELECTED CASES FROM THE SPANISH CONSTITUTIONAL COURT'S CASE-LAW

Xabier ARZOZ
SPAIN

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION: FIVE SELECTED CASES FROM THE SPANISH CONSTITUTIONAL COURT'S CASE-LAW

Xabier ARZOZ[*]

1. INTRODUCTION

1.1. The Spanish Constitutional Court and Its Jurisdiction

The Spanish Constitutional Court (*Tribunal Constitucional*) was founded in 1980 in accordance with the Constitution of 1978 (SC)[1] and Organic Law 2/1979 on the Constitutional Court of 3 October 1979.[2] The Spanish Constitutional Court belongs to the so-called 'European model' of constitutional adjudication, a model used by a majority of the States in continental Europe,[3] and follows the functions and powers of the German Federal Constitutional Court established by the German Basic Law in 1949[4] particularly closely.

The Spanish Constitutional Court reviews the constitutionality of legislation, adjudicates on the allocation of powers between the central state and any of the seventeen autonomous regions, rules on

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1 English text at http://www.tribunalconstitucional.es/es/constitucion/Documents/ConstitucionINGLES.pdf

2 English text at http://www.tribunalconstitucional.es/es/constitucion/Documents/ConstitucionINGLES.pdf

3 See, for instance, FERRERES COMELLA, Víctor: *Constitutional Courts and Democratic Values. A European perspective*, Yale University Press, 2009.

4 Nevertheless, during the Second Republic (1931-1936) Spain adopted the constitutional jurisdiction designed by Hans Kelsen for Austria in 1920, which was also implemented by Czechoslovakia in the inter-war period. See CRUZ VILLALÓN, Pedro: La formación del sistema europeo de control de constitucionalidad (1919-39) [*The formation of the European model of constitutional review (1919-1939)*] Centro de Estudios Constitucionales 1987.

conflicts between constitutional bodies, and examines individual complaints on the violation of fundamental rights. [5]

For the purposes of this report, a closer look at the fundamental rights jurisdiction of the Court is a worthwhile exercise. Individuals may lodge constitutional complaints (*recursos de amparo*) with the Constitutional Court when they consider that his or her fundamental rights have been infringed upon by a public power and after having exhausted all (ordinary) legal remedies. Only a selected group of fundamental rights guaranteed by the Constitution, that is, those recognised in Articles 14 to 29 and 30(2) SC, are protected by the subsidiary remedy of constitutional complaint. For instance, the fundamental rights of matrimony (Art 32), of private property and inheritance (Art 33), of foundation (Art 34), and of free enterprise (Art 38) are not protected by the *amparo* appeal.

Within its fundamental rights jurisdiction, the Constitutional Court acts as a 'special court of appeals'.[6] It is the supreme judicial body in Spain because it can overturn the decisions of any other court – even the Supreme Court.[7] It cannot, however, decide on all the factual and legal issues that a case may raise. Its fundamental rights jurisdiction is limited to checking whether the relevant fundamental right has been infringed upon.

With the amendment to the Organic Law on the Constitutional Court in 2007, the *amparo* appeal acquired an objective character; it is not enough for the applicant party to simply argue the existence of a fundamental rights violation as the admission of the case demands (and the applicant party must argue) that the case possess

5 For an introduction into the Spanish constitutional system, see FERNÁNDEZ SEGADO, Francisco (ed.): *The Spanish Constitution in the European constitutional context*, Dykinson 2003, 2294 pages; BORRAJO INIESTA, Ignacio: 'Adjudicating in Divisions of Powers: the Experience of the Spanish Constitutional Court', in Andrew LE SUEUR (ed.), *Building the UK's New Supreme Court – National and Comparative Perspectives*, Oxford University Press 2004, pp. 145-174; FERRERES COMELLA, Víctor: *The Constitution of Spain. A Contextual Analysis*, Hart Publishing 2013; ARZOZ, Xabier, 'Constitutional Court of Spain', in Rainer GROTE, Frauke LACHENMANN and Rüdiger WOLFRUM (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press (forthcoming).

6 FERRERES COMELLA 2013, *supra* n. 5, p. 226.

7 According to Article 123(1) of the Constitution of Spain, 'The Supreme Court, with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to the provisions concerning constitutional guarantees'.

'special constitutional significance', that is, the capacity to fill out and further develop the Constitutional Court's doctrine.

Constitutional Court decisions may not be reviewed by any domestic court of law.[8] Nevertheless, individuals are also protected by the European Convention of Human Rights and its additional Protocols and may bring before the European Court of Human Rights an individual complaint against the State as a whole for the violation of any of the rights protected through the Convention system.

1.2. The Freedom of Expression and of Association in the Spanish Constitution

The Constitutional Court's case-law has imported from the German legal order the notion that rights have a double dimension; they are subjective, meaning their owners can invoke them before the government, but they are also objective values of the legal order as a whole which all branches of the State must promote (Judgment 25/1981).[9]

The Freedom of expression and the freedom of association are two independent fundamental rights in the Spanish Constitution as they are, presumably, in other constitutions as well. Each has its own constitutional proclamation and its own case-law.

Although the freedom of expression and the freedom of association are autonomous fundamental rights, they are profoundly related since both are indispensable pillars of a democratic society. The European Court of Human Rights has stressed this relationship in a number of cases, stating that 'the protection of opinions and the freedom to express them represents one of the objectives of the rights to reunion and association,' and that the activity of political parties must be understood as a 'collective exercise of the freedom of expression'.[10]

8 Article 4(2) of the Organic Law 2/1979 on the Constitutional Court of Spain.

9 FERRERES COMELLA 2013, *supra* n. 5, p. 257. On this issue, see SOLÁZABAL ECHAVARRÍA, Juan José: 'La libertad de expresión desde la teoría de los derechos fundamentales' [Freedom of expression from the perspective of fundamental rights theory], *Revista Española de Derecho Constitucional*, Issue 32, 1991, pp. 73-113.

10 European Court of Human Rights, 30 January 1998, case *The United Communist Party of Turkey and others v. Turkey*, §§ 42-43; 31 July 2001, case *Refah Partisi and others vs. Turkey*, § 43.

1.2.1. The Freedom of Expression

Article 20(1) of the Spanish Constitution proclaims the freedom of expression in conjunction with other freedoms (artistic and academic freedom and freedom of communication). This report focuses on the most basic right recognized by Article 20(1)(a), that of expressing ideas, opinions, and thoughts through any means of communication, which can be differentiated from the other rights mentioned in Article 20(1)(d) – the right to freely disseminate and to receive information. The constitution-maker wished to differentiate the freedom to disseminate ideas, thoughts and opinions from the freedom to disseminate information. For our purposes, Article 20 reads:

> '1. The following rights are recognized and protected:
>
> a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication;
>
> […]
>
> 2. The exercise of these rights may not be restricted by any form of prior censorship.
>
> […]
>
> 4. These freedoms are limited by respect for the rights recognized in this Title, by the legal provisions implementing them, and especially by the right to honour, to privacy and to one's image and by the protection of youth and childhood.
>
> 5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order.'

The Constitutional Court has built a general doctrine underlying both the freedom of expression and the freedom of communication. At the beginning of its case-law, the Court stressed the service rendered by those fundamental rights to democracy and in

particular, to the building of free public opinion.[11] However, this led to neglect of the subjective dimension of the freedom of expression (and communication); ideas and thoughts that do not contribute to free public opinion remained without constitutional protection. The non-instrumental concept of the freedom of expression was restored in the late 1990's. Now it is considered that, with the recognition of the fundamental rights of Article 20(1), the Constitution aims to preserve the free *process* of communication – a point already made by Judgment 6/1981 of the Constitutional Court –, not a qualified by-product of such a process.

The constitutional scope of protection of the freedom of expression has almost always been defined in opposition to other fundamental rights (the right to reputation, to private and family life, and to one's image). In other words, the content of the freedom of expression has been defined by its limits.[12] In Judgment 11/2000, the Court summed up the criteria it uses to decide whether a message (consisting of either opinions or information) is constitutionally protected by the freedom of expression and communication:

> 'The circumstances that must be considered when establishing the level of constitutional protection of the message are: the public relevance of the issue (SSTC 6/1988, of 21 January; 121/1989, of 3 July, 171/1990, of 12 November; 197/1991, of 17 October, and 178/1993, of 31 May), the public nature of the person about which the criticism or the opinion is expressed (STC 76/1995, of 22 May), and especially if they hold a public post, regardless of the institution they serve, such that, given the functions that the freedoms of expression and information fulfil, their holders must endure the criticisms or revelations, even if they 'hurt, shock, or bother' (STC 192/1999, of 25 October). The context in which they are expressed, for instance, an interview or an oral intervention, is also relevant for the constitutional judgment (STC 3/1997, of 13 January),

11 See VILLAVERDE MENÉNDEZ, Ignacio: 'La libertad de expresión' [Freedom of expression], in Maria Emilia CASAS BAAMONDE – Miguel RODRÍGUEZ-PIÑERO Y BRAVO-FERRER (eds.), Comentarios a la Constitución Española [*Commentary on the Spanish Constitution*], WolterKluwer 2008, pp. 472-502.

12 VILLAVERDE MENÉNDEZ 2008, *supra* n. 11, p. 475.

and, above all, whether they effectively contribute to building free public opinion (SSTC 107/1988, 105/1990, 171/1990, and 15/1993, of 18 January, among others).'[13]

1.2.2. The Freedom of Association

Article 22 of the Spanish Constitution proclaims the freedom of association:

'1. The right of association is recognized.

2. Associations which pursue ends or use means legally defined as criminal offences are illegal.

3. Association set up on the basis of this section must be entered in a register for the sole purpose of public knowledge.

4. Associations may only be dissolved or have their activities suspended by virtue of a court order stating reasons.

5. Secret and paramilitary associations are prohibited.'

The most relevant aspect of Article 22 from the perspective of Spanish constitutional history is the elimination of the limits and controls to which associations were traditionally bound, even in the liberal periods of Spain's history.

The Constitution does not contain a constitutional notion of association, but legal scholars consider that it implies the voluntary and stable meeting of two or more people to achieve certain aims.[14]

The aforementioned protection extends to all kinds of associations. Article 22 of the Constitution is the common regulation for all types of association as it contains the basic legal regime.[15] Organic Law 1/2002 on the regulation of the right of association, of 22 March 2001,

13 Translated by the author.

14 GÓMEZ MONTORO, Ángel J.: 'Articulo 22' [Freedom of association], in Maria Emilia CASAS BAAMONDE – Miguel RODRÍGUEZ-PIÑERO Y BRAVO-FERRER (eds.), Comentarios a la Constitución Española [*Commentary on the Spanish Constitution*], WolterKluwer 2008, pp. 540-55.

15 We must note that, until 2002, there was no legal regulation of the fundamental right to association.

was enacted to develop the constitutional right and to regulate the most basic form of association. Autonomous Communities may regulate specific kinds of associations within their territory.

In addition, the Spanish Constitution recognizes the functions of special kinds of association: political parties (Art 6), trade unions (Art 7 and 28), associations of employers (Art 7), religious communities (Art 16), associations of consumers and users (Art. 51 (2)), professional associations (Art 52) and cooperative associations (Art 129). According to Article 6 (in the Preliminary Title of the Constitution, which contains most of the basic structural decisions by the constitution-maker), 'Political parties are the expression of political pluralism; they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic'.

1.3. The Cases Selected in this Report

It is difficult to select only five significant judgments from the Constitutional Court's case-law to cover the rich variety of cases for two different fundamental rights such as the freedom of expression and the freedom of association. Throughout its case-law, the Spanish Constitutional Court has adopted 133 judgments deciding on individual complaints wholly or partially concerning the freedom of expression and roughly 62 judgments deciding on individual complaints wholly or partially concerning the freedom of association. The array of cases analysed by its case-law is rich; it covers very different situations and means of communication (professional journalists, letters to the director, public servants, university professors, politicians, lawyers defending their clients in court, etc.). The practical delimitation between the freedom of expression and the freedom of communication is not easy since ideas and information are often communicated at the same time. In fact, as previously indicated, the freedom of expression and the freedom of communication are recognized by the same constitutional provision; they share a common justification and

a similar methodological approach. Therefore, the case-law often considers them jointly, even when a stricter approach could be adopted.[16]

Furthermore, the content and scope of the mentioned fundamental rights have also been analysed in other constitutional procedures: in the abstract judicial review of laws that certain public parties may submit to the Constitutional Court (the central government, the ombudsman, regional governments, and parliaments) and in the specific judicial review of laws that any ordinary court may refer to the Constitutional Court. The main procedural difference between individual complaints and the judicial review of laws (both abstract and incidental) is that the resolution of the former, as a rule, is devolved to one of the two chambers (six judges in each chamber), and the resolution of the latter to the plenary (twelve judges).

The cases selected in this report include the resolution of three individual complaints and two cases of the judicial legislative review, one concerning criminalization of the denial and justification of the Holocaust and the other the prohibition of political parties which are believed to sympathise with terrorist organisations. Both cases are particularly complex and deserve closer attention.

In terms of subject area, three of the selected cases deal with the freedom of expression (2., 3. and 4.) and two with the freedom of association (5. and 6.), the second one dealing with a special kind of association: political parties.

2. THE PREVALENT POSITION OF THE FREEDOM OF EXPRESSION (JUDGMENT 136/1994)

2.1. The Facts

A town council member publicly accused the town deputy mayor of several irregularities with regard to the management of a local vocational training institution. Two local newspapers reported on the accusations. The town council member was sued for contempt.

16 See, for instance, Constitutional Court of Spain Judgment 136/1994, analysed below under section 2.

The first level of jurisdiction absolved the town councillor while the second, the Provincial Court, fined him, suspended him from his duties, and sentenced him to prison. The town councillor lodged an *amparo* appeal with the Constitutional Court alleging a violation of his freedom of expression (Article 20(1) SC).

2.2. The Court's Decision

The Court began by affirming that the fundamental right allegedly infringed upon by the applicant was indeed the freedom of expression, not the freedom of communication, since he did not attempt to communicate information to the public but to present his point of view to the town council regarding the management of a certain area by the town's deputy mayor. However, the judgment's reasoning did not hold very strictly to this initial line, continuing to consider the accuracy of the information communicated.[17]

The Court recalled that the 'expansive force' of the freedoms of expression and communication necessitates a restrictive interpretation of their limitations, including the right to reputation. When the exercise of the freedoms of expression and communication affects the right to reputation, the judicial body must carry out a *balancing* appraisal of the circumstances of the case, in order to establish whether the behaviour of the actor was justified, which is to say, if it is within the borders of the said freedoms. When the said *balancing* is lacking or turns out to be unreasonable, it must be concluded that the freedom of expression has been violated.

The contrast between the freedoms of expression and communication, on the one hand, and the right to reputation, on the other hand, must be made with due consideration to the special position that the freedoms of expression and communication occupy with respect to the rights of personality recognized by Article 18 SC (private and family life, image, and reputation) given that they are both individual liberties and institutional guarantees of public opinion – a concept indissolubly linked to the value of political

17 The accuracy and truthfulness of the information is relevant within the scope of protection of freedom of communication. By contrast, it is not relevant within the scope of protection of freedom of expression. This point is made more clearly in Judgment 235/2007, analysed below in section 3 of this report.

pluralism in a democratic State. Of the rights of personality, the right to reputation is the most vulnerable to infringement by the freedoms of expression and communication.

Certainly, criminal legislation offers broad protection of people's reputation and of the dignity of institutions through an array of offenses. Traditionally, the criminal approach consisted of judging whether the exercise of the freedom of expression or communication affected the right to reputation. However, the constitutional approach imposes a different kind of perspective: judging whether the exercise of those freedoms is a cause of exclusion of the unlawfulness. That is the case when the exercise of those freedoms has been made within their constitutionally-protected scope, especially when their purpose is the improved functioning of public powers and the prevention irregularities or poor functioning – knowledge of which could prevent the commission such socially-harmful acts.

With regard to the specific circumstances of the case, the Court deemed that the statements in question by the town councillor were neither gratuitous nor groundless. The mere circumstance that the information was not totally accurate did not exclude its truthfulness. There were some irregularities, and as such they were reported to the press. Public interest in the information was clear in the local context in which they were made public. The declarations were made within the framework of a political controversy in which the leader of the local opposition was exercising his right to criticize the activities of the governing political group. They were not personal issues but the attribution of facts regarding the task of governing the town. There was no intent to cause harm but instead to criticize the management of specific local issues. In this case, the prevalent position of the freedoms of expression and communication was affirmed over other legally-protected interests, such as the principle of authority protected by the offence of contempt (making explicit reference to the ECtHR's case: *Lingens*, of 8 July 1986).

2.3. Assessment

Judgment 136/1994 is significant because it explicitly pointed to the prevalent position of the freedom of expression. It is also

characteristic of the Constitutional Court's early case-law, in which the balancing approach was the key to the resolution of conflicts between the freedom of expression and other fundamental rights. The Court stated expressly that the judicial body had to carry out a *balancing* appraisal of the circumstances of the case in order to establish whether the behaviour of the actor was *justified*, meaning it was within the borders of the said freedoms. The underlying idea was that the freedom of expression is of a higher rank in so much as it contributes to free public opinion. Conversely, when the expressed message (ideas or information) does not fulfil the said condition, the conflict has to be decided in favour of the right to one's reputation and private life.

Later on, especially from Judgments 200/1998 and 192/1999 onward, the Court would do away with the balancing approach and opt to delimit the constitutional content of freedom of expression.[18] This new approach stresses the subjective dimension of the freedom of expression and its independence from democratic-functional considerations.

3. THE LIMITS OF THE FREEDOM OF EXPRESSION: IN PARTICULAR THE RIGHT TO REPUTATION (JUDGMENT 176/1995)

3.1. The Facts

In Spain, two Frenchmen, the publisher and the editor of a comic book, were sentenced to prison and to pay a fine for the publication of a comic bearing the title "Hitler-SS," a crime deemed a serious offence.

The publisher of the comic submitted an individual complaint to the Constitutional Court against the judgment, alleging that it violated Article 20 of the Constitution, which recognizes both the freedom of expression and of communication. He argued, first, that the comic intended to satirize and to ridicule using elements inherent to the artistic style: the denial of the existence of Nazi extermination camps, the use of phrases and writings attributed to

18 VILLAVERDE MENÉNDEZ 2008, *supra* n. 11, p. 475.

French ultranationalist politician Le Pen, and second, that he had only bought the reproduction rights for publication of the comic, that he lacked the necessary *animus iniurandi*, that is, the intent to insult.

3.2. The Court's Decision

First of all, the Court differentiated the functions assigned to ordinary courts from its own function, that is, elements which have a constitutional dimension from those which do not. Thus, the existence of *animus iniurandi* (or its opposite, *animus iocandi*, the intent to joke), which the plaintiff objected to in his complaint, is a subjective element of the criminal category applied by the sentencing court; in other words, it is an ingredient of the conduct defined by the criminal provision in question. The decision of whether such subjective element is present or not is part and parcel of the function of the judiciary, and the Constitutional Court cannot replace that decision with its own. Ordinary courts are competent to establish the facts of the case through their practise and the independent analysis of evidence free of outside interference. The constitutional jurisdiction, by contrast, is not a third level of jurisdiction nor should it review decisions taken by ordinary courts if they seem reasonable. The Constitutional Court can only check the constitutional dimension of the judicial decision. When there is a conflict between two fundamental rights, the judicial decision must draw on a certain concept of those rights and the relationship between them. If that concept is not constitutionally acceptable, the decision taken by the ordinary court is considered to be in violation of one of the two fundamental rights. A constitutional complaint before the Constitutional Court only allows for review of the balance between the fundamental rights in conflict adopted by the ordinary court from the point of view of the Constitution with the aim of preserving or restoring the fundamental right in danger or already violated.[19]

Secondly, the Court established that the fundamental right exercised by the publisher of the comic had not been the freedom

19 Constitutional Court of Spain, Judgment 176/1995, Legal Grounds 1 and 4.

of communication but the freedom of expression. The object of the freedom of expression is thoughts, ideas, opinions, and value assessments. The freedom of communication, in turn, refers to facts that may be relevant knowledge for the general public. Certainly, the Court admits that it is not an easy delimitation since the expression of ideas often needs to be based on telling facts, and vice-versa. Many times telling facts includes value assessments. Nevertheless, the Court considered that the comic, a graphic novel of roughly ninety pages, was literary fiction with no historical intent and which included numerous value assessments. Therefore, it had to be included within the scope of the freedom of expression. For the Court,

> 'It is clear that any opinion – even one which attacks the democratic system – is covered by the freedom of expression, regardless of how erroneous or dangerous it may seem to the reader. The Constitution – it has been said – protects even those who oppose it. As a result, we need not discuss the authenticity of historical facts such as the Holocaust. The freedom of expression includes the right to be wrong; any other attitude toward the said freedom enters into the realm of dogmatism or even totalitarian thought, incurring in the same fault against which we struggle. The claim of absolute truth – which is different from the concept of veracity as a requirement for information – is a persistent temptation for those who desire censorship […]. Our judgment must eschew categories of right and wrong or the accuracy or lack thereof of solutions proposed, which by their very nature have no chance at absolute certainty nor unanimous acceptance. We must not formulate value judgments on issues that are intrinsically debatable, nor share or reject opinions in a controversial context. Nor is it our mission to guarantee the purity of syllogisms, stylised elegance, or good manners.'[20]

The Court declared that all citizens are holders of the right to freedom of expression, though there are prototypical holders, such

20 Constitutional Court of Spain, Judgment 176/1995, Legal Ground 3 (translated by the author).

as journalists. The freedom of expression is most protected by the Constitution when journalists exercise it when attempting to form public opinion through press, radio, cinema, or television. The Court also extended the qualified status of journalists to the heads of newspapers and news agencies and to editors, who have the possibility of selecting, deciding on, or vetoing the contents of texts arriving before them.

Third, the Constitutional Court recalled one of the insurmountable limits of the freedom of expression; the Constitution does not recognize the right to insult, which would be incompatible with the dignity of the person proclaimed in Article 10(1) SC. In fact, the right to one's reputation is expressly foreseen in Article 20(1) SC as one of the limits of the freedom of expression and communication.

The Court then proceeded with a close examination of the contents of the publication. It stated that the message of the comic was racist in character and went against constitutional values, that its style was libidinous both in the words used and in the grimaces and attitudes shown and that its intended audience went beyond children and teenagers. The Court found that the publication employed hate speech, that it showed deep hostility that incited people to violence both directly and indirectly through humiliation, and that it lacked any positive social value, be it aesthetic, historical, sociological, scientific, political, or pedagogical. The analysis of the content of the comic by the Court was particularly crushing. In its conclusion, it stressed the following:

> 'Apology of the executioners, through the glorification of their image and the justification of their acts, and the consequent humiliation of the victims does not belong to the content of the freedom of expression as a fundamental value of the democratic system that our Constitution proclaims. Any use of the freedom of expression that denies human dignity, part of the irreducible core of the right to reputation, lacks constitutional protection (Judgments 170/1994 and 76/1995). A comic like the one here reviewed, which transforms a historic tragedy into a burlesque farce, must be considered libel, in so much as it purposefully and unscrupulously seeks

the humiliation of the Jewish people, belittling them in an attempt to undermine their reputation, an element inherent in infamy or dishonour.'[21]

4. THE CRIMINALIZATION OF THE DENIAL OF THE HOLOCAUST (JUDGMENT 235/2007)

4.1. The Facts

The owner of a Barcelona bookshop specialized in World War II books written by authors who defend Nazi Germany and deny the existence of the Holocaust was sentenced to prison according to Article 607(2) of the Criminal Code for distributing, disseminating, and selling materials and publications which deny the persecution and genocide suffered by the Jewish people prior to and during the Second World War.

Article 607(2) of the Criminal Code (CC) established that "dissemination, through any medium, of ideas or theories which deny or justify the offences classified in the previous paragraph of this Article, or which attempt to rehabilitate systems or institutions which harbour practices which generate such crimes shall be punished with a sentence of between one to two years in prison".

The crimes referred to in the aforementioned first paragraph of Article 607 CC are those of genocide, defined as conduct guided by the intent to destroy totally or partially a national, ethnic, racial or religious group by perpetrating any of the following acts: 1) killing any of their members; 2) sexually molesting any of its members or causing any other of the injuries established in Article 149 CC; 3) subjecting the group or any of its individuals to living conditions which would endanger their lives or seriously harm their health or cause any of the injuries established in Article 150 CC; 4) carrying out enforced displacement of the group or its members, adopting any measure which is likely to prevent the way of life or the reproduction of the group, or to forcibly transfer individuals from one group to another; and 5) to cause any other harm apart from the aforementioned.

21 Translated by the author.

On appeal against the aforementioned sentence, the Provincial Court of Barcelona raised the issue of unconstitutionality (*cuestión de inconstitucionalidad*) before the Constitutional Court with respect to paragraph two of Article 607 CC, alleging that it could be contrary to the right to freely express and disseminate thoughts, ideas and opinions through words, writing or any other means of reproduction [Art 20 (1)(a) SC].

The Constitutional Court limited its judicial review to the first part of paragraph two of Article 607 CC, since the criminal proceedings had dealt exclusively with the dissemination of ideas and theories which deny or justify genocide. Therefore, judicial review excluded the constitutionality of the criminalization of attempts to rehabilitate systems or institutions which harbour practices which generate such crimes.

4.2. The Arguments of the Parties

The Provincial Court raising the proposal of judicial review to the Constitutional Court considered that the conduct defined as criminal in Article 697(2) CC could not be framed within the concept of a provocation to act criminally nor an apology of the crime, given that the literal meaning of the aforementioned provision did not require that the speech be aimed at inciting crimes of genocide, nor that they praise genocides or applaud those who perpetrate them. According to the Provincial Court, it is neither appropriate to interpret the provision in question in terms of categories of incitement to commit a crime or of an apology of the crime, as this would presuppose an extensive interpretation thereof, contrary to the requirements of the principle of criminal legality. The behaviour questioned, in that it is classified as criminal by Article 607(2) CC, is the mere dissemination of ideas or theories which deny or justify the existence of historical facts classified as genocide.

By contrast, both the State Attorney and the State Public Prosecutor, which have the right to intervene in this kind of procedure before the Constitutional Court, defended the constitutionality of the said provision considering that the freedom of expression cannot protect the aforementioned conducts. In their views, the denial or the

justification of genocide contains a potential danger to extremely important rights and, therefore, cannot claim protection under the freedom of expression. In particular, the important rights affected by the conduct in question are the rights of certain religious, ethnic, or racial minorities and the constitutional system itself, insofar as the democratic system would be destabilized by the growth and extension of ideas or theories which deny or justify certain historical facts legally defined as crimes of genocide.

4.3. The Court's Decision[22]

4.3.1. Previous Case-law as a Point of Departure

The Constitutional Court reiterated its case-law on the constitutionally protected content of the freedom of expression. It recalled that 'the rights guaranteed in Article 20(1) SC are […] not simply an expression of individual freedom but are also elements which shape our democratic political system', and that Article 20(1) SC 'guarantees a constitutional interest in the formation and existence of free public opinion, a guarantee which is imbued with special significance since it is a prior and necessary condition for the exercise of other rights inherent in the operation of a democratic system. It becomes, in turn, one of the pillars of a free and democratic society' (quoting from Judgment 159/1986, of 16 December 1986, Legal Ground 6).

The Constitutional Court recalled that in the Spanish constitutional system 'there is no room for a model of 'militant democracy', that is, a model which imposes adherence on its members, but instead for one of positive adherence to the system and, first and foremost, to the Constitution' (Judgment 48/2003, of 12 March, LG 7). Therefore, the Court differentiated between activities contrary to the Constitution and thus deprived of its protection, and the mere dissemination of ideas and ideologies:

> 'The value of pluralism and the need for a free exchange of ideas as the underpinning of the representative democratic

22 An unofficial translation of the Judgment's legal grounds into English can be downloaded in http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx

system prevent any activity by public powers which would control, select or seriously determine the mere public circulation of ideas or doctrines. In this way, the constitutionally protected framework of the freedom of expression cannot be restricted by the fact that it is used for the dissemination of ideas or opinions contrary to the essence of the Constitution – and certainly those which were circulated in the issue which gave rise to the present question of unconstitutionality are repulsive from the perspective of constitutionally guaranteed human dignity – unless these effectively harm rights of constitutional relevance. For the civil morals of an open and democratic society, indubitably not every idea expressed will simply be worthy of respect. Even when tolerance constitutes one of the "democratic principles of coexistence" referred to in Article 27(2) SC, the said value cannot simply be identified with indulgence in light of the speech which repulses anyone who is aware of the atrocities perpetrated by the totalitarian movements of our times. The problem which we need to take into consideration is whether the denial of facts which could be considered barbaric acts or their justification have their scope of expression in the free social debate guaranteed by Article 20 SC or if, conversely, such opinions may be the object of punishable state sanction since they affect constitutionally protected rights.'

4.3.2. The European Court of Human Rights' Case-law

The Constitutional Court recalled that freedom of expression is not an absolute right and that the dissemination of abusive or offensive phrases and expressions is outside the scope of protection of that right (Judgments 204/1997, of 25 November; 11/2000, of 17 January, LG 7; 49/2001, of 26 February, LG 5; 160/2003, of 16 September, LG 4). In particular, the freedom of expression does not guarantee 'the right to express and disseminate a specific understanding of history or perception of the world with the deliberate aim of deriding and discriminating through the formulation of such ideas against persons and groups of any condition or personal, ethnic, or social circumstances, as this would be tantamount to admitting

that for the mere fact of being made in the course of a more or less historic discourse, the Constitution permits the violation of one of the paramount values of the legal system, namely equality [Art 1(1) SC], and one of the bases for political order and social peace, the dignity of person [Art 10(1) SC]' (Judgment 214/1991, of 11 November, LG 8).

The Court stated that 'constitutional recognition of human dignity provides the framework within which fundamental rights are to be exercised' and affirmed that the limits to the freedom of expression in the Spanish constitutional system essentially coincide with those recognized by the European Court of Human Rights (ECtHR) in application of section two of Article 10 of the European Convention of Human Rights (ECHR). It recalled that, throughout the ECtHR's case-law, the freedom of expression cannot provide protection to 'the discourse of hatred', that is, to any discourse which involves direct incitement to violence against citizens in general or against particular races or beliefs.

Nevertheless, one of the keys to the solution of the case is the interpretation of the ECHR's case-law on hate speech[23] and on the exception to the guarantee of rights contained in Article 17 ECHR.[24] The Constitutional Courts interprets the ECtHR's case-law on hate speech in the sense that only under special circumstances[25] may States, within their margin of appreciation, invoke the exception to the guarantee of rights contained in Article 17 ECHR and in their domestic law *permit* the restriction of the freedom of expression for those who clearly deny established historic facts, on the clear understanding that the Convention only establishes a common European minimum which *cannot* be interpreted as *restricting* fundamental freedoms recognized by internal constitutional systems (Art 53 ECHR). With those words, the Constitutional

23 European Court of Human Rights, 8 July 1999, case *Ergogdu and Ince vs Turkey*; 4 December 2003, case *Günduz vs. Turkey*; 6 July 2006, case *Erbakan vs. Turkey*; 24 June 2003, case *Garaudy vs. France*.

24 European Court of Human Rights, 13 February 2003, case *Refah Partisi and others vs. Turkey*; 23 September 1998, case *Lehideux and Isorni vs. France*; 23 June 2004, case *Chauvy and others vs. France*; 17 June 2004, case *Fdanoka vs. Letonia*.

25 Those special circumstances are evidence of damage and express the wish to destroy freedoms and pluralism or attack the freedoms recognised in the European Convention on Human Rights.

Court proclaimed its will to preserve its constitutional autonomy to interpret the constitutionally-protected scope of the freedom of expression since States are not obliged to invoke Article 17 ECHR nor, therefore, to prohibit the mere dissemination of ideas, even if those ideas may be offensive for certain segments of society.

4.3.3. The Purpose and Meaning of Article 607(2) CC

The second step in the Court's reasoning was a look at the purpose and meaning of the contested provision. The Court stated that Article 607 CC had to be understood in the context of other criminal provisions which comply with undertakings acquired by Spain in matters of persecution and prevention of genocide [Art 22(2) of the International Covenant on Civil and Political Rights, and Art 5 of the United Nations Convention for the prevention and punishment of the crime of genocide of 9 December 1948] and stressed that, without prejudice to international obligations, 'other countries which suffered particularly from the genocide committed during the period of national socialism, have also introduced as a punishable crime, as a result of those tragic historical circumstances, that of a mere denial of the holocaust'.

Amidst this background, the Constitutional Court suggested that Article 607 CC went beyond what international instruments binding Spain strictly require given that the said provision complements the various modes of perpetration of the crime of genocide with an independent penal category which does not require a specific malicious intent concerning the desire or intention to destroy a social group but punishes the mere dissemination of certain ideas and theories.

The Court argued that a literal interpretation of the conduct punished by the first part of Article 607(2) was not consistent with the constitutional content of the freedom of expression:

> 'While obviously accepting the particularly objectionable nature of genocide, one of the most abhorrent crimes imaginable against the human race, it is true that the conduct described in the contested provision consists of the mere

transmission of opinions, however insubstantial they may be, from the perspective of the values on which our Constitution is based. The literalness of the illegality contained in Article 607(2) CC does not require, at first glance, positive actions of xenophobic or racist proselytising, nor even incitement, at least indirectly, to commit genocide, which are indeed present, in terms of racial hatred or anti-Semitism, in the crime established in Article 510 CC, punished with more serious penalties. The types of conduct described do not necessarily imply glorification of genocides or any intention to discredit, despise or humiliate the victims. Far from it, the literalness of the provision insofar as it punishes the communication of ideas considered in themselves, without additionally requiring contravention of other constitutionally protected rights, is apparently designed to prosecute a conduct which in that it is covered by the right to freedom of expression [Art 20(1) SC] and even possibly by scientific freedoms [Art 20(1) (b) SC] and freedoms of conscience (Art 16 SC) which are manifested to the contrary (Judgment 20/1990, of 15 February, LG 5), constitutes an insurmountable barrier for criminal legislature.

Thus, this is not a question of the Criminal Code restricting the freedom of expression but rather the fact that this interferes with the actual scope of delimitation of the constitutional right. Beyond the risk, something undesirable in a democratic state, of making criminal law a dissuasive factor in the exercise of freedom of expression, a point we have made on other occasions (…), criminal regulations are prohibited from encroaching on the constitutionally guaranteed content of fundamental rights. The freedom of configuration of criminal legislature reaches its limit in the essential content of the right to freedom of expression, in such a way that in the case in question, our constitutional system does not permit the mere transmission of ideas to be classified as a crime, not even in cases where those ideas are truly execrable, being contrary to human dignity, a precept which forms the basis of all the

rights included in the Constitution, and therefore our political system.'

4.3.4. Exploring Consistent Interpretation

In the Spanish constitutional system, by virtue of the principle of conservation of legal norms, it is only necessary to declare unconstitutional those provisions whose incompatibility with the Constitution is clearly evident due to the fact that they cannot be interpreted in accordance therewith. In other words, the Court must explore the interpretive possibilities of the contested provision, to look for any possibility that would both safeguard the primacy of the Constitution, and to respect the democratic principle vested in the legislature. The Court, however, cannot attempt to reconstruct a legal norm against its obvious meaning, thus creating a new regulation with the concomitant assumption by the Constitutional Court of a positive legislative function, which institutionally does not correspond to it. Therefore, the contested provision would conform to the Constitution if it were possible to assume from its terms that the conduct penalised implied direct incitement to violence against specific groups or contempt for victims of the crimes of genocide.

In reality, the first part of Article 607(2) provided two different conducts classified as a crime, according to which disseminated ideas or theories deny or justify genocide. Here, the Court introduced a relevant distinction between both conducts. It considered that denial may be understood as the mere expression of a point of view on specific acts, sustaining that they either did not occur or were not perpetrated in a manner which could classify them as genocide, while justification, in turn, does not imply total denial of the existence of the specific crime of genocide but relativizes or denies its unlawfulness based on certain identification with the authors.

Then, the Court examined whether any or the two conducts could be qualified as a version of the "discourse of hatred" and arrived at different conclusions.

On the one hand, it rejected that the mere denial of a crime of genocide involves the said discourse as it presupposes direct

incitement to violence against citizens or against specific races or beliefs, which is not the case considered in this point by Article 607(2) of the Criminal Code (CC):

> 'The mere denial of the crime as opposed to other types of conduct in which specific values adhere to the criminal act, promoting it through the externalisation of a positive opinion, is, in principle pointless. Furthermore, not even tendentially – as the Public Prosecutor suggests – can it be stated that all denial of conduct legally defined as a crime of genocide objectively pursues the creation of a social climate of hostility against those persons who belong to the same groups, and who, in their day, were victims of a specific crime of genocide, the inexistence of which is claimed, nor can it be stated that any denial may per se be capable of achieving this. In that case, without prejudice to the corresponding judgment of proportionality determined by the fact that a merely preventive purpose or assurance cannot constitutionally justify such a radical restriction of these freedoms (Judgment 199/1987, of 16 December, LG 12), constitutionality of the provision would be a priori sustained by the requirement of an additional element not expressive of the crime classified in Article 607(2) CC; namely that the penalised conduct consisting of the dissemination of opinions denying genocide were in truth conducive to creating an attitude of hostility towards the affect group. To impose from this Court a restrictive interpretation in this aspect of Article 607(2) CC, by adding new elements, would exceed the limits of this jurisdiction by imposing an interpretation of the provision totally contrary to its literal meaning. As a result, the aforementioned conduct remains in a state prior to that justifying the intervention of criminal law, in that it does not even constitute a potential danger for the legal rights protected by the regulation in question, so that its inclusion in the provision assumes violation of the right to freedom of expression [Art 20(1) SC]. […] interpreted in this sense, the punitive regulation does, on this point, conform to the Constitution.'

On the other hand, it concludes that the disseminating of ideas justifying genocide may be qualified as a version of the 'discourse of hatred':

> 'Since it expresses a value judgment, it is indeed possible to note the aforementioned purposive element in the public justification of genocide. The special danger of such despicable crimes such as genocide, which place the very nature of our society in jeopardy, in exceptional circumstances permit criminal legislature, without any constitutional loss, to punish public justification of that crime, provided that the justification operates as an indirect incitement to its perpetration (…). Therefore, legislature may, within the scope of its freedom of configuration prosecute such conduct, including making it subject to criminal punishment provided that the mere ideological affiliation to political positions of any kind is not deemed to be included therein, which would be fully protected by Article 16 SC and, in connection, by Article 20 SC.
>
> Therefore, it will be necessary for the public dissemination of justificatory ideas to enter into conflict with constitutionally relevant rights of particular importance, which require the protection of penal sanctions. This will occur, firstly, when the justification for such an abominable crime is a means of indirect incitement to its perpetration. Secondly, it will also occur when by means of conduct consistent with presenting the crime of genocide as fair, some kind of incitement to hatred towards specific groups, defined on the basis of their colour, race, religion or national or ethnic origin, is attempted, in such a way that it presents a clear danger of generating a climate of violence and hostility which may be concentrated in specific discriminatory actions. It should be emphasised that indirect incitement to commit some of the types of conduct classified in Article 607(1) CC as a crime of genocide –which include among others, murder, sexual aggression, or forced displacement of populations – committed with the purpose of exterminating a whole human group, affect essential human dignity in a special way, in that it is one of the foundations of the political system (Art 10 SC) and sustains fundamental

> rights. Such a close link with the core value of any legal system based on the rights of persons enables legislature to prosecute modes of incitement in this crime, including indirect modes, which otherwise could remain outside the scope of criminal rebuke. The consideration of punishable dissemination of conduct justifying genocide such as a manifestation of the discourse of hatred is, furthermore, totally in line with the most recent international texts. […] Furthermore, disrespectful or degrading behaviour towards a group of people cannot be claimed to be valid in the exercise of the freedoms guaranteed in Article 20(1) SC which do not protect "totally degrading expressions, that is, those that in the specific circumstances of the case and irrespective of their truthfulness, or lack thereof, are offensive or contemptible" (for all cases see Judgment 174/2006, of 5 June 2006, LG 4; 204/2001, of 15 October 2001, LG 4; 110/2000, of 5 May 2000, LG 8).'

In conclusion, the Court accepted the partial unconstitutionality of the first part of Article 607(2) of the Criminal Code. The Judgment had four dissenting opinions from four constitutional judges.

4.3. Assessment

Judgment 235/2007 has been the object of many doctrinal commentaries in Spain, both in favour and against.[26] The criticism

26 DE LA ROSA CORTINA, Jose Miguel: 'Negacionismo y revisionismo del genocidio: perspectiva penal y constitucional' [Denial and revisionism of genocide: criminal and constitutional perspective], *La Ley*, Issue 6842, 2007; SANZ PÉREZ, Ángel Luis: 'Libertad de expresión y la negación de los crímenes contra la humanidad: la negación de los límites. Comentario a la STC 235/2007' [Freedom of expression and denial of crimes against humankind], *Repertorio Aranzadi del Tribunal Constitucional*, Issue 18, 2007, p. 13-30; FERNÁNDEZ-VIAGAS BARTOLOMÉ, Plácido: 'El bárbaro civilizado. Al hilo de la STC 235/2007' [The civilised barbaric], *Repertorio Aranzadi del Tribunal Constitucional*, Issue 19, 2007, p. 13-32; SUÁREZ ESPINO, Maria Lidia: 'Inconstitucionalidad del delito de negación de genocidio: Comentario crítico a la Sentencia del Tribunal Constitucional 235/2007, de 7 de noviembre' [Unconstitutionality of the crime of denial of genocide], *Cuadernos de Derecho Público*, Issue 30, 2007, p. 175-185; TORRES PÉREZ, Aida: 'La negación del genocidio ante la libertad de la STC 235/2007: las inconsistencias de la STC 235/2007 al descubierto' [Denial of genocide before the freedom of Judgment 235/2007: inconsistencies of the ruling], *Revista Vasca de Administración Pública*, Issue 79, 2007, p. 163-202; TAJADURA TEJADA, Javier: 'Libertad de expresión y negación del genocidio: Comentario crítico a la STC de 7 de noviembre de 2007' [Freedom of expression and denial of genocide], *Revista Vasca de Administración Pública*, Issue 80, 2008, p. 233-255; ROLLNERT LIERN, Göran: 'Revisionismo histórico y racismo en la jurisprudencia constitucional: Los límites de la libertad de expresión (a propósito de la STC 235/2007)' [Historical revisionism and racism in constitutional case-law: the limits of freedom of expression], *Revista de Derecho Político*, Issue 73, 2008, p. 101-146; SALVADOR CODERCH, Pablo – RUBÍ PUIG, Antoni: 'Negación de genocidio y Libertad de Expresión' [Denial of genocide and freedom of expression], *El Cronista del Estado Social y Democrático de Derecho* 1 (2009), pp. 32-43; RAMOS VÁZQUEZ, Jose Antonio: 'La declaración de inconstitucionalidad del delito de negacionismo (art. 607.2 del Código Penal)'

has focussed on two main aspects.

Firstly, the reasoning itself: some commentators (and the majority of the dissenting votes) consider the differentiation introduced by the judgment in the legal consideration of the two conducts punished by the same criminal provision as rather artificial. The criminalisation of the denial of the holocaust is considered to be unconstitutional since the literal meaning of the provision would not allow for the implicit inclusion of a purposive element. By contrast, the criminalisation of the justification of the holocaust is considered to conform to the Constitution since justification would always imply some kind of incitement to hatred towards specific groups and would present the clear danger of producing hostility and violence towards them.

However, in my opinion, the differentiation made by the Constitutional Court is not artificial. There is a morally and, therefore, legally-relevant difference between denying and justifying an abhorrent crime against the human race.

Secondly, it is argued that the legal consideration of the denial of the holocaust by the Spanish Constitutional Court deviates from the approach to the same conduct by the European Court of Human Rights.[27] In my opinion, the judgment sufficiently and justly explains the reasons the Constitutional Court deviates from the ECtHR's approach. On the one hand, the Spanish constitutional system does not contain a provision similar to Article 17 ECHR; it has no provision on the abuse of rights (*Verwirkung*), and the Spanish Constitutional Court cannot import such an institution. Therefore, no one can be deprived of their fundamental rights, even

[Declaration of unconstitutionality of crime of denial], *Revista Penal*, Issue 23, 2009, p. 120-137; BILBAO UBILLOS, Juan Maria: 'La negación de un genocidio no es una conducta punible (comentario de la STC 235/2007)' [Denial of genocide is not a punishable behaviour], *Revista Española de Derecho Constitucional*, Issue 85, 2009, p. 299-352; ÍÑIGO CORROZA, Maria Elena: 'Caso de la Librería Europa' [The case of the Europa bookshop], en Pablo SÁNCHEZ-OSTIZ GUTIÉRREZ (ed.), *Casos que hicieron doctrina en Derecho penal*, La Ley 2011, p. 613-631.

27 ALCÁCER GUIRAO, Rafael: 'Libertad de expresión, negación del holocausto y defensa de la democracia' [Freedom of expression, denial of holocaust and defence of democracy], *Revista Española de Derecho Constitucional*, Issue 97, 2013, p. 313. On the ECtHR's case-law on this regard, see LAZCANO BROTONS, Iñigo: 'Artículo 10', in Iñaki LASAGABASTER HERRARTE (ed.), Convenio Europeo de Derechos Humanos. Comentario sistemático [*European Convention of Human Rights. Systematic Commentary*], 3nd ed., Thomson-Reuters 2015, p. 510-630.

if they use them to destroy the freedoms of others and pluralism. On the other hand, the Constitutional Court stresses – and rightly so – that the Convention system offers a common European *minimum*, which cannot be interpreted as restricting fundamental freedoms recognized by constitutional systems. The fact that the ECHR system allows States to restrict the freedom of expression in *exceptional* circumstances does not mean that all States should restrict the freedom of expression in those circumstances.

5. THE CONTENT OF THE FREEDOM OF ASSOCIATION (JUDGMENT 104/1999)

5.1. The Facts

The facts of this case are rather simple, but the judgment allowed the Court to define the content of the right to freedom of association and to delineate the underlying space of an association's self-government.

A regional association of people with disabilities held an extraordinary meeting of its members in order to amend its internal statutes. The meeting was challenged by two people on the basis that they had not been summoned to it. The first judicial level denied them the legitimacy to challenge the meeting since it considered that they were not members of the association. Though they were in possession of receipts demonstrating that they had paid the membership fees for the previous year, the documentation of the association did not certify that they were members of the association. The Provincial Court and Supreme Court, in turn, considered that the receipts showing the payment of membership fees were proof enough of their status as association members. Consequently, the extraordinary meeting was declared null and void.

The association's board of directors, on behalf of the association, lodged an *amparo* appeal with the Constitutional Court, invoking the violation of the right to freedom of association by the aforementioned judgment of the Supreme Court.

5.2. The Court's Decision

The Court recalled that the right to freedom of association is one of the fundamental public freedoms of the person since it is aimed at guaranteeing a space of personal autonomy and the exercise, in full self-determination, of the powers that make up that specific expression of freedom (Judgment 244/1991). The Freedom of association is a key component of pluralist democracies and constitutes one of the structural elements of the rule of law proclaimed by the Spanish Constitution, which by its own nature rejects any kind of interference from public power (Judgment 56/1995).

The activity of an association is not a terrain free from judicial control, but when the statutes of the association are lawful, judicial control limits itself to checking conformity of the activity of the association with its statutes, essentially the capacity of the acting body and the adequacy of the proceedings. Judicial control cannot review decisions which result from value assessments and have a discretional character; it can only check whether they have a reasonable basis.

The freedom of association includes four complementary areas: the freedom to create associations and join existing associations, the freedom to not associate and to leave an association, the freedom to organise and operate free from public interference, and a set of powers that the members of the association have available to them individually vis-à-vis the association to which they belong or vis-à-vis other individuals that intend to join the said association. Interestingly, the Court states that the right to define the corresponding organisation, including the power to regulate the causes and the procedure to admit and expel members of the association belongs to the core content of the freedom of association. This has important consequences for the legislature; it cannot supress the essential content of fundamental rights (Art 53(1) SC).

After establishing the content of the freedom of association, the Court looked at the specific case. It stated that the legal life of an association is ruled by its statutes and by the decisions validly taken

by the general assembly and the managing bodies of the association. The basis of any association is the free will of its members to join and to maintain membership in order to achieve certain social aims; those who intend to join the association must know those aims and must accept the statutes, by which they will be bound, in their entirety. In the case that there is no decision by the board of directors of the association on the admission of those who claim to be members and even if they are in possession of the receipts signed by one of the members of the said board, those documents cannot award membership status; such an action would amount to an evasion of the admission procedure established by the statutes and subversion of the board of directors' competence.

The Court considered that the ordinary courts had not put emphasis on the right issue, focussing on the issue of the evidence of the applicant parties as members of the association rather than on the interpretation of statute provisions. Thus, the ordinary courts had invaded the area of the association's self-government and created a rule by analogy that was not contained in the statutes. The issue was not a problem of evidence. The right of the members of an association entails the right to the fulfilment of the statutes, provided that they conform to the Constitution and to the laws. Omitting the proceedings defined by the statutes of the association for the admission of new members with the argument that membership fees had been paid, affects the content of the freedom of association as to its self-government.

6. THE RESTRICTION OF THE FREEDOM OF ASSOCIATION OF POLITICAL PARTIES (JUDGMENT 48/2003)

6.1. Background to the Case: Law 6/2002 on Political Parties

On 27 June 2002, the Spanish Parliament enacted Organic Law 6/2002 on Political Parties. The Law was intended to develop Articles 1 [the highest value of political pluralism], 6 [political parties], 22 [freedom of association] and 23 [the right to participation] of the Spanish Constitution by amending and updating the Law 54/1978 of 4 December 1978 on political parties, having regard to the

experience acquired over the years, and to establish a complete and coherent framework for political parties, reflecting their role in a consolidated democracy. The main innovations introduced by the new Law appeared in Chapter II on the organisation, functioning and activities of political parties, and in Chapter III on their dissolution and suspension by the courts of their activities.

The Law is based on the principle that any project or objective is constitutional provided that it is not pursued by means of activities which breach democratic principles or the fundamental rights of citizens. A party may be dissolved only in the event of repeated or accumulated acts which unequivocally prove the existence of undemocratic conduct at odds with democracy and in breach of constitutional values, democracy and the rights of citizens. Sub-paragraphs (a), (b) and (c) of paragraph 2 of section 9 draw a clear distinction between organisations which defend their ideas or programmes, whatever they may be, in strict compliance with democratic methods and principles, and those whose political activity is based on an accommodation of violence, political support for terrorist organisations or violations of the rights of citizens or democratic principles.

Chapter III sets out the grounds on which political parties may be dissolved or their activities suspended by order of the court and describes the applicable procedure. The Law vests in the 'special Chamber' of the Supreme Court established by section 61 of the Judicature Act the jurisdiction to dissolve political parties. The provision is made for specific priority proceedings, involving a single level of jurisdiction, which may be brought only by the Public Prosecutor's office or the government of their own motion or at the request of the Chamber of Deputies or the Senate. The judgment delivered by the 'special Chamber' of the Supreme Court upon completion of these proceedings may be challenged only by way of an individual application to the Constitutional Court.

Section 12 details the effects of the court-ordered dissolution of a political party. Once the judgment has been served, the dissolved party must cease all activity. Furthermore, it may not set up a political

organization or use an existing party with a view to pursuing the activities of the party that has been declared illegal and dissolved.

The political and constitutional complexity of the aforementioned regulation should be stressed. Politically, because the Law was not merely an abstract or hypothetical regulation; it was directed – as it soon turned out – at the dissolution of a certain Basque nationalist party which had been in operation since the beginning of the democratic system, receiving around 15%-20% of the vote in the Basque regional elections and in some periods even holding a seat at the European Parliament. It was this political party that was considered to hold close ties to the terrorist organisation *ETA*. Constitutionally, the Law 6/2002 created a legal scheme for the dissolution of political parties while the Constitution did not foresee the dissolution of political parties for reasons other than a criminal activity.[28]

On 27 September 2002, the government of the Autonomous Community of the Basque Country brought an action before the Constitutional Court challenging the constitutionality of the Law on political parties. It argued that the Law violated many constitutional guarantees: the freedom of association; the principle of legality of crimes and punishments; the freedom of ideology, expression, and communication; the right to political participation; and the principle of non-retrospectivity.

28 There is a vast bibliography on the constitutionality of Law 6/2002 on Political Parties. See VÍRGALA FORURIA, Eduardo: 'Los partidos políticos tras la LO 6/2002' [Political parties after Organic Law 6/2002], *Teoría y realidad constitucional*, Issue 10-11, 2003, p. 203; ECHARRI CASI, Fermín Javier: Disolución y suspensión judicial de partidos políticos [*Dissolution and judicial suspension of political parties*], Dykinson 2003; ESPARZA OROZ, Miguel: La ilegalización de Batasuna [*The illegalisation of the political party Batasuna*] Thomson Reuters 2004; TAJADURA TEJADA, Javier: Partidos políticos y Constitución [*Political parties and Constitution*], Civitas 2004; MONTILLA MARTOS, J. A.: *La prohibición de partidos políticos* [The prohibition of political parties] Universidad de Almería 2004; LÓPEZ BOFILL, Hèctor: La democràcia cuirassada [*The panzer democracy*], La Esfera de los Libros 2005, p. 128 et sequatur.; HOLGADO GONZÁLEZ, M.: 'La ilegalización de partidos políticos en España como instrumento de lucha contra el terrorismo' [The illegalisation of political parties in Spain as an instrument to fight against terrorism], in Javier PÉREZ ROYO (ed.), Terrorismo, democracia y seguridad, en perspectiva constitucional [*Terrorism, democracy and security*], Marcial Pons 2010, p. 187. In English see COMELLA FERRERES, Víctor: 'The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna', in András SAJÓ (ed.), *Militant Democracy*, Eleven International Publishing 2004, p. 133-156.

6.2 The Court's Decision

As regards the existence of such a law-making provision for the dissolution of political parties and its purpose which, according to the Basque government, consisted of 'establishing a model of militant democracy imposing restrictions on political parties, in particular by imposing on them an obligation, not provided for in the Constitution, to accept a given political regime or system', the Constitutional Court stated:[29]

> 'According to the applicant government, the argument set out above is based on references in certain paragraphs of sections 6, 9 and 10 of the LOPP to the 'constitutional values expressed in constitutional principles and human rights' (section 9(1)), to 'democratic principles' (sections 6 and 9(2)), to the 'system of liberties' and to the 'democratic system' (sections 9(2) and 10(2), sub-paragraph (c)), to the 'constitutional order' and to 'public peace' (section 9(2), sub-paragraph (c)). Despite the fact that the legal significance of those references can be grasped only in the context of each of the provisions containing them and that each of the provisions in question must in turn be interpreted in the light of the law and of the legal system as a whole, the Basque government's submission that there is no place, in our constitutional order, for a model of 'militant democracy' within the meaning given to that expression by the Government, namely, a model in which not only compliance with, but also positive acceptance of, the established order and first and foremost the Constitution is required, must be endorsed […]. The impugned Law allows for no such model of democracy. Right at the outset, the explanatory memorandum lays down the principle of a distinction between the ideas and aims proclaimed by political parties, on the one hand, and their activities, on the other, and states that 'the only aims explicitly vetoed are those which fall

29 The following synthesis and English translation of the relevant grounds of the Constitutional Court's Judgment 48/2003 is based on §§ 20-25 of the European Court of Human Rights' Judgment of 30 June 2009, case *Herri Batasuna and Batasuna v. Spain*, applications nos. 25803/04 and 25817/04.

within the criminal law', so that 'any project or objective is deemed to be constitutional provided that it is not pursued by means of activities which breach democratic principles or the fundamental rights of citizens'. Consequently, and as regards the aspect which is of particular interest here, the Law lists as grounds for illegality 'conduct' – that is to say, acts – of political parties which, through their activities, and through the ultimate aims proclaimed in their manifestos, fail to satisfy the requirement of Article 6 of the Constitution, which the impugned Law merely mentions.

[…] Second, and most importantly, it is clear that the principles and values to which the Law refers can be none other than those proclaimed by the Constitution, and that their content and scope depend on the meaning arising out of the interpretation of the positive constitutional provisions as a whole. Thus, in our system, 'democratic principles' can only be principles specific to the democratic order arising out of the institutional and normative fabric woven by the Constitution, the actual functioning of which leads to a system of powers, rights and balances giving form to a variant of the democratic model which is precisely that assumed by the Constitution in establishing Spain as a social and democratic State governed by the rule of law (Article 1(1) of the Constitution).'

As regards the applicant parties' argument that the provisions of the Law, namely some of the cases referred to in section 9(3) (tacit support, for example), established a 'militant democracy' in breach of the fundamental rights of freedom of ideology, participation, expression, and information, the Constitutional Court stated:

'[…] the system established by the first three paragraphs of section 9 of the LOPP must firstly be described. The first paragraph refers not to a positive adherence of any kind but to simple respect for constitutional values, which must be demonstrated by political parties when engaging in their activities and which is compatible with the broadest

ideological freedom. Paragraph 2 provides that a political party may be declared illegal only 'when as a result of its activities, it infringes democratic principles, in particular when it seeks thereby to impair or to destroy the system of liberties, to hinder or to put an end to the democratic system by repeatedly and seriously engaging in any of the conduct described below'. Lastly, sub-paragraphs (a), (b) and (c) list the general criteria for a party to be declared illegal on account of its activities […]. As regards paragraph 3 of section 9 of the LOPP, the flawed drafting of its introduction might suggest that the instances of behaviour described by that provision are in addition to those specified in the preceding paragraph and that they must therefore be interpreted separately. However, an interpretation of these two provisions taken together and an interpretation of the whole section which contains them show that the instances of behaviour described in paragraph 3 of section 9 have the general features described in paragraph 2 of the same section. The instances of behaviour referred to in section 9(3) of the Law merely specify or clarify the principal causes of illegality set out in general terms in section 9(2) of the Law. A separate interpretation and application of such conduct can be done only on the basis of the cases provided for in section 9(2).

That having been said, while it is not for the Constitutional Court to determine whether or not mere failure to condemn [terrorists acts] can be construed as implicit support for terrorism, it is clear that symbolic actions can be used, in certain circumstances, to legitimize terrorist acts or excuse or minimize their anti-democratic effects and implicit violation of fundamental rights. In such circumstances, it is plainly impossible to speak of a violation of the right to freedom of expression.

[…]

The same can be said, in general, of sub-paragraph (c) of section 10(2) of the LOPP, which provides: 'where, through

> its activities, it repeatedly and seriously violates democratic principles or seeks to impair or to destroy the system of liberties or to hinder the democratic system or to put an end to it by means of the conduct referred to in section 9.' It must also be stated in this regard that that provision concerns only the activities of political parties and in no way extends to their aims or objectives. The wording of that provision shows, therefore, that only those parties which through their activities rather than their ideology effectively and proactively seek to 'impair or to destroy the system of liberties' are liable to be dissolved.'

As regards the Basque government's complaint that the dissolution measure prescribed by law was disproportionate, the Constitutional Court stated:

> '[…] taken separately, none of the conduct described in section 9 of the LOPP can entail a party's dissolution. In order for that measure to be pronounced, as stated in section 9(2), the conduct in question must be engaged in 'repeatedly and seriously'. Secondly, it must be pointed out that the existence of a party which, through its activities, collaborates with or supports terrorist violence, jeopardises the survival of the pluralist order proclaimed by the Constitution and that, faced with that danger, dissolution would appear to be the only sanction capable of repairing the damage done to the legal order. Lastly, it must be stressed that Article 6 of the Constitution contains a definition of a party. According to the Constitution, a party may only be considered a party if it is the expression of political pluralism. Consequently, it is quite acceptable, constitutionally, for a party whose activities undermine pluralism and to a greater or lesser extent destabilise the democratic order, to be dissolved. Similarly, the European Court of Human Rights has considered that even though the margin of appreciation left to States must be a narrow one where the dissolution of political parties is concerned, where the pluralism of ideas and parties inherent in democracy is in danger, a State may forestall the execution

of a policy at the root of that danger [*Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, 31 July 2001].

[…] it is not sufficient to establish the existence of just one of the acts described by the Law. On the contrary, those acts need to be engaged in 'repeatedly and seriously' (section 9(2)) or 'repeatedly or cumulatively' (section 9(3)). […] To conclude, [the relevant provisions] describe particularly serious conduct and establish as grounds for dissolution only those which are manifestly incompatible with the peaceful and lawful means which are an essential part of the process of political participation to which the Constitution requires political parties to lend their qualified support. […] The criteria established by the case-law of the European Court of Human Rights as regards the dissolution of political parties have therefore been complied with (*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports of Judgments and Decisions* 1998-I; *Socialist Party and Others v. Turkey*, 25 May 1998, *Reports* 1998-III; *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, ECGR 1999-VIII; *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, 31 July 2001 and [GC], ECHR 2003-II; *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/92, ECHR 2002-II; and *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002). That case-law states that in order to comply with the European Convention of Human Rights, the dissolution of a party must satisfy certain criteria, namely: (a) the law must include the circumstances and causes of dissolution (that criterion is clearly satisfied by the rules at issue, since they are set out in a formal law); (b) the aim pursued must be legitimate (which, as indicated above, consists in the instant case of protecting the democratic process of political participation through the exclusion of any associative organisation which could be likened to a party exercising an activity not falling within the constitutional definition of political parties); and (c) the dissolution must

be 'necessary in a democratic society') (demonstrated in the context of the foregoing analysis of the specific causes of dissolution provided for by the law).

[…] The fact that convicted terrorists are regularly appointed to positions of leadership or entered on lists of candidates for election may appear to constitute an expression of support for terrorist methods which goes against the obligations imposed by the Constitution on all political parties. Furthermore, the fact that such a practice can be taken into account only if the convicted terrorists have not 'publicly rejected terrorist aims and methods' cannot be interpreted as an obligation to disavow earlier activities. The provision in question [section 9(3)(c)] is of prospective effect only and applies only to political parties which are led by convicted terrorists or whose candidates are convicted terrorists. It lays down as a cause of dissolution the regular use of people who may legitimately be assumed to sympathise with terrorists' methods rather than with any ideas and programmes that terrorist organizations might seek to implement.'

The Constitutional Court also rejected the complaints based on the principle of non-retrospectivity, the principle of *non bis in idem*, the lack of foreseeability, and the specific features of the judicial proceedings. Accordingly, it unanimously dismissed the applicant parties' claims, stating in paragraph 23 of its reasoning that sections 3(1), 5(1), 9(2) and (3) and paragraph 2 of the sole transitional provision of the LOPP were constitutional only if 'interpreted in accordance with the terms set out in paragraphs 10, 11, 12, 13, 16, 20 and 21' of the reasoning of its judgment.[30]

30 On the consequences of the judgment for the constitutional system, see NEBRERA, Montserrat: 'Patriotismo y mutación constitucionales (En torno a la LO 6/2002 de partidos políticos y la STC 48/2003)' [Patriotism and constitutional change (About Organic Law 6/2002 on political parties and Judgment 48/2003 of the Constitutional Court], *Revista de Estudios Políticos*, Issue 123, 2004, p. 243 et seq.; MONTILLA MARTOS, Jose Antonio: 'Algunos cambios en la concepción de los partidos. Comentario a la STC 48/2003, sobre la Ley Orgánica 6/2002, de Partidos Políticos' [Changes in the notion of political parties. Commentary on Judgment 48/2003 on Organic Law 6/2002 of Political Parties], *Teoría y Realidad Constitucional* 12-13 (2004), p. 567; REVENGA SÁNCHEZ, Miguel: 'El tránsito hacia (y la lucha por) la democracia militante en España' [The marsch towards, and the fight in favour of militant democracy in Spain], *Revista de Derecho Político*, Issue 62, 2005, p. 11-31; LÓPEZ BOFILL,

6.3. The Aftermath

The Basque government subsequently lodged an application with the European Court of Human Rights (no. 29134/03), which was declared inadmissible on the grounds of *ratione personae* incompatibility on 3 February 2004.

The Law on Political Parties immediately entered into force. On 2 September 2002, only two months after the publication of the Constitutional Court's judgment, the Spanish government initiated proceedings to dissolve the Basque political parties with close ties to terrorist organizations. In reality, it was the same party under three different names it had used previously (*Herri Batasuna*, *Euskal Herritarrok* and *Batasuna*). These political parties were dissolved by a unanimous judgment of the Supreme Court of 27 March 2003.[31]

Herri Batasuna and *Batasuna* lodged two *amparo* appeals with the Constitutional Court against the judgment of the Supreme Court. By two unanimous judgments of 16 January 2004 the Constitutional Court dismissed the appeals (Judgments 5 and 6/2004). Subsequently, *Herri Batasuna* and *Batasuna* lodged an application with European Court of Human Rights (nos. 25803/04 and 25817/04), which unanimously held on its Judgment of 30 June 2009 that there had been no violation of Article 11 of the Convention (freedom of association) and that it was not necessary to examine the complaints separately under Article 10 of the Convention

Hèctor, 'Parteiverbot ohne Grundlage in der Verfassung?' [Prohibition of political parties without constitutional basis?], in *Verfassung im Diskurs der Welt – Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag*, Mohr 2004, p. 393; BALAGUER CALLEJÓN, Francisco – AZPITARTE SÁNCHEZ, Miguel, 'Das Grundgesetz als ein Modell und sein Einfluss auf die spanische Verfassung von 1978' [German Basic Law as a model and its influence on the Spanish Constitution of 1978], *Jahrbuch des öffentlichen Rechts*, Issue 58, 2010, p. 27; ÁLVAREZ CONDE, Enrique – CATALÀ I BAS, Alexandre Hugo: 'La aplicación de la Ley Orgánica de Partidos Políticos. Crónica inacabada de la ilegalización de Herri Batasuna, Batasuna y Euskal Herritarrok' [The application of Organic Law on political parties. Unfinished chronicle of the illegalisation of Herri Batasuna, Batasuna and Euskal Herritarrok], *Foro - Nueva época*, Issue no. 0, 2004, p. 14.

31 On the Supreme Court's Judgment see VÍRGALA FORURIA, Eduardo: 'La STS de 27 de marzo de 2003 de ilegalización de Batasuna: el Estado de Derecho penetra en Euskadi' [Judgment of 27 March 2003 of the Supreme Court on the illegalisation of Batasuna: the rule of law permeates the Basque Country], *Teoría y realidad constitucional*, Issue 12-13, 2003, p. 609; and 'El recorrido jurisprudencial de la suspensión y disolución de Batasuna: agosto de 2003 a mayo de 2007' [The case-law on the suspension and dissolution of Batasuna: from August 2003 to May 2007], *Revista Española de Derecho Constitucional*, Issue 81, 2007, p. 243.

(freedom of expression), since the questions raised by the applicant parties under that Article concerned the same facts as those raised under Article 11.[32] Applications from other private persons before the European Court of Human Rights were equally unsuccessful.[33]

The effects of the Supreme Court's judgment of 27 March 2003 went even further. The next elections to take place in the autonomous region of the Basque Country, saw the inclusion of the names of people belonging to the dissolved political parties on the electoral lists of other political parties or new associations. These were also subsequently dissolved. As a result, another slew of cases arrived at the Constitutional Court.[34]

On 10 January 2011, the terrorist organization ETA declared a 'permanent, general and verifiable' cease-fire. Some weeks later, the founding of a new political organization under the name *Sortu* was publicly announced. The state government denied its inscription in the registry of political parties since it considered that it was a successor of the dissolved party, *Batasuna*. On 23 March 2011,

32 See RODRÍGUEZ, Ángel: 'Batasuna ante el Tribunal Europeo de Derechos Humanos: protección «multinivel» de derechos en Europa y régimen de los partidos políticos en España' [Batasuna before the European Court of Human Rights: multilevel protection of rights in Europe and the political parties legislation in Spain], *Revista de Derecho Comunitario Europeo*, Issue 35, 2010, pp. 195-221.

33 European Court of Human Rights, 30 June 2009, case *Etxeberria, Barrena, Arza, Nafarroako Autodeterminazio Bilgunea, Albako and others v. Spain*, nos. 35579/03, 35613/03 and 35634/03; *Herritarren Zerrenda v. Spain*, no. 43518/04. See IGLESIAS BÁREZ, Mercedes: 'La ley de partidos políticos y el test de convencionalidad europeo: el diálogo entre el Tribunal Constitucional y el Tribunal Europeo de Derechos Humanos en torno a la ilegalización de Herri Batasuna y Batasuna' [Law on political parties and the European conventionality test: dialogue between the Spanish Constitutional Court and the European Court of Human Rights with regard to the illegalisation of Herri Batasuna and Batasuna], *Teoría y Realidad Constitucional*, Issue 25, 2010, p. 567.

34 See Constitutional Court of Spain, Judgments 85/2003 (*Ametzak Amezketa*), 176/2003 (*Herri Taldea*), 99/2004 (*Herritarren Zerrenda*), 68/2005 (*Aukera Guztiak*), 126/2009 (*Iniciativa internacionalista - La solidaridad entre los pueblos*). On the legal problem of the succession of political parties through associations of electors see SERRANO MAÍLLO, María Isabel: 'Agrupaciones de electores y la posible continuidad de partidos políticos ilegalizados por parte de éstas' [Associations of electors and the eventual continuity of illegalised political parties], *Teoría y Realidad Constitucional*, Issue 16, 2005, p. 435; ÁLVAREZ CONDE, Enrique – CATALÀ I BAS, Alexandre Hugo: 'Los efectos directos y colaterales de la disolución de Herri Batasuna' [Direct and collateral effects of the dissolution of Herri Batasuna], *Foro - Nueva época*, Issue 2, 2005, p. 131; VÍRGALA FORURIA, Eduardo: 'La admisión de Iniciativa Internacionalista a las elecciones europeas de 2009: el Tribunal Constitucional corrige acertadamente la decisión del Tribunal Supremo' [The admission of Iniciativa Internacionalista to European elections of 2009: the Constitutional Court reviews correctly the decision of the Supreme Court], *Revista Española de Derecho Constitucional*, Issue 87, 2009, p. 315.

the Supreme Court declared the lawfulness of the government's decision not to register *Sortu*. Unlike previous cases, the decision was not taken unanimously but with a majority of nine judges to seven. *Sortu* lodged an application with the Constitutional Court. On 20 June 2012, the Constitutional Court decided that with the aforementioned judgment, the Supreme Court had violated *Sortu*'s fundamental right to create political parties recognized in Article 22 of the Constitution. The decision was taken by the narrowest of majorities (one vote). Since then, *Sortu* has taken part in all elections held in the Basque Country. The government has not tried again to dissolve it.

7. Conclusions

This brief exposé of the Spanish Constitutional Court's case-law on the freedom of expression and associations confirms two main points.

Firstly, constitutions are living documents; their interpretation is dynamic. Constitutional Courts do not deal with a plurality of ordinary laws but with one single law, the most basic law of any state: the Constitution. Constitutional provisions on fundamental rights have particularly undetermined vague contours, and the Constitutional Court's task is to make these provisions more explicit.

Secondly, the Spanish Constitutional Court's case-law demonstrates a systematic adherence to the European Convention on Human Rights and to the case-law of the European Court of Human Rights. The European Convention has acquired a central role within the so-called 'Common European Constitutional Law'; in other words, it constitutes 'European rule of law'. Moreover, when the Spanish Constitutional Court purports to deviate from the criteria developed by the European Court of Human Rights – if only apparently as happened in Judgment 235/2007, in which a higher level of protection of freedom of expression was upheld –, it provides extensive reasoning even though it has no constitutional obligation to do so.

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION IN UZBEKISTAN'S CONSTITUTIONAL LAW

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ABSTRACT

This paper consists of the overview of the current state of the legislative basis of the freedom of expression and freedom of association in the Republic of Uzbekistan, analysis of the national and international instruments regulating these issues. The author tries to develop the scope of the abovementioned freedoms and their limitations according to national and international legal acts. The peculiarities of the national regulation of these issues have also been explored in the current paper and the author tries to reveal the causes and grounds for the existence of such peculiarities.

KEY WORDS: *Freedom of expression and association, scopes and limitations of the freedom*

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION IN UZBEKISTAN'S CONSTITUTIONAL LAW

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INTRODUCTION

As Aristotle said: "Man is by nature a social animal", thus every human being communicates with the other members of the society, expresses and exchanges his ideas and information. Therefore, the freedom of expression is indispensable for human dignity and fulfillment. It also plays an essential role in the implementation of the other human rights, as well as democracy and rule of law. The freedom of expression is also a cornerstone of the freedom of assembly and association.[1] These freedoms coupled make the grounds without which democracy cannot exist.

The Freedom of expression – a natural and inalienable human right that belongs to his inner world. It is the foundation of all spiritual life, and does not allow any intrusion and intervention without the consent of the person. Along with such rights as the right to life, liberty, dignity and integrity of the individual and others, the freedom of thought and expression is a prerequisite of the life of a civilized society and must be unequivocally recognized and guarded by the state.[2]

Civilized relations between the authorities and individuals suggest openness, broad public discussion of socially important problems, smooth implementation of the constitutional rights and freedoms in the field of information and use it for the full development of the individual,

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1 UN Human Rights Committee's general comment 34, http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, DAI: 20 July 2015.

2 MURATOV, Marat: Право на свободу слова: история и современность [*Right to Freedom of Speech: History and Modernity*], Moscow 2002, p.10.

General Provisions of the Freedom of Expression and the Freedom of Association

A. FREEDOM OF EXPRESSION

The long evolution of ideas on the freedom of expression has led to its recognition by the majority of democratic states in the world and securing this right in the constitutions of these states as well as in international documents.

For instance, Article 19 of the Universal Declaration on Human Rights (UDHR) states:

> "Everyone has the right to the freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states:

> Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The scope of this right stipulated by the aforementioned documents was elaborated in detail by UN treaty bodies and the Article was interpreted broadly.

As a party to these international documents, Uzbekistan has implemented their provisions on the freedom of expression into the Constitution and laws. The Constitution secures freedom of expression in two ways. Firstly, it is fixed as a part of constitutional order of the state in Article 12. Secondly, the freedom of expression is guaranteed as a part of constitutional-legal status of an individual in Article 29.

Article 12 of the Constitution of the Republic of Uzbekistan[3] states:

> "In the Republic of Uzbekistan, public life shall develop on the basis of a diversity of political institutions, ideologies and opinions. No ideology may be established as the state".

This provision should be considered as a legacy of the communistic past, when all the other ideologies and opinions except the communistic one were considered as alien, and even were persecuted. This Article provides a kind of freedom of expression on a state level. It implies that no framework in a form of ideology can be imposed on anyone. This Article resides in part one of the Constitution which is dedicated to the main principles and comprises the element of the constitutional order.

In part two of the Constitution which is dedicated to the human rights and freedoms, we can find Article 29 which explicitly secures the freedom of expression. It states:

> "Everyone shall be guaranteed freedom of thought, speech and opinions. Everyone shall have the right to seek, obtain and disseminate any information except that which is directed against the existing constitutional order and the other limitations specified by law.
>
> Freedom of opinions and their expression may be restricted by law if any state or other secret is involved."

3 The Constitution of the Republic of Uzbekistan, adopted on 8 December 1992, http://ksu.uz/en/page/index/id/7, DAI: 20 July 2015.

Scope

The wording of the provision is somewhat different from that of UDHR and ICCPR's Article 19. This difference can be explained by the fact that the notion of the freedom of expression in most post-soviet countries legislation is expressed by the words "freedom of thoughts and speech". Nevertheless, the scope of the notion is almost the same. Varying from some countries (e.g. Belgium[4]) , the freedom of expression in Uzbekistan can be exercised by "everyone", i.e. regardless of citizenship. According to Article 18 of the Constitution, no distinctions in exercising the right are permitted on the basis of someone's sex, race, nationality, language, religion, social origin, convictions, individual and social status. Any privileges may be granted solely by law and must conform to the principles of social justice.

The words "…freedom of thought…" comprise the freedom of the individual from any ideological control, everyone's right to independently choose for oneself the system of spiritual values. "Freedom of speech" implies the possibility to publicly express one's ideas.

Several legislative acts elaborated the freedom of expression as an element in the structure of the legal status of a person. The analysis of these acts exposes the following universal, interdependent and interrelated elements:

1) the right to freely hold the opinion;

2) the right to a free renunciation of his opinions and beliefs;

3) the right to freely express one's opinion;

4) the right to communicate orally or in writing, including the right to refrain from communicating;

5) the right to freely choose the medium of communication;

6) the right to seek, receive and impart information and ideas through any media and regardless of frontiers;

4 Title II of the Constitution of Belgium "On Belgians and their rights", www.const-court.be/en/basic_text/belgian_constitution.pdf, DAI: 20 July 2015.

7) the right to full and objective awareness of the facts and circumstances that pose a threat to human life or health or otherwise directly affect the rights, freedoms and duties of man and citizen;

8) the right to maximum free exchange and comparison of ideas and knowledge;

9) the right to participate in the development of information;

10) the right to a contradiction of false or distorted reports, and to be protected from harm caused by such messages;

11) the right to individual and collective appeals to state bodies and local self-government and others.

Two laws guarantee everyone's right to seek information. They are – the Law "On Guarantees and Freedom of Access to Information"[5] and the Law "On Principal and Guarantees of Freedom of Information"[6]. According to their provisions, every citizen is guaranteed the right of access to information. The state protects everyone's right to seek, receive, transfer and disseminate information. The basic principles of the freedom of information include openness, publicity, accessibility and authenticity. Information should be open and transparent, except for being confidential.

The information should be publicly available and reliable. The distortion and falsification of information is prohibited. The media as well as the source and author of information are responsible for the accuracy of the information disseminated in accordance with the law. The law stipulates that censorship and monopolization of information is not allowed. Any denial to information can be appealed in a court.

The bodies of state power and administration, self-government bodies, public associations and other non-profit organizations and officials are obliged to in accordance with legislation to

5 Adopted on 24 April 1997, http://www.lex.uz/pages/getpage.aspx?lact_id=2118, DAI: 20 July 2015.
6 Adopted on 12 December 2002, http://www.lex.uz/pages/getpage.aspx?lact_id=52709, DAI: 20 July 2015.

provide everyone with access to information affecting his rights, freedoms and legitimate interests, create available information resources, broadly inform the users about the rights, freedoms and responsibilities of citizens, their security and other issues of public interest. In addition, a special law "On Openness of the Activity of Organs of State Power and Administration"[7] was adopted to ensure access of individuals and legal entities to information about the activities of the state and government, to guarantee the right to information about the activities of state authorities, to increase the responsibility of state and governments and their officials for the decisions, to determine the procedure of dissemination of information about the activities of state authorities.

At the same time, the law prescribes the manner in which the information can be obtained. According to it, everyone has the right, either directly or through his representatives to handle written or oral request for information. The written request shall contain the name, surname, address accesses (for a legal entity - its details) and the name of the requested information and its nature. A written answer to the request must be given as soon as possible, but not later than thirty days from the date of the receipt of the request, unless otherwise provided by law. The answer to the oral inquiry should be given as soon as possible. A delay in providing the information requested should not exceed two months from the filing date of the request. If the authority or official does not possess the requested information, it shall, within five days from the date of the receipt of the request notify the person, where he can find the requested information.

Providing the requested information may be denied if it is confidential or its disclosure may cause damage to the rights and legitimate interests of the individuals or the interests of society and the state. However, the law guarantees that some information cannot be confidential. They are: acts of legislation on the rights and freedoms of citizens, the order of their implementation, as well as establishing the legal status of state power and administration, local

7 Adopted on 5 May 2014, http://www.lex.uz/pages/getpage.aspx?lact_id=2381138, DAI: 20 July 2015.

authorities, public associations and other non-profit organizations; information on ecological, meteorological, demographic, sanitary and epidemiological emergencies and other information necessary to ensure the safety of the population, human settlements, production facilities and communications; information available in open funds of libraries, archives and information systems of legal entities operating in the territory of the Republic of Uzbekistan. The bodies of state power and administration, self-government bodies, public associations and other non-profit organizations are required to transmit to the media reports on events, facts, phenomena and processes of interest to society.

A free, uncensored and unhindered press of other media is essential in any society to ensure the freedom of opinion and expression and the enjoyment of other rights.[8] Taking into account the importance of the mass media, a special chapter was allocated in the Constitution. Article 67 of the Constitution states:

> "The mass media shall be free and act in accordance with law. It shall bear responsibility for trustworthiness of information in a prescribed manner.
>
> Censorship shall be impermissible."

The freedom of the activity of mass media and its legal regulation was elaborated in the Law "On Mass Media".[9] According to its provisions, mass media is a form of periodical distribution of mass information, which has a permanent title and exits out or broadcasts at least once every six months, in print (newspapers, magazines, records, papers) and in electronic form, and other forms of periodical distribution of information. The media is free and carry out its activities in accordance with law and other legislative acts. Everyone has the right to speak in the media to openly express their opinions and beliefs, unless otherwise provided by law. The media in accordance with the law has the right to seek, receive, impart information and is responsible for the objectivity and accuracy of the information disseminated.

8 See footnote n. 1 *supra.*

9 Adopted on 26 December 1997.

Restrictions, Limitations and Liability

As many other human rights, the right to freedom of expression is not absolute. UDHR and ICCPR also have limitation on the freedom of expression. Limitations are the exception to the freedom, permitted only to protect:

- the rights or reputations of others;

- national security;

- public order;

- public health;

- morals.

UN treaty bodies has extendedly analyzed and interpreted this limitation and came to the conclusion that the limitation is legitimate if it falls within the very narrow conditions defined in the three-part test in Article 19(3) of the ICCPR:

1. The right to freedom of expression can be limited by a law or regulation that is formally recognized by those entrusted with law making.[10] The law or regulation must meet the requirement of legal certainty.

2. The aim of the limitation of the right to freedom of expression should be legitimate, i.e. they should be directed to '…respect for the rights and reputations of others, and protection of national security, public order (*ordre public*), public health or morals'. According to the interpretation of Article 19 ICCPR, this list of aims is exhaustive.

3. Any limitation of the right to freedom of expression must be truly necessary. That means that the legitimate aim could not be reached by imposing any other method of regulation except limiting the right. Necessity also implies the proportionality of the taken measures of limitation. Any harm to the freedom of expression subsequent to imposing the limitations should not overweigh the benefits of that freedom. Otherwise, it would not be proportionate.

10 See footnote n. 1 *supra.*

Article 20 of ICCPR prohibits propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Uzbek legislation as well has its own limitations on the right of freedom. Sub (2) of article 29 expressly states that the freedom of opinion and expression may be restricted in case any state or the other secret protected by law is involved. Accordingly, the legislator has implemented a special Law "On Protection of State Secrets".[11] This law determines what the state secrets are and how they are classified as secrets. The law stipulates that information cannot be classified as state secret if such classification threatens the personal safety of the citizens.

Further, Article 20 of the Constitution states:

> "The exercising of rights and freedoms by a citizen must not encroach on the lawful interests, rights and freedoms of other persons, the state and society."

Thus, the boundaries of the freedom of expression of the individual finish where the other person's rights and freedoms start. Therefore, the freedom of expression can be limited on the ground of ensuring and protecting rights, freedoms and legitimate interests of individuals, state and society. Article 27 of the Constitution secures protection against encroachments on one's honor, dignity, interference in private life. Those are the values protected by the Constitution.

According to the Law "On Principal and Guarantees of Freedom of Information", the Government has approved the list of confidential information which could be closed. Those are:

- information about the personal data of individuals;

- information concerning the private life, as well as information violating the privacy of an individual, except in cases established by law;

- information about the source of information or the author, under the pseudonym, except in cases established by law;

11 Adopted on 7 May 1993.

- information on the privacy of correspondence, telephone conversations, postal, telegraph and other messages transmitted via telecommunication networks, to which access is limited in accordance with the law;

- information constituting secrecy of the investigation and legal proceedings to which access is limited in accordance with the law.

- service information to which access is limited by the owner of the information, in accordance with the law.

- information that constitutes trade secrets, access to which is limited in accordance with the law;

- bank secrets, secrecy and security of the individual will, to which access is limited in accordance with the law;

- information related to professional activities, access to which is limited in accordance with legislation (medical secret, the secret of notarial acts, attorney secrets, and so on);

- information about the nature of the invention, utility model or industrial design prior to official publication of information about them.

The Law "On Informatization"[12] provides a list of information, which cannot be disseminated, i.e. the freedom of expression is limited. Those are:

- call for a violent change of the constitutional order and territorial integrity of the Republic of Uzbekistan;

- propaganda for war, violence and terrorism, as well as the ideas of religious extremism, separatism and fundamentalism;

- constituting state secrets or other secrets protected by law;

- exciting national, racial, ethnic or religious hatred and defaming the honor and dignity or business reputation of citizens, prevent interference in their private lives;

- propaganda of narcotic drugs, psychotropic substances and precursors;

12 Adopted on 11 December 2003.

- pornography;

- other acts that entail criminal and other responsibility in accordance with law.

The Law "On Mass Media" has also limitations, which refrain the mass media from disseminating some kind of information. The list of such information is the same. The legislation considers disclosure of the above-mentioned information in mass media as an abuse of the freedom of expression.

The legislation contains as well the provisions that constitute liability for the abuse of the freedom of expression. The Civil Code of the Republic of Uzbekistan[13] stipulates remedies defaming the honor and dignity or business reputation of individuals; interference in their private lives. At the same time, the Code of the Republic of Uzbekistan on Administrative Liability[14] and Criminal Code[15] establish liability for slander and libel; insult; disseminating information containing ideas of religious extremism, separatism, and fundamentalism, calls for bashing or violent eviction, or aimed at creating panic among the population; distribution of materials propagating national, racial, ethnic or religious hatred; demonstration of products, propagate the cult of violence or cruelty and others.

B. THE FREEDOM OF ASSOCIATION

In order to achieve life goals and rights it is often necessary to join efforts, i.e. creating all sorts of associations and organizations able to identify, express and represent collective interests. The total of these organizations reflects the ability of civil society to organize itself, i.e. to solve social problems without the intervention of the government.

By their nature, the right of association provides for the establishment of the public, i.e. non-government associations, namely: political parties, trade unions and other social organizations.

13 Adopted on 21 December 1995 and 29 August 1996.
14 Adopted on 22 September 1994.
15 Adopted on 22 September 1994.

Everyone has the right not only to create the non-governmental organizations, along with other people, but also to join the already established one, to participate in their activities and withdraw from them freely.

This right as one of the fundamental human rights has been secured by several universal international documents. Article 19 of UHRD states:

"(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association."

A similar provision can be found in ICCPR. Article 22 of the latter stipulates:

"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

In the constitutional law of Uzbekistan, the freedom of association is also considered in two aspects. Firstly – as an element of constitutional status of an individual, secondly – as an element of constitutional order. That's why provisions dedicated to this issue can be found in several chapters of the Constitution.

Article 34 of the Constitution, which is in chapter dedicated to human and civil rights, stipulates:

"Citizens of the Republic of Uzbekistan shall have the right to form trade unions, political parties and other public associations, and to participate in mass movements.

No one may infringe on the rights, freedoms and dignity of individuals constituting the minority opposition in political parties, public associations and mass movements, as well as in representative bodies of authority."

A separate chapter XIII constitutes the provisions about public associations. Article 56 of the latter states:

"Trade unions, political parties, scientific societies, women's, veterans' and youth leagues, professional associations, mass movements and other organizations of citizens, registered in the procedure prescribed by law, shall have the status of public associations in the Republic of Uzbekistan."

Scope

The rights of citizens to form trade unions; political parties and other public associations and to participate in mass movements consist in:

- the corresponding satisfaction of the multifaceted interests of citizens, aimed at clearly defined goals and objectives for the development of political activity;

- becoming a member of the existing public associations and mass movements;

- achieving the objectives and tasks of associations;

-participating in governance through political parties and other public associations.

The government at the legislative level regulates the general provisions on the formation, registration, financing, relationship with other government agencies, and others. Public associations are autonomous in the formation of the internal structure and activities.

The Constitution, as well as many others, recognizes the right of citizens to unite in associations on the condition that the objectives and activities of these organizations are not inconsistent with the Constitution and existing laws. The implementation of the right to freedom of association is regulated by several laws. One of them is the Law "On Public Associations".[16]

The concept of "public associations" include political parties, trade unions, youth, women's organizations and various national-patriotic movements. Public associations – is a manifestation of people's initiative, their participation in public life. They, therefore, act as an integral part of democracy, the rule of law and a form of civil society.

According to the aforementioned Law, public association is a voluntary formation, resulting from the free will of citizens united for the joint implementation of their rights, freedoms and legitimate interests in the sphere of politics, economy, social development, science, culture, ecology and other areas of life.

Public associations are established in order to:

implement and protect civil, political, economic, social and cultural rights and freedoms, develop the activity and initiative of citizens, their participation in the management of state and social affairs;

satisfy professional and amateur interests;

develop scientific, technical and artistic creativity;

protect public health, and participate in charitable activities;

conduct cultural, professional, fitness and sports activities, nature conservation, historical and cultural monuments;

promote patriotic and humanistic education;

expand inter-republican and international relations, peace and friendship between peoples and activities not prohibited by law.

16 Adopted 15 February 1991, http://www.lex.uz/pages/getpage.aspx?lact_id=111827, DAI: 20 July 2015.

The basic principles of creating public associations are: voluntariness, equality of its members (participants), self-government, legality and publicity. Participation or non-participation of a citizen in a public association cannot serve as grounds for restricting his rights, freedoms or granting him benefits, including terms of employment positions in the state organization, or the basis for non-performance of duties provided by the Law

Public associations are established on the initiative of at least 10 people. The initiators of the creation of a public association convene a constituent assembly (conference) or general meeting, at which the charter, the position are approved and governing bodies are formed. The activities of public associations under their articles of association may be participated by collective members – collectives of enterprises, institutions, organizations, citizens' associations.

Public associations are equal before the law. To fulfill their goals and objectives, associations have the following rights:

freely disseminate information on the objectives and activities of the association;

contribute to the formation of bodies of state power and administration;

participate in decision-making bodies of state power and administration;

represent and defend the legitimate interests of its members in state and public bodies;

establish mass media and carry out publishing activities.

By entering into the political system, public associations are characterized by specific features: firstly, they do not necessarily possess a superordinate system and integrate the citizens on the basis of particular feature; secondly, they are self-governing associations, they are based on voluntary individual or collective membership; thirdly, their members participate in the creation of the property

companies in the form of membership fees; fourthly, manage the affairs of organizations, either directly or through elected bodies.[17]

Article 58 of the Constitution stipulates that the state safeguards the rights and lawful interests of public associations, and provide them with equal legal possibilities for participating in public life.

Interference by state bodies and officials in the activity of public associations, as well as interference by public associations in the activity of state bodies and officials, is impermissible.

The state provides material and financial support to ensure the implementation of the goals of public associations by means of a preferential tax policy, providing children, youth, veterans' organizations the right to use the premises of schools, secondary and higher education, non-school institutions, clubs, palaces and houses of culture, sports and other facilities free of charge or on favorable terms.

The state and its organs do not interfere in the activities of public organizations. Activities of organizations, political parties and other public associations are carried out mainly in non-working hours of their members (participants), and at the expense of these associations.

However, the State may exercise control and supervision over the activities of public associations (art. 20 of the Law), as follows:

firstly, the financial authorities monitor the sources of funding and income of public associations;

secondly, supervision over the execution of laws by those organizations;

thirdly, getting explanations from the members of public associations on issues related to compliance with the statute;

fourthly, by means of participation of government officials in their activities.

17 AZIZKHODJAEV, Alisher et al.: O'zbekiston Respublikasi konstitutsiyaviy huquqi [*Constitutional Law of the Republic of Uzbekistan*], Tashkent State Institute of Law, 2010, p.172.

Public associations in turn, do not interfere in the activity of state bodies, they do not have the right to control, to demand a report on the work done to implement the financial control of public authorities in addition to the cases provided for by law.

Several types of public associations are specially mentioned in the Constitution. For instance, Article 59 of the latter stipulates that trade unions express and protect the socio-economic rights and interests of workers. Membership in professional organizations is voluntary.

In accordance with the Law "On Trade Unions, Rights and Guarantees of their Activity"[18] a trade union is a voluntary professional public association, designed to express and defend the economic, social and cultural needs of the working man. Acting in accordance with the law, they unite in their ranks millions of workers, farmers, civil servants, students, pensioners, and so on. Trade unions are an important part of the political system of the society, they are involved in the management of state and social affairs. The main task of the trade unions are: to protect the rights and interests of workers; to improve their conditions of work, life and culture; representation of their interests in the production, life and culture; to monitor compliance with labor legislation; to control the rules and regulations for the protection of health and safety; to participate in management of social security.

Working people and persons studying at higher and secondary educational institutions, without distinction of any kind are entitled to freely establish at their choice and without prior permission the trade unions and the right to join trade unions. Workers have the right to form trade unions at enterprises, institutions, organizations and other places of work (Article 2 of the Law).

In accordance with the Constitution and the Law, trade unions are independent in their activities of state bodies, economic bodies, political and other public associations, they cannot and are not controlled, except for the cases stipulated by legislative acts. Any

18 Adopted July 29, 1992. http://www.lex.uz/pages/getpage.aspx?lact_id=2974, DAI: 20 July 2015.

interference that might restrict trade union rights or obstruct their implementation is prohibited.

Trade unions draft and approve their statutes, determine the structure, elect their governing bodies, organize their activities, hold meetings, conferences, plenary meetings and congresses. Trade unions, in accordance with their statutory objectives and tasks, have the right to cooperate with trade unions in other countries of their choice to join international and other trade union associations and organizations.

In accordance with the Constitution and the Law, trade unions have a whole set of rights: to participate in development of laws and regulations; to protect the right to work; to negotiate on the conclusion of collective agreements; to promote the social protection of workers; to monitor the compliance with labor legislation; to settle labor disputes; to obtain information about labor issues and socio-economic development; to monitor the execution of the administration of the collective agreement and others.

The activities of trade unions are guaranteed by the state. The administration of the state and economic bodies, social organizations and officials are obliged to respect the rights of trade unions to promote their activities. The persons elected to the bodies of trade unions are not be subject to disciplinary action, or dismissed by the administration.

The freedom of expression plays a significant role in the implementation of democracy as it gives an opportunity to unite in achieving the political goals. Thus, Article 60 of the Constitution states:

> "Political parties shall express the political will of various sections and groups of the population, and through their democratically elected representatives shall participate in the formation of state authority. Political parties shall submit public reports on their financial sources to the *Oliy Majlis* or their plenipotentiary body in a prescribed manner."

The Law "On Political Parties"[19] regulates the functioning of

19 Adopted December 26, 1996. http://www.lex.uz/pages/getpage.aspx?lact_id=57033, DAI: 20

political parties. A political party is a voluntary association of the citizens of the Republic of Uzbekistan, formed on the basis of common views, interests and goals, striving for the implementation of the political will of a certain part of society in the formation of public authorities and to participate through their representatives in the management of state and social affairs.

There must be not less than twenty thousand signatures of citizens intending to unite into political party and living in at least eight territorial subjects (regions), including the Republic of Karakalpakstan and Tashkent city. The initiators of the creation of a political party in an amount of not less than fifty persons must form an organizing committee on preparation of constituent documents of the party, the formation of its membership and the convening of a constituent assembly or conference.

The Organizing Committee not later than seven days from the date of its establishment must inform in writing the Ministry of Justice of the Republic of Uzbekistan on its own initiative, of the composition and the leader, the seat of the Committee and the date for convening the constituent assembly or conference. The Organizing Committee has the right to operate in a maximum of three months from the date of its creation. A political party is formed at the constituent congress or conference. The founding congress or conference adopts the charter and program of the party, it forms the elected bodies. The Constitution and law guarantees the rights of the political parties.

Restrictions, Limitations and Liability

The right to freedom of association is not absolute as well. Article 57 of the Constitutions prohibits creation and activity of political parties and other public associations that aim to change the constitutional order, act against the sovereignty, integrity and security of the Republic, constitutional rights and freedoms of its citizens, advocate war, social, national, racial and religious hatred, encroach on health and morality of the people, as well as paramilitary associations, political parties based on ethnic and

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religious grounds. The creation of secret societies and associations is also banned.

In addition, the law "On Public Associations of the Republic of Uzbekistan" give a more precise list of activities of public associations, unacceptable to our society. The creation of public associations whose activities are aimed at destroying the moral foundations of society and universal humanistic values, as well as having the aim of the illegal change of the constitutional order or violation of the territorial unity of the Republic of Uzbekistan, propaganda for war, violence or cruelty, the incitement of social, racial, ethnic and religious hatred, leading to a split in society, committing other acts prohibited by law is prohibited.

According to Article 62 of the Constitution, public associations may be dissolved, banned or restricted in their activity solely by the sentence of a court.

The Code of the Republic of Uzbekistan on Administrative Liability and Criminal Code establishes liability for resisting and intervening into the right to freedom of association, as well as for violation of legislation on public association by individuals.

CONCLUSION

Human rights are the most fundamental rights of human beings. They define relationships between individuals and power structures, especially the State. Human rights delimit state power and, at the same time, require states to take positive measures ensuring an environment that enables all people to enjoy their human rights. In light of this, it should be noted that the right to freedom of expression and freedom of assembly play an essential role in constituting and promotion of democracy.

Humanity had come a long way till it recognized that the freedom of the individual is not an imaginary independence of the objective laws of society but it is an ability to wisely choose one's course of action within them. Thus, the freedom of expression and the freedom of assembly are not absolute, they are subject to limitations and restrictions imposed by international documents and domestic law.

CITATION NETWORK ANALYSIS OF THE FREEDOM OF EXPRESSION IN THE DECISIONS REGARDING INDIVIDUAL APPLICATIONS: THE CASE OF THE TURKISH CONSTITUTIONAL COURT

Assoc. Prof. Dr. Serdar GÜLENER

TURKEY

CITATION NETWORK ANALYSIS OF THE FREEDOM OF EXPRESSION IN THE DECISIONS REGARDING INDIVIDUAL APPLICATIONS: THE CASE OF THE TURKISH CONSTITUTIONAL COURT

Assoc. Prof. Dr. Serdar GÜLENER[*]

Introduction: Social Network Analysis and Law

Citation(s) that law courts made to the former decisions are important components of legal justification. A former decision same as or similar to a file in front of a judge makes it easier to decide and it also lightens the conscientous responsibility. In both situations, it determines the elbow room of the judge. The judge does not only see the borderline in the former decision but also s/he can own the responsibility of the legal situation regarding the decision.

One of the principal sources that provide legitimacy of the decisions brought by the law is "stability".[1] Then it can be possible for individuals to know the earlier legal rules before and to determine their acts according to the laws. Legal stability which is in a close relationship with the legal security concept, necessitates not only the body of the current law but also the consistency of the court decisions. A legal order which doesn't change rapidly or changes on a reasonable base most can be accepted as stable. At this point, the connection between the decisions of the courts has to be in a consistent line.

In the studies made on the legal discipline, computer softwares started being used considerably. Especially precedent analysis is an important area about this subject. Social Network Analysis is only one of the techniques used for this purpose.

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1 See for a study considering the difference between the former decisions and analogy about the judge's decision; Frederick Schauer (2008), "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", Perspectives on Psychological Science, Vol. 3, No. 6, s. 454-460.

Social Network Analysis (SNA) provides very suitable opportunities in giving the meaning of the data related to the "network" situations. This method noticeable in many areas of social sciences, is used time to time in the studies related to the law. With the help of the computer programmes, we can see the citations of the court decisions and the relational level of these citations.

We can see them by the help of some visual and statistical tools. In the relevant literature, you can see some studies about the decisions of U.S. Supreme Court (USSC) [2] and Europe Human Rights Court (ECtHR).[3] However there is no such study in Turkey yet.[4]

Table 1: Decisions Analyzed

No.	Application Number	Decision	No.	Application Number	Decision
1	2013/2602	Emin AYDIN	11	2013/7363	Bejdar Ro AMED
2	2014/3986	Yaman AKDENIZ vd.	12	2013/9343	Mehmet Ali AYDIN
3	2014/4705	Youtube LLC vd.	13	2014/12151	Bekir COŞKUN
4	2013/409	Abdullah OCALAN	14	2013/2593	Tuğrul CULFA
5	2013/1461	Fatih TAS	15	2012/1184	Nilgün HALLORON
6	2013/1481	İsa YAGBASAN vd.	16	2013/8598	Ali Rıza ÜÇER
7	2012/990	Ali KARATAY	17	2013/5574	İlhan CIHANER
8	2013/6154	Fikriye AYTIN vd.	18	2012/1051	Sebahat TUNCEL
9	2013/434	İbrahim BILMEZ	19	2013/5356	Sinem HUN
10	2013/3614	K. Reşit BEKIR	20	2013/1123	Adnan OKTAR

According to the deficiencies in the literature, in this study, we can see the decisions of the Constitutional Court about the freedom of expression in the individual application and citation analysis *(for coding you can see "sample coding table").* In this context, first of all, the decisions on infringements given by the court are listed. After that, every decision is examined by the UCINET 6.0 programme and the citations between the decisions and the citations related to

2 James H. Fowler, Timothy R. Johnson, James F. Spriggs II, Sangick Jeon, Paul J. Wahlbeck, (2007), "Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court", Political Analysis, 15:324–346.

3 Yonatan lupu and Erik Voeten, "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights", British Journal of Political Science, 42, 413–439.

4 See for the study evaluating over the attribution network the studies in public policy literature: Sıtkı Çorbacıoğlu (2008), "Kamu Politikası Analizinde Görünmez Üniversite: Altı Bilim Adamı Arasındaki Bilişsel ve Sosyal Ağbag", Amme İdaresi Dergisi, Vol. 41, No. 4, pp. 23-48.

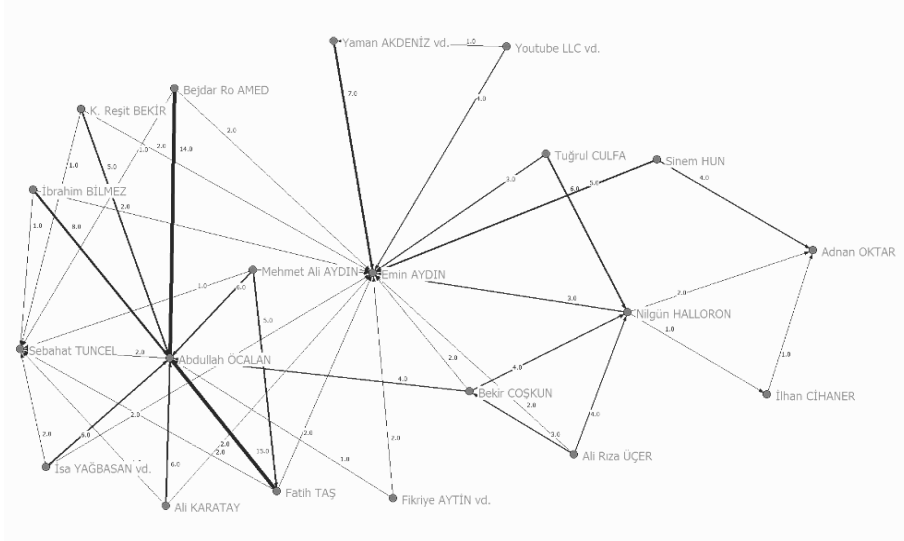
the decisions of European Court of Human Rights. But according to the frame of the study, only the citation of the decisions of the Constitutional Court will be evaluated. While doing this, we have to use degree centrality, betweenness centrality, closeness centrality and faction analysis, and make evaluation over the decisions which came to the front.

We should admit that not all the decisions about the freedom of expression will be examined, and that is a subject of a more detailed study. Here we will examine the relation between citation network and the differences in this relation and decisions. In such a process, as the court decision number increases, it can be possible to gain a new approach in the analysis of the relation between the decisions made by this method.

Sample Coding

	Emin AYDIN	Yaman AKDENİZ vd.	Youtube LLC vd.	Abdullah ÖCALAN
Emin AYDIN		0	0	0
Yaman AKDENİZ vd.	7		0	0
Youtube LLC vd.	4	1		0
Abdullah ÖCALAN	0	0	0	

Figure 1. Citation Network Map



Density

The density of the network consisting of the decisions on the freedom of expression and shown in the table 1 is 39,2% (0,392). This shows us just the 39,2 of all the possible networks occured.

Centrality

In the SNA, it is accepted that the actor[5], which is more related to the other actors, is stronger. It is assumed that if an actor has more network recieved, it shows that the actor is prestigious and if the actor has more network sent, it shows that the actor is impressive[6]

Table 2. Freeman Degree Centrality

		1	2	3	4
		OutDegree	InDegree	NrmOutDeg	NrmInDeg
5	Fatih TAŞ	19.000	5.000	6.667	1.754
11	Bejdar Ro AMED	17.000	0.000	5.965	0.000
12	Mehmet Ali AYDIN	14.000	0.000	4.912	0.000
9	İbrahim BİLMEZ	11.000	0.000	3.860	0.000
13	Bekir COŞKUN	10.000	3.000	3.509	1.053
6	İsa YAĞBASAN vd.	10.000	0.000	3.509	0.000
7	Ali KARATAY	9.000	0.000	3.158	0.000
19	Sinem HUN	9.000	0.000	3.158	0.000
14	Tuğrul CULFA	9.000	0.000	3.158	0.000
16	Ali Rıza ÜNERER	9.000	0.000	3.158	0.000
10	K. Reşit BEKİR	8.000	0.000	2.807	0.000
2	Yaman AKDENİZ vd.	7.000	1.000	2.456	0.351
15	Nilgün HALLORON	6.000	14.000	2.105	4.912
3	Youtube LLC vd.	5.000	0.000	1.754	0.000
8	Fikriye AYTİN vd.	3.000	0.000	1.053	0.000
4	Abdullah ÖCALAN	2.000	65.000	0.702	22.807
17	İlhan CİHANER	1.000	1.000	0.351	0.351
1	Emin AYDIN	0.000	42.000	0.000	14.737
18	Sebahat TUNCEL	0.000	11.000	0.000	3.860
20	Adnan OKTAR	0.000	7.000	0.000	2.456

One of the terms used to determine the power of the actor's recieved and sent network is "freeman degree centrality".

5 In this study every actor expresses the "individual application" about the freedom of expression.

6 Robert A. Hanneman and Mark Riddle (2005), Introduction to Social Network Methods, Riverside, CA: University of California, Riverside (published in digital form athttp://faculty.ucr.edu/~hanneman/),

In table 2, it can be seen that the freeman degree centrality of the decisions is about the freedom of expression. According to this table, among the decisions made, the most cited one is Fatih Taş decision and Bejdar Ro Amed and Mehmet Ali Aydın decisions follow it . Among the decisions received, the most cited one is Abdullah Ocalan decision and Emin Aydın and Nilgun Halloron decisions follows it.

Table 3. Freeman Betweenness Centrality

		1 Betweenness	2 nBetweenness
15	Nilgün HALLORON	6.000	1.754
4	Abdullah ÖCALAN	3.000	0.877
13	Bekir COŞKUN	2.000	0.585
2	Yaman AKDENİZ vd.	0.000	0.000
1	Emin AYDIN	0.000	0.000
6	İsa YAĞBASAN vd.	0.000	0.000
7	Ali KARATAY	0.000	0.000
8	Fikriye AYTİN vd.	0.000	0.000
9	İbrahim BİLMEZ	0.000	0.000
10	K. Reşit BEKİR	0.000	0.000
11	Bejdar Ro AMED	0.000	0.000
12	Mehmet Ali AYDIN	0.000	0.000
3	Youtube LLC vd.	0.000	0.000
14	Tuğrul CULFA	0.000	0.000
5	Fatih TAŞ	0.000	0.000
16	Ali Rıza ÜNER	0.000	0.000
17	İlhan CİHANER	0.000	0.000
18	Sebahat TUNCEL	0.000	0.000
19	Sinem HUN	0.000	0.000
20	Adnan OKTAR	0.000	0.000

Degree centrality may give us information about the centrality of the actor in the network. Bu it is not enough to give any idea about these actors' real position.[7] While it shows only the closest network to the actor and that can be misleading. Therefore, we can look at another centrality measurement "freeman betweenness centrality". Betweenness is a centrality measurement that stands in the shortest

7 Çorbacıoğlu (2008), p. 43.

way between two actors and shows the positions of the other actors[8]. If a centrality value of an actor is high, it shows that the actor is a bridge in the network.[9] When we examine Table 3 decisions , it can be seen that the most central decisions are Nilgun Halloron and Abdullah Ocalan and Bekir Coskun decision follows them .

Another measurement used in the centrality evaluation is "closeness centrality". Closeness is based on the closeness of one actor to another one in the network. It is important for showing the distance and the accessibility of the actors to each other. If the numeric value of an actor's closeness is low, it shows that the actor is closer to the other actors. In the opposite situation, the increasing numeric value shows the actor is further to the other actors. In other words , the value of closeness is inversely proportional to the numeric value.

Table 4. Closeness Centrality

	1	2	3	4
	inFarness	outFarness	inCloseness	outCloseness
1	Emin AYDIN	95.000	380.000	20.000	5.000
18	Sebahat TUNCEL	175.000	380.000	10.857	5.000
4	Abdullah ÖCALAN	191.000	361.000	9.948	5.263
20	Adnan OKTAR	269.000	380.000	7.063	5.000
17	İlhan CİHANER	307.000	361.000	6.189	5.263
15	Nilgün HALLORON	323.000	323.000	5.882	5.882
2	Yaman AKDENİZ vd.	361.000	361.000	5.263	5.263
13	Bekir COŞKUN	361.000	269.000	5.263	7.063
5	Fatih TAŞ	361.000	323.000	5.263	5.882
6	İsa YAĞBASAN vd.	380.000	323.000	5.000	5.882
9	İbrahim BÖLMEZ	380.000	323.000	5.000	5.882
12	Mehmet Ali AYDIN	380.000	304.000	5.000	6.250
11	Bejdar Ro AMED	380.000	323.000	5.000	5.882
14	Tuğrul CULFA	380.000	306.000	5.000	6.209
3	Youtube LLC vd.	380.000	342.000	5.000	5.556
16	Ali Rıza ÜNER	380.000	252.000	5.000	7.540
7	Ali KARATAY	380.000	323.000	5.000	5.882
8	Fikriye AYTİN vd.	380.000	324.000	5.000	5.864
19	Sinem HUN	380.000	342.000	5.000	5.556
10	K. Reşit BEKİR	380.000	323.000	5.000	5.882

8 S. P. Borgatti, M. G Everett and J. C. Johnson, (2013). Analyzing Social Networks. SAGE Publications Limited, p. 208.

9 Necmi Gürsakal (2009), Sosyal Ağ Analizi, Dora Yayıncılık, Bursa, pp. 92-94.

We can see the closeness centrality values of the freedom of expression network. According to this table, Emin Aydın decision is the most central decision in the network and Sebahat Tuncel, Abdullah Ocalan and Adnan Oktar decisions follow it .

Cliques

Cliques can be determined as the sub-groups which the neighbour actors are united in the network.[10] When we examine table 5, we can see that the decisions on the freedom of expression have made 11 different cliques. As seen, more central decisions are in more cliques than the others. Abdullah Ocalan (5.,6.,7.,8.,9.,10. clique) and Sebahat Tuncel (5.,6.,7.,8.,9.,10. cliques) are in 6 cliques, Emin Aydın is (1.,2.,3.,4. clique) in 4 cliques and Nilgun Halloron (1. and 2. clique) is in 2 cliques.

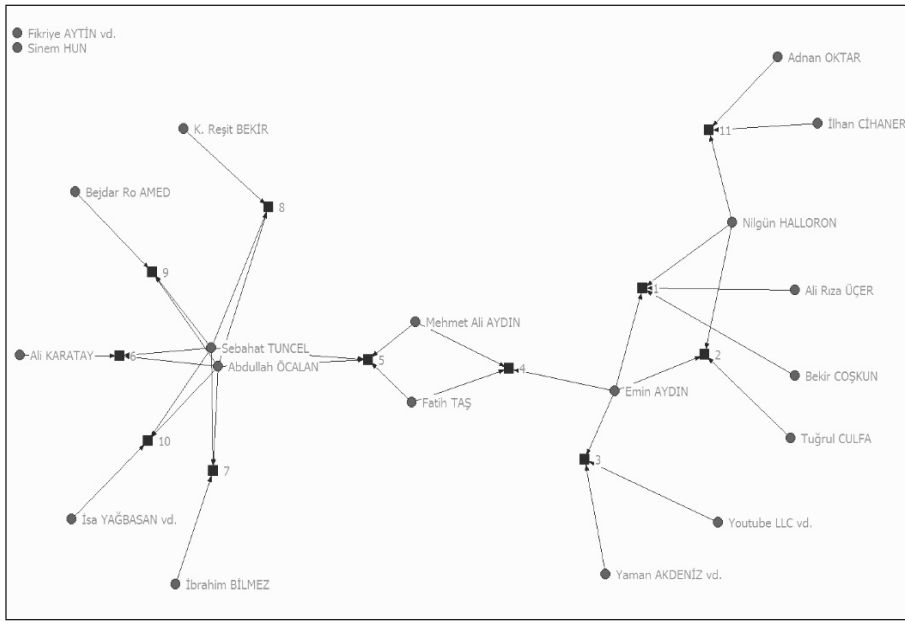
Table 5 : Cliques of the Freedom of Expression Decisions

1:	Emin AYDIN Bekir COŞKUN Nilgün HALLORON Ali Rıza ÜÇER
2:	Emin AYDIN Tuğrul CULFA Nilgün HALLORON
3:	Emin AYDIN Yaman AKDENİZ vd. Youtube LLC vd.
4:	Emin AYDIN Fatih TAŞ Mehmet Ali AYDIN
5:	Abdullah ÖCALAN Fatih TAŞ Mehmet Ali AYDIN Sebahat TUNCEL
6:	Abdullah ÖCALAN Ali KARATAY Sebahat TUNCEL
7:	Abdullah ÖCALAN İbrahim BİLMEZ Sebahat TUNCEL
8:	Abdullah ÖCALAN K. Reşit BEKİR Sebahat TUNCEL
9:	Abdullah ÖCALAN Bejdar Ro AMED Sebahat TUNCEL
10:	Abdullah ÖCALAN İsa YAĞBASAN vd. Sebahat TUNCEL
11:	Nilgün HALLORON İlhan CİHANER Adnan OKTAR

The map of the factions occurred according to the similarity between the freedom of expression decisions is shown in figure 2. Here, it is remarked that Fikriye Aytin and Sinem Hun decisions are not in any cliques.

10 Borgatti, Everett and Johnson, (2013), Analyzing Social Networks ..., p. 219.

Figure 2. Cliques



Conclusion

When we consider the centrality and faction analysis, some decisions in the citation network of the Constitutional Court come to the front. These decisions are not only highly central but also they are in more cliques.

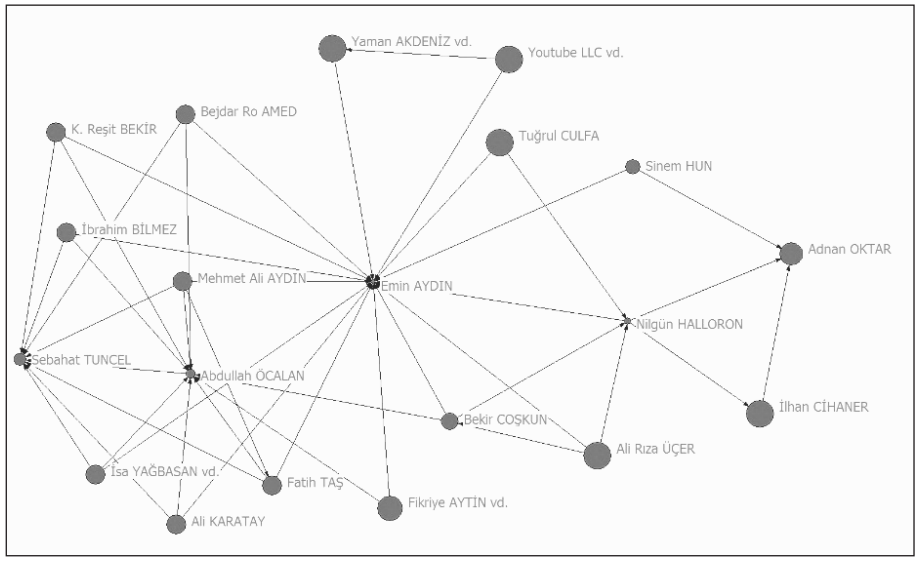
Especially, Emin Aydın decision is the most central decision in the degree centrality and closeness centrality. The main reason for this is that it is the first decision of the Constitutonal Court and the principles for the individual applications are determined in this decision. Therefore, it has been a basic reference source for the subsequent decisions. This decision is about the application of a writer who was sued about his writings in a local newspaper. The decision has referred to the definiton of the freedom of expression and also the obligations of the government about this freedom, the reasons for limiting the freedom of expression, the freedom of having an opinion, the freedom of expressing the knowledge and thought, methods, types and tools of expression, hate speech and protecting the reputation and fame of the others for the first time.

Another remarkable decision is Abdullah Ocalan decision. This decision is high in also degree, betweenness and closeness centrality. The main reason of this is bringing new principles to the freedom of expression. Ocalan case is about a decision of collecting his book before publishing. Like Emin Aydın decision, this decision has referred to the terms as the right to have and distribute an opinion, political expressions, expressions, to promote violence and terror propaganda, the decision on collecting books and public safety.

Another decision which is high as degree centrality and betweenness centrality is Nilgun Halloron decision. The main charactheristic about the centrality of the decision is being a bridge between the other decisions. There is the betweenness centrality in figure 3. Small shaped tangels show the decisions which are high in betweenness centrality. The bridge decision between the decisions is on the right side of the network and on the other side is Nilgun Halloron decision.

Halloron case is about a decision of the words used in an e-mail. The main charactheristic seperating the decision from the other decisions is academical expressions and the intervention of compensation sentence to the freedom of expression.

Figure 3. Betweenness Centrality Network



Another decision which is low in betweenness centrality but high in degree centrality and closeness centrality is Sebahat Tuncel decision. This decision is rendered for the applicant for the ban on leaving the country and violation of the freedom of expression. The reason of high degree centrality is recieving too much citation and the reason of high closeness centrality is easier to access than the other decisions. The charactheristic that puts the decision in the center as an individual application is a former decision chronogically. It is an important decision about drawing the lines of the intervention to the freedom of expression. Hence, the other decision cited to this decision is this part as a reference.

These highly central decisions are remarked as the most common decisions with the related ones and have the most cliques.

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSEMBLY IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Eugenie TARIBO
Dmitrii KUZNETSOV

THE RUSSIAN FEDERATION

ABSTRACT

The paper consists of seven sections describing the Constitutional Court's practice in respect of freedom of expression and freedom of assembly issues. The matters covered by the paper include challenges of the constitutionality of laws forbidding civil servants to give public statements, regulation of religious organisations public events, regulation of restricted urban areas where the freedom of assembly is limited, the content-based restrictions in respect of LGBT-speech.

KEY WORDS: *The Constitutional Court of the Russian Federation, the freedom of assembly, the freedom of expression, individual complaint, constitutional review.*

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSEMBLY IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Eugenie TARIBO [*]
Dmitrii KUZNETSOV[**]

1. The Russian Constitution guarantees both the freedom of expression and the freedom of assembly. These two freedoms are enshrined in the text of the Constitution's Chapter 2, "The Rights and Freedoms of Man and Citizen" in Article 29 and Article 31.[1] These articles correspond to the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] which Russia has been a part of since 1998. Association of people is one of the channels to express their opinions on various social and political matters in the country. However, association is not intended solely to express citizens' opinions and translated them to the authorities or other citizens. This social institute is designed to make collective solutions to problems related to the activities of parties, trade unions, commercial, public and religious organisations. As it concerns the freedom of expression, it is implemented not only by the way of rallies (meetings, demonstrations, marches and pickets), but also through the media, through creative and educational activities,

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1 The Constitution of the Russian federation, 1993, available at: http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter1.aspx [accessed 15 September 2015].

2 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 15 September 2015].

etc. Thus, the freedom of assembly and the freedom of expression can be considered either individually or in conjunction. In my presentation I will discuss these freedoms from a perspective of the Constitutional Court practice in two ways: individually and in their interrelation.

Before describing the Constitutional Court case law, there is a need for a brief introduction. The Constitutional Court expresses its opinions in respect of constitutional rights and freedoms when it receives complaints from citizens on the matters of law.[3] However, jurisdiction of the Constitutional Court is limited. Many complaints are solved by ordinary courts or through non-judicial activities of prosecutors and ombudsmen. Moreover, some issues are not on the agenda of the Constitutional Court due to the passivity of citizens in defending their rights using the constitutional complaint procedure. Therefore, on the one hand, the practice of the Russian constitutional justice is not able to show the whole picture of the problems in the sphere of realisation of the freedom of assembly and the freedom of expression. On the other hand, the practice of the Constitutional Court, of course, can be regarded as a mirror, which reflects the most acute problems in this area with the highest degree of popular interest. Below we discuss these problems and the ways constitutional justice solves them.

2. I would like to begin with the freedom of expression. Four years ago, the Constitutional Court considered the complaint of the citizens who challenged constitutionality of laws forbidding civil servants to give public statements, evaluations and to estimate activities of state bodies or their heads in the media, when it was not within their competence. In case of violation of this provision, an employee shall be subjected to official dismissal.

As it was stressed in the media, such a ban to some extent was caused by spreading of the Internet video services, such as the U-Tube. These web-pages were utilised by some officials who posted their revelatory videos describing the state of affairs

3 See: Federal Constitutional Law on the Constitutional Court of the Russian Federation, available at: http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx [accessed 15 September 2015].

in the departments where they were serving (the newspaper "Kommersant", №118, 01.07.2011).[4] One of the applicants in this case posted a video message on the Internet, where he criticised the police department, where he was serving. Then, in an interview, he said that the abuses in the abovementioned police department, as they were mentioned in the video, are still not eliminated. On the basis of this information, the applicant was dismissed from his duty for repeated violations of the ban on expression of public opinions in respect of a state body. On June 30th, 2011 the Constitutional Court announced its Judgement on the case.[5] The Court found that the challenged law cannot be applied automatically to any out of public criticism by a civil servant. The disputed provision of the law cannot be considered as prohibiting public expression of civil servants opinions (including in the media), in respect of the work of state bodies. The Constitutional Court elaborated a number of tests which must be regarded when evaluating the actions of a public servant:

1) the content of public statements, their social significance and motives;

2) the ratio of real or potential damage to the state or public interests to the harm, prevented as a result of the civil servant's actions;

3) whether there is a possibility for a civil servant to protect his or her rights or state or public interests, which caused the act of expression, in other legal ways; whether there are any other relevant circumstances.

Law enforcement decisions which provoked the appeal to the Constitutional Court in case if they were adopted on the basis of the contested law, interpreted differently than the Court's interpretation, shall be subjected to review. This decision of the Constitutional Court is of great importance for the ordinary courts, which have to move away from formalism in consideration of

4 Available in Russian, URL: http://www.kommersant.ru/doc/1670271 [accessed 15 September 2015].

5 Judgement No. 14-P of 30th of June, 2011.

disputes on dismissal for public criticism of the authorities, and have to seek the objective truth. The courts need to act in such a way which shows the fine line that separates unauthorised slander and disloyalty from a legitimate expression in the lawful form.

3. Another example belongs to the area of freedom of assembly. In 2012, the Constitutional Court reviewed the complaint of the Commissioner for Human Rights (Federal Ombudsman) concerning the Federal Law on Rallies and Regional Law (the Republic of Tatarstan) on the freedom of conscience. The Ombudsman lodged the complaint protecting the religious organization "Jehovah's Witnesses".[6] The organisation was fined for not having informed the authorities of the municipality about its religious meeting. This meeting was held not in the prayer house of the said organisation but in one of the public buildings of the city, which had been rented by the organisation. Both the Federal and the Regional laws prescribe that the rules of holding rallies are fully applicable to any religious meetings if they are held outside the places of worship, as well as outside cemeteries or hospitals where certain rituals are performed, as it was done in the current case. In particular, the contested legislative provisions oblige to notify the municipality about an upcoming religious gathering.

What is the purpose of this regulation? At first sight, it is unclear why the municipality should be notified if a religious organisation conducts a public event in a rented space situated not in a private but in a public building. In a multi-religious country the aim of such provisions is that the municipality must be aware of the upcoming meeting to assess whether to take steps to ensure security and order in the area of the event. However, it is not always when religious meetings are held in conditions which require mandatory adoption of preventive measures. For example, they may be held outside the places of worship, not in the municipal buildings, but in private houses.

Therefore, the Constitutional Court declared that the disputed laws do not contradict the Constitution of the Russian Federation. This is so to the extent that they introduce (as a general rule) the

6 Judgement No. 30-P of 5th of December, 2012.

notification procedure in respect of worship and religious gatherings in places such as those places where the citizens, on whose behalf the Ombudsman addressed the Court, held their meetings.

At the same time, the Constitutional Court declared the challenged provisions partly unconstitutional. They were declared unconstitutional to the extent applicable to prayer and religious meetings, procedures for holding rallies, demonstrations and marches to the extent applicable without distinction between religious meetings, which may require the public authorities to take measures to ensure public order and safety, and those religious meetings which does not involve such a necessity.

4. The abovementioned examples of freedom of expression and freedom of assembly cases were considered as their own, outside of any relationship between them. Now we consider the situation where these freedoms are realised one through another, namely: the freedom of expression of citizens is realised through meetings, marches, demonstrations, pickets.

As the Constitutional Court case law shows, conflicts over freedom of assembly were not associated with restrictions on the expression of certain opinions as such, while processions, rallies, and demonstrations exist for expression of an opinion on a particular political issue. In other words, the difficulties in conducting meetings occurred not because of the content of the problems submitted for public discussion, but because of the technical conditions of such meetings. Opposition groups of citizens often challenge organisational modalities of the meetings. And this is a manifestation of these opposition views against the power of the government, which, in their opinion, has established such rules which are disproportionate and unreasonable. In several press publications, the position of some opposition leaders, who were encouraging "instead of protesting against a specific issue" "just gather", was considered as the non-constructive one ("Literary Gazette" № 39 (6293) of 6 October 2010).[7]

7 Available in Russian, URL: http://www.lgz.ru/article/N39--6293---2010-10-06-/ [accessed 15 September 2015].

The first block of the Constitutional Court decisions concerns regulation of venues, prohibited for public gatherings. Currently the law names a number of areas where the conduct of public events is prohibited. In particular these are areas around the courts. Back in 2007, the Federal Ombudsman lodged a complaint to the Constitutional Court, arguing that the boundaries of the territories directly adjacent to the buildings occupied by the courts are uncertain. When these boundaries are not specified clearly, it is what makes it difficult to comply with the ban on holding the public event, punishable with the administrative liability in the form of fine.

By the decision of 17th July, 2007[8], the Constitutional Court rejected the complaint of the Ombudsman, but at the same time the Court gave a detailed answer to the question in the complaint. However, the Constitutional Court pointed out that restricted areas, adjacent to buildings and other facilities, are territories, the boundaries of which are defined by decisions of regional authorities or decisions of municipalities in accordance with the legislation in the field of land management, the use of land and urban planning. The Court concluded (in favour of human rights protection) that if there is no decision of a public authority on designation of the appropriate territory, there is no reason to consider picketing or another public event violating the prohibition of public events on the territory adjacent to the building with a special legal regime. Consequently, there is no reason to find the protestor liable. Thus, the legal uncertainty about compliance with the ban on holding public events near buildings with a special regime has been overcome.

In 2014 the Constitutional Court considered the notion of unconstitutionality of the regional law of St. Petersburg on rallies. The law prohibits holding meetings, rallies, marches and demonstrations in the Palace Square, St. Isaac's Square and the Nevsky Avenue. However, the city's public authorities designated a special place for holding public gatherings in the heart of St. Petersburg: a platform located on the Field of Mars. Moreover,

8 Decision No. 573-O-O of 17th July, 2007.

there is no requirement of notification of public authorities on an event there. The applicant claimed that this regulation is groundlessness because the disputed law does not prohibit to organise cultural, sport, and other celebrations on the Nevsky Avenue. The Constitutional Court decision of 22nd April 2014,[9] rejected the complaint, stressing that non-political public events are not as controversial as public events or celebrations of a political nature. Taking into account the designation of a special place at the very city centre, the Court found that the ban on public rallies of political nature on the Nevsky Avenue cannot be considered as a violation of constitutional rights of citizens and has no objective justification. The Constitutional Court also referred to the decision of an ordinary court (the decision of the St. Petersburg City Court) which, while considering the applicant's case, said that the ban on holding meetings on the Nevsky Avenue appears objectively necessary, as this avenue is one of the main highways for public transportation and is characterised by high pedestrian congestion.

Another example of the dispute over the conduct of a public event in the territory with a special regime is the decision of the Constitutional Court from June, 2015. The complainant, an organiser of a public event, submitted to the prefecture of one of the Moscow districts a notice of intention to hold a march promoting healthy lifestyle and Vaishnavism beliefs. The Deputy Prefect informed the applicant that the public event must be coordinated with agencies in charge of the relevant territory. The territory in question was the territory of the nature reserve "Sparrow Hills". In the constitutional complaint, the applicant challenged the constitutionality of the law which was the legal foundation for the prefect's answer. He believed that this provision allows arbitrary decisions with regard to refusing to conform to public religious missionary activities. The Constitutional Court decision of 23rd June, 2015[10] № 1296-O dismissed the appeal, stating that the law obliges the executive authority, in case when they have a reasonable expectation that a public event could violate legal restrictions, to warn the organiser

9 Decision No. 976-O of 22nd April, 2014.

10 Decision No. 1296-O of 23rd June, 2015.

of a public event about it. The Constitutional Court emphasised that the applicant was not denied the right to organise a procession. Since the selected place is situated within the protected territory, the applicant was asked to communicate with the agency responsible for the maintenance of the protective regime of this area about the conduct of a public event there.

The second block of the Constitutional Court decisions is not bound to the "forbidden" or "regime" territories, but it is devoted to the debates over coordination of conventional (non-proscribed) venues of meetings. Issuing decisions of 2nd April, 2009[11] and of 1st June, 2010[12] № 705-O-O, the Constitutional Court reviewed the provisions of the Federal law, which implies the need to negotiate a place and time of a public event if the place and time offered by organisers were rejected by the authorities. The Constitutional Court took into account the information from the report of the Federal Ombudsman (Commissioner for Human Rights in the Russian Federation). The Ombudsman provided examples of the challenged norm application, when it *de facto* blocked public events. Nevertheless, not all such activities were subjected to the actual restrictions, but only those which were perceived (perhaps imaginary) not just as disagreement with public authorities but as denial of their legitimacy, the possibility of any cooperation with them and, more importantly, change of the constitutional order.

It is clear that when a proposal to postpone the location and time of the event is not only a pretext for its factual ban, and is really conducted to negotiate a venue and time, the goals of participants and third parties, such a restriction of freedom of assembly corresponds to constitutional goals. However, if the provision of approval of the location time of the public event is utilised for blocking it, such a practice, of course, contradicts the purpose of the rule. The Constitutional Court clearly indicated in its decision that a public authority may not prohibit an event solely on the ground of this provision. It can only suggest another venue or time. Moreover, such a change is permissible if it does not impede

11 Decision No. 484-OP of 2nd April, 2009.
12 Decision No. 705-O-O of 1st June, 2010.

the achievement of the legitimate objectives of the public event. In this regard, the Court's decision included the principle *dictum*: the suggestion should be of adequate social and political significance. The Constitutional Court also elaborated on the reasons why a public authority has the right to offer a different place and time of the meeting. As it was pointed out, establishing an exhaustive list of such reasons would unreasonably restrict the discretion of public authorities in respect of the implementation of their constitutional duties. In respect of the decision, it should be noted that if the legislature cannot in a case like this limit the administrative authority's discretion, there are great opportunities for the judiciary to check the validity of a particular administrative decision on the ban of a meeting. Whether the decision of the administrative body is motivated? Whether there are substantial reasons for the ban, were not they imaginary, and were they really obstacles to the rally? The Constitutional Court as well as the legislator, which adopted the 2015 Code of Administrative Justice, focus ordinary courts on the fact that in dealing with such disputes, they have to play an active role in collecting evidence on their own initiative.

In addition, the Constitutional Court has made guidelines regarding the timing for consideration of such disputes. It is crucial for the organisers of the meeting to hold their event on a specific date where the event as such is reasonable if it is confined to a specific holiday or a memorial day. Therefore, the Constitutional Court has expressly stated that judicial review of such cases should be conducted as soon as possible, as provided for dispute resolution in the field of electoral rights, i.e., before the date of the scheduled public event. The Constitutional Court stressed that otherwise the judicial protection would be significantly weakened.

The third block of the Constitutional Court decisions reflects other conflicts around the rules governing the technical organisation of meetings. The application of the law on meetings identified the problem of fulfilling the time requirements for the appropriate applications for public gatherings. The law establishes a specific period of time when one can fill a notice of a public event (no earlier than 15 and no later than 10 days before the alleged date of the

event). However, with regard to regulation of public holidays, as well as by-laws regulating the process of filing of such notifications, in reality there were insurmountable obstacles for public events. Such obstacles take place when the deadline for the notice of the public event is during non-working holidays.

In respect of this problem, the Constitutional Court adopted the Judgement of 13th May, 2014[13], in in which it noted: the parameters of public events, including its form, timing and venue are subjected to change and adjustment only within the framework of conciliation between the organiser and competent public authorities . Implementation of specific time limits for notification about the meeting ensures equal conditions for the realisation of the right to freedom of peaceful assembly and prevents possible abuse of that right. The establishment of the initial terms of the notice about the meeting is related to the notification submitted long before the intended date of a public event, seeking prevention of other stakeholders from having their gatherings at the same time and in the same place. The deadline for submission of notifications is intended to ensure appropriate time opportunities for the coordination of the public event with the competent public authority. Meanwhile, the legal regulation of labour relations can permit a situation when a number of consecutive public holidays may exceed the period when the organiser of a public event shall submit a notice of the event. As a result, the organiser is in a situation of intolerable uncertainty as to the proper procedure for submitting an appropriate notice, and he or she is deprived of the opportunity to hold this public event, what violates the Constitution. That was the reason why the Constitutional Court declared the contested provision unconstitutional, and ordered the Federal Legislator to introduce necessary changes in the legal regulation for ensuring the possibility of submitting a notice of a public event, in cases when the period of submission, while counting as a general rule, is identical to non-working holidays.

The next example concerns disputes over alleged inconsistencies in number of participants in a public event as it was suggested by

13 Judgement No. 14-P of 13th May, 2014.

the organisers of the event and an actual number of participants. In identifying the inconsistency, the organiser of the action was subjected to liability in the form of a significant monetary penalty. This issue was considered by the Constitutional Court, which as a result adopted its Judgement No. 12-P on 18th May, 2012.[14] In Particular the Constitutional Court pointed out:

The number of participants exceeding the number which was stated in the notice of its organiser in itself is not sufficient to bring him or her to administrative liability, as well as exceeding the rules of occupancy limit of the venue space in itself;

The responsibility of the organiser in case of violation of the established order may occur only when the excess of declared number of participants of the public event and creation of a real threat to public safety and order were caused by the organiser of the public event; or when the organiser, allowing the excess of the participants, has not taken appropriate measures to limit the access of citizens to the event, and did not maintain public order and security, which led to a real threat of violation of public order and security, as well as damage to property;

The liability of the organiser for violation of the public order in case when a number of participants exceeded the number stated in the notification is possible only when the organiser is undoubtedly guilty.

The final conclusion of the Constitutional Court is that the challenged statute is not unconstitutional only when the abovementioned conditions are met. Thus, the Constitutional Court *de facto* added its own binding instructions to the contested regulation.

5. The Judgement of 14th February, 2013[15] has a special and very important place in the Constitutional Court practice. This decision is characterised with the fact that there is no assessment of the constitutionality of a specific provision or provisions regarding

14 Judgement No. 12-P of 18th May, 2012.
15 Judgement No. 4-P of 14th February, 2013.

the notion of meetings (i.e. it is not limited to some narrow aspect). Firstly, it evaluated a large complex of norms governing the exercise of freedom of assembly. From a perspective of quality, the Constitutional Court was assessing not just a set of rules on a range of issues. In fact, the Constitutional Court verified the legislation reform of rules of conduct of public events. This reform substantially toughened these rules and liability for their violation. It is not surprising that many of the opposition MPs who voted against the reform, appealed to the Constitutional Court requesting review of the constitutionality of these legislative innovations. Along with the request of opposition of MPs, the Constitutional Court also received a complaint of a citizen. Both appeals were reviewed in a Court session with the participation of all stakeholders.

The applicants challenged the provisions which:

prohibited a person from being an organiser of a public event, if he or she was brought to administrative responsibility for offenses in the sphere of organisation of rallies twice or more times;

included disproportionate administrative fine as well as the possibility of such punishment as mandatory works for violating the rules of conduct or holding of a public event, if it has led to public order violations;

permitted a preliminary agitation campaign from the date of coordination of time and place of the public event with the authorities.

This is not the whole list of innovations in the reform of the rules of holding rallies. There is no need to name all the provisions, since the core challenge was the new legal regime of holding rallies as such, which was much stricter than the prior one. The Constitutional Court in its Judgement significantly softened the severity of the contested regulations and, in fact, softened the legal regime of rallies, lowering the degree of the reform.

For example, the Constitutional Court stated that a citizen, who was twice punished for violation of the rules of conducting of the rally, has no right to act as an organiser of a new event only where

the re-imposition of responsibility took place within the sentence for the offense committed earlier – that is the period of 1 year. Moreover, such a ban may not be imposed indefinitely: it is designed only for the period during which the person is considered to be punished. The Constitutional Court noted that during this period the organiser of a public event has the right to be the initiator of such events, acting indirectly, for example, referring to the initiative to other citizens, political parties and other public associations and religious organizations. He or she is not deprived of an opportunity to take a personal part in public gatherings, including the role of the person performing administrative functions at the time of the meeting or demonstration.

Increased fines were found inconsistent with the Constitution. The legislator was called to amend the relevant legislation, and before that the courts were allowed to reduce the penalty below the lower limit prescribed for the commission of a relevant offense. However, the statute providing for mandatory work as a form of administrative punishment was found constitutional, with certain reservations. Such a penalty may not be imposed for violations of the formal rules of rallies. It can be imposed only if the offense had serious consequences: for example, when it caused harm to the health of citizens, property of individuals or legal entities, or if there were other similar consequences.

From the point of view of the Judgement of the Constitutional Court, the applicants did not have a "complete victory": they were not satisfied with the result, as their desire to reset the reform failed. But the defence - a parliamentary majority - also embraced the decision critically. The Upper Chamber of the Parliament, the Council of the Federation, was critical about the decision. However, despite the complaints about the fact that the effectiveness of measures in the framework of the reform is weakened, the parliamentarians stressed: the decision should be respected and enforced.[16]

6. The only decision of the Constitutional Court, not on the organisational but on the substantive aspect of freedom of assembly

16 The news agency "Interfax", 14th February, 2013.

was uphold in respect of public actions of sexual minorities, which voiced the matters that these community believed relevant and socially significant. The Constitutional Court in the Judgement No. 24-P of 23rd September, 2014 assessed the Statute prescribing punishment for the propaganda of non-traditional sexual relations among minors. The applicants who appealed to the Constitutional Court were referring to the fact that their goal was not to propagate but to inform minors. However, as the only possible means to achieve this goal, they have chosen a public space in the immediate vicinity of a school. They were considering any restrictions in respect of such public gatherings as a violation of freedom of expression. Thus forefront was not to inform or convey their opinion in itself (what is feasible through contacts with authorities in the field of education, school authorities, parents committees), but holding a public event near the children facility.

The impugned provision was recognised not contrary to the Constitution with certain reservations. Firstly, the provision is aimed at protecting constitutional values such as family and childhood, as well as at preventing harm to the moral and spiritual development of minors. Secondly, it does not involve intervention in the sphere of individual autonomy, including sexual self-determination of individuals. Thirdly, the rule is not intended to prohibit or reprimand non-traditional sexual relationships. The Constitutional Court emphasised that the law cannot be considered as impeding the unbiased public debate on the legal status of sexual minorities, as well as the use by their representatives of legal ways of expressing their position on these issues and protection of their legitimate rights and interests, including the organisation and conduct of public events.

According to the media, the applicants were largely satisfied with this decision, arguing that despite some incompleteness, it is a step forward in protecting the rights and freedoms of sexual minorities, including protection of freedom of expression through public gatherings. One of the applicants considered the decision of the Constitutional Court as a "grand breakthrough for the rights of sexual minorities in Russia." Although other gay activists said

that "nothing fundamentally new in the CC decision was stated", and the only new position in the Court's decision "is equating the crimes against the LGBT community to criminal acts against the social group".[17]

7. Summarising the practice of the Constitutional Court of Russia regarding the freedom of expression and the freedom of assembly, one could come to the following conclusions.

The decisions of the Constitutional Court do not reflect the entire spectrum of the issues in this area, which is related only to challenges of the constitutionality of law by the citizens and the parliamentary opposition. These are the laws, which set certain limits on the freedom of expression and the freedom of assembly. Nevertheless, the practice of the Constitutional Court is a mirror which reflects the most acute and urgent problems of the implementation of these freedoms. These problems demonstrate an increased conflict level in this area.

The practice of the Constitutional Court until 2012 primarily was constituted of the Court's decisions rejecting constitutional complaints. However, in the recent years the Court adopts judgements more often, considering the cases involving all stakeholders, and allowing them also to use the written procedure. This shows that problems in this area have accumulated to a certain critical mass and have been exacerbated by a complex legislative tightening the public events regulation.

The main feature of these problems was that the conflict and sometimes just misunderstanding about the rules of holding rallies are not related to the content of the ideas, opinions or calls. The authorities do not follow one ideology, they demonstrate practicality, readiness to perceive critical or opposition opinions on a wide range of issues. They demonstrate openness to a variety of ideologically different rallies. They also create advisory councils and advisory bodies for consideration of the abovementioned critical opinions at maximum. The decisions of the Constitutional

17 "BBC - Russian Service" 25th September, 2014.

Court illustrate that tension occurs around the organisational aspects of public actions. This applies to the territory of rallies, the rules for notification about a rally or a demonstration, specific timing and places of their holding, the number of participants, the role and responsibilities of the organisers. It may seem that for the organisers of public events, and for government bodies, the technical aspects of rallies rather than ideological ones are of primary importance. For the participants of public rallies the participation is a way of organised and sometimes force or psychological pressure on the government. For the government to establish a clear mode of organisation and holding of rallies and marches is a way of preserving public order and safety and preventing undue influence upon the work of public authorities, including the judicial, the electoral ones, etc. And there is only one decision of the Constitutional Court which demonstrates a certain conflict or tension regarding the content of the opinion which was translated through the assembly. That was the abovementioned decision concerning public activities of sexual minorities.

Such characteristics of disputes over the rules of public actions are reflected in the role of the Constitutional Court as an arbiter – whether it takes an active or restrained role. To a greater extent, this is a restrained role. But this does not exclude that the same decision of the Constitutional Court may be perceived by the opposition as insufficiently bold and by the authorities as intemperate and unreasonably levelling efforts of the legislator. In any case, decisions of the Constitutional Court, in spite of their compromise nature, eliminate unnecessary tension around the rules of the public rallies. Even acknowledging that contested legislative provisions do not contradict with the Constitution, the Court has supplied the contested norms with correct interpretation, obliging the ordinary courts and non-judicial bodies to be guided by such an interpretation. At the same time, the Constitutional Court gave the legislator certain instructions for making adjustments to the regulation of the freedom of assembly. And in cases where the rules governing public rallies were obviously irrational, arbitrary or block freedom of assembly (as in the case of the deadlines for notification) the Constitutional Court found such rules clearly unconstitutional.

FORMATION OF THE BODY OF CONSTITUTIONAL CONTROL OF THE KYRGYZ REPUBLIC ANNOTATION

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ABSTRACT

This article contains information about the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, its functions and competencies, the body of Constitutional oversight in the Kyrgyz Republic.

KEY WORDS: *Constitutional oversight, human rights and freedom, law, protection of rights, independence.*

FORMATION OF THE BODY OF CONSTITUTIONAL CONTROL OF THE KYRGYZ REPUBLIC ANNOTATION

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Main Article

One of the basic conditions of a democratic state of law is respect for the constitutional legality. This raises the need for the implementation of the constitutional control. This need is due to the main role and place of the Constitution in the legal system of the state. The Constitution establishes the most important areas of the organization and functioning of any state: political, economic, social, and others.

The world experience, the experience of our country shows that legal acts are often in conflict with the Constitution. In order to exclude the existence of such acts, the State must have at its disposal the authorities that would ensure the correct application of the constitutional norms and principles invalidates those laws that do not conform to the Constitution.

Constitutional control occupies a leading position in the whole system of control over the legality. The basic law will be effective only when the system of constitutional control will be active in the area of legal protection.

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

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The fundamental purpose of the Constitutional Chamber is to protect the constitutional order, rights and freedoms of humans and citizens.

The mission of the Constitutional Chamber is to protect human rights and freedoms as the highest constitutional value. The Constitutional Chamber provides a fair and impartial constitutional justice, protects the foundations of the constitutional system, forms and develops new traditions of constitutionalism, the rule provides a direct acting of the Constitution, strengthens public confidence in the constitutional justice, provides stability of constitutional values, ensures the stability of constitutional principles and norms and is the custodian of the letter and the spirit of the Constitution.

Constitutional Chamber establishes and decides questions only of law. It owns a priority in ensuring the unity of legal space and constitutional law.

The Constitutional Chamber is independent and obeys only the Constitution of the Kyrgyz Republic, performs its activities in accordance with the Constitutional Law "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic". Accordingly, the decisions of the Constitutional Chamber are based on the Constitution of the Kyrgyz Republic and express the legal position of judges, free from any bias.

Competencies of the Constitutional Chamber are determined by the Constitution of the Kyrgyz Republic and the constitutional law "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic", according to which, the Constitutional Chamber:

- declare unconstitutional laws and other regulatory legal acts in the event that they contradict with the Constitution;

- conclude on the constitutionality of international treaties not entered into force and to which the Kyrgyz Republic is a party;

- shall conclude on the draft law on changes to the present Constitution.

The Constitutional Chamber is the most important institution in the structure of the state, which plays a key role in the preservation and strengthening of the constitutional order in Kyrgyzstan. The instability of the constitutional system leads to weakness of the state, political, social and economic instability and permanent crisis. In the present situation, the Constitutional Chamber becoming the backbone of the approval of the constitutional order, the protection of the rights and freedoms of human and citizen, the principle of separation of powers and the constitutional mechanism of checks and balances.

In turn, the development of constitutionalism is closely related to sustainability of the Constitutional Chamber, with preservation of its independence and impartiality in resolving the issues referred to its competence. Constitutional stability is the basis of the stability of the state in general, and any other important initiatives and desires, even with good intentions cannot be above the constitutional stability.

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION IN THE ACTS OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF THE KYRGYZ REPUBLIC

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ABSTRACT

This article contains information about the procedure of submitting petition to the Constitutional Chamber and about the acts of the Constitutional Chamber related to the freedom of expression and the freedom of association.

With the adoption of the new version of the Constitution of the Kyrgyz Republic adopted by the public referendum on 27/06/2010, Constitutional Court of the Kyrgyz Republic was transformed to the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.

Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (hereinafter- Constitutional Chamber) started its activities as a new body of constitutional review in 2013, when the judges were elected, even if the Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" was passed on 13/06/2011.

The first case of the Constitutional Chamber was considered at its sitting and made a decision on it on 29/10/2013.

Therefore, this article describes the acts of the Constitutional Chamber in the period from October 2013 to August 2015.

KEY WORDS: *Competencies of the Constitutional Chamber, petition, human and citizen rights, the right to free expression of opinion, media, the freedom of association, trade union.*

THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSOCIATION IN THE ACTS OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF THE KYRGYZ REPUBLIC

Baktygul ARYKOVA[*]

Main Article

I. The procedure of submitting petition to the Constitutional Chamber

One of the competencies of the Constitutional Chamber is declaring unconstitutional laws and other regulatory legal acts in the event that they contradict with the Constitution of the Kyrgyz Republic.

In order to implement these competencies, the Constitutional Chamber provides the following procedure.

The Constitution of the Kyrgyz Republic and the Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" provide the procedure of submitting petition to the body of constitutional oversight.

This procedure contains the subject, object, format, period and language of the petition.

Subject: persons and legal entity, the President, Parliament, Government, the Prime-minister, judges of the Kyrgyz Republic, the Ombudsmen, the Prosecutor General and bodies of local self - governance.

Object: violation of rights and freedoms of citizens by virtue action of unconstitutional laws or other normative legal acts.

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Format: petition should comply with the requirements of the Constitution of the Kyrgyz Republic and the Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic".

Period: one month to decide the issue on acceptance of the petition for constitutional proceeding or refuse to accept the petition for constitutional proceeding.

Language: Kyrgyz or Russian.

The petition is considered by a Panel of three judges of the Constitutional Chamber.

The main function of the Panel of judges is to check the compliance of the petition to the requirements of the Constitution of the Kyrgyz Republic and the Constitutional Law of the Kyrgyz Republic "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic".

The panel of judges provides checking the petition within one month from the date of registration of the application.

At the end of checking, the Panel of judges makes a decision on acceptance of the petition for constitutional proceeding or on refusal to accept it.

Both of these acts of the Panel of judges may be appealed to the Constitutional Chamber. When we say "Constitutional Chamber", it means 11 judges.

In the case of acceptance of the petition for constitutional proceedings, it is considered by the Constitutional Chamber within 5 months.

Thus, compliance with all requirements of law and procedure of submitting the petition to the body of constitutional oversight is an important moment in the administration of constitutional justice, which is aimed on protection of human and citizen rights.

II. Freedom of expression and freedom of association in the acts of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic

The freedom of expression and freedom of association are the inalienable rights of humans and citizens.

The Constitution of the Kyrgyz Republic provides that everyone shall have the right to the freedom of thought and opinion; everyone shall have the right to free expression of opinion, the freedom of speech and the press; no one may be forced to express his/her opinion or to deny it (Article 31).

The Constitution of the Kyrgyz Republic also provides the right of everyone shall have the right of freedom of association (Article 35).

These constitutional guarantees are essential attributes of a democratic state where the rule of law and the rights and freedoms of human and citizen are protected by the state.

The Constitutional Chamber in its decisions expressed its legal position on the issues of freedom of expression and freedom of association.

A. The freedom of expression

Freedom of expression is one of the constitutional guarantees provided by the Kyrgyz Republic to every citizen. This guarantee is manifested in various areas of activity of the citizen and it is the highest value like any other human rights in the Kyrgyz Republic.

Thus, the Constitutional Chamber in its decision of 24.09.2014 expressed the following position (Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, 24.09.2014, Case Kochkarova E.A. - Law of the Kyrgyz Republic "On the status of deputy of the Jogorku Kenesh of the Kyrgyz Republic", paragraph 2):

"Implementing forms of direct democracy, citizens directly express their will, expressing their opinion in a referendum and voting for of this or that candidate in elections. In a representative

democracy, the people elect from among citizens the deputies to the representative bodies of state authority and delegate them the right to pass laws and to decide other important issues of state and public life. "

In this case, the freedom of expression is reflected in the field of electoral law, when humans will be manifested at the referendum and when people vote for the candidate at the elections.

The Constitutional Chamber in its decision of 14.01.2015 expressed the following position (Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, 14.01.2015, Case Umetalieva T.Dj. - Law of the Kyrgyz Republic "On amendments to some legislative acts of the Kyrgyz Republic" dated 05.17.2014 number 68", paragraph 4):

"The Constitution of the Kyrgyz Republic guarantees everyone the right to freedom of thought and opinion, the right to freedom of expression, freedom of speech and press, the right to freely seek, freely seek, receive, keep and use information and disseminate it orally, in writing or otherwise. (parts 1, 2 of Article 31 part 1 of article 33).

Implementation of the media social functions as informing society on public interest issues intended at formation of the public opinions, views and positions on the events taking place around."

In this case, the freedom of expression is reflected in the field of journalism and media, whose activities have their own specific features.

The Constitutional Chamber in its decision of 24.06.2015 expressed the following position (Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, 24.06.2015, Case Osmonalieva A.M., Osmonbaev B.K., Sutalinova G.A. - Law of the Kyrgyz Republic "On elections of the President of the Kyrgyz Republic and the deputies of the Jogorku Kenesh of the Kyrgyz Republic", paragraph 2):

"The Constitution of the Kyrgyz Republic, declaring human rights and freedoms the supreme value, guarantees everyone the

right to freedom of thought and opinion, the right to free expression of opinion, freedom of speech and press, right to freely seek, receive, keep, use information and disseminate it orally, in writing or otherwise. Along with other rights and freedoms, they act directly, defining the meaning and content of the activity of legislative, executive and self-governance bodies (Part 1 of Article 16, paragraph 1 and 2 of Article 31, Part 1 of Article 33). Freedom of expression and freedom of speech and the press are necessary conditions for human expression, the formation of its active position in life, awareness of their own importance and value, meet the need to be heard and to hear others. The guarantee of freedom of expression is to protect the individual from restrictions on the ability to think freely and independently. Consequently, opinion cannot be shown free, if you cannot express it freely. Freedom of expression is manifested in a person's opportunity to publicly express, disclose, freely to express, distribute in any way their thoughts, opinions and beliefs. Freedom of the press - it's personal and political rights of citizens to freely establish print media freely publish and distribute any printed materials. Provided in paragraph 1 of Article 33 of the Constitution of the Kyrgyz Republic the right to freedom of information should be considered as a derivative and, at the same time, as an additional guarantee of the right to freedom of expression and freedom of speech. At the same time, during the election process, freedom of speech and freedom of information create necessary political informational space and media plays special role in this."

In this case, the freedom of expression is evident in the field of journalism and media, where citizens have the right to express their opinion through the press.

B. The freedom of association

The freedom of association also guaranteed by the Constitution of Kyrgyz Republic and is one of the most important rights of citizens aimed at the realization of citizens in the society.

The Constitutional Chamber in its decision of 04.07.2014 expressed the following position (Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, 04.07.2014, Case Saatov

T.Dj., Dzhanseitova K.A. - Labor Code of the Kyrgyz Republic, paragraph 2):

"Professional associations (unions) - voluntary associations of citizens on the basis of common interests, both in production and non-production areas, created to protect labor and socio-economic rights and interests of its members (Article 1 of the Law "On Trade Unions ").The main functions (activities) of trade unions are representing the interests of workers to the employer, state authorities and local self-government and the protection of labor rights of workers, their social and economic interests. The establishment of such a union of public associations is carried out through the right to freedom of association, which is stipulated by the Constitution (Article 35) and is enshrined in the Constitution of the International Labor Organization (hereinafter - ILO). The basis of this right is the voluntary expression of the citizens - to create and be a member of the association, which proclaims the norms of the Constitution, international law and national legislation."

In this case, the freedom of association is expressed in the possibility of citizens to form and be a member of trade unions.

The Constitutional Chamber in its decision of 24.06.2015 expressed the following position (Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, 24.06.2015, Case Osmonalieva A.M., Osmonbaev B.K., Sutalinova G.A. - Law of the Kyrgyz Republic "On elections of the President of the Kyrgyz Republic and the deputies of the Jogorku Kenesh of the Kyrgyz Republic", paragraph 2):

"Political parties, as a voluntary association of citizens within the framework of civil society act as a necessary institution of representative democracy, which ensures the participation of citizens in the political life of society and promotes expression of the political will of the citizens."

In this case, the freedom of association is expressed in the possibility of citizens to form political parties and thus express their civic activity.

FREEDOM OF EXPRESSION IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF TURKEY

Prof. Dr. Engin YILDIRIM

TURKEY

FREEDOM OF EXPRESSION IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF TURKEY

Prof. Dr. Engin YILDIRIM[*]

Good morning, everybody! Actually, I am not sure whether I deserve such complimentary statements. I think it is a bit exaggeration. So, anyway, my lecture is going to consist of two main parts. In the first main part, I will concentrate on the freedom of expression of the members of terrorist organizations, those people convicted of being members of terrorist organization, the extent to which the Turkish Constitutional Court is ready or is willing to recognize these people's right to freedom of expression. And in the second part of my lecture, I am going to talk about the right to freedom of organization with a particular emphasis on labour rights. In my view, labour rights are one of the most important rights in the world of human rights and in my world as a Justice of the Turkish Constitutional Court, I give a special importance to the application or to the cases brought to the Court when they deal with labour rights. So, anyway, as we all know or probably you do not know, I believe the Turkish people know Turkey has come a long way in terms of human rights since 1980 coup d'état. Then all of human rights and freedoms were severely curtailed. Since then, there have been many improvements in the field of human rights but if we take the number of applications to the European Court of Human Rights into consideration, Turkey still, in my personal view, still suffers from a relatively poor human rights record. So, one of the main jobs, I think, of the Turkish Constitutional Court is to deal with these issues, to address these problems and to improve human rights of this country. I think constitutional application, constitutional complaint or what we call individual application is

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one of the main ways of improving the rights of this country. And I believe so far the Turkish Constitutional Court has been relatively good in the improvement of human rights of this country.

Before moving on to the freedom of issues related to freedom of expression, let me add some words about the historical course of this Court in the field of human rights. The Turkish Constitutional Court, is one of the oldest Constitutional Courts in Europe, founded in 1961. So, it has a record of more than 50 years. Whenever you look at, or you view a text book about comparative constitutional law, you see hardly any reference to the wording, to the ruling of this Court. But I hope in the near future the state of affairs will change and you will see or we will see references to the rulings or to the wordings of this Court as an exemplary way showing how a Court could play a role in improving the human rights of a country. Currently, the Court has been in the process of adopting the rights-based approach in its jurisdictions and the constitutional complaint has been one of the means of improving this record. As we all know, freedom of expression constitutes the basis for many other rights such as the right to association, the right to information, the right to communication, and breaches of freedom of speech are closely affiliated with other types of human rights violations as well. What does the Turkish Constitutional Court understand by the concept of freedom of expression? Let me quote a definition about what the Court understood by freedom of expression. In an individual application, the Court ruled that freedom of expression means that individuals can freely access new types of information and that they cannot be condemned for the thoughts and convictions they have and they can freely express, tell, design, convey and disseminate them to others through various methods, by themselves or together with others. The freedom of expression ensures that the individual and the society are informed by performing the transmission and circulation of thoughts. I think the most important thing about these statements is that they are relatively new for the Turkish Constitutional Court. In the past, it was almost impossible to see such views in the world of this Court. So, I think it represents a huge improvement with regard to the views of the Turkish

Constitutional Court's understanding of freedom of speech, of freedom of expression.

Now, let me give some examples of cases related to freedom of expression. I think one of the most important decisions of the Court is related to Abdullah Öcalan who is the founder of terrorist organization called "PKK"(Kurdistan Workers Party) which has waged a ruthlessly terror campaign against the security forces and security parts of the civil society. Öcalan is convicted of being the founder of a terrorist organization and as a result, he serves currently life imprisonment. Mr. Öcalan, in his application to the Constitutional Court, claimed that his freedom of expression was violated because he wrote a book entitled "Kurdistan Revolution Manifesto" which was confiscated and destroyed by the state authorities. In the confiscation decision, the local Judge ruled that the map of Kurdistan on the cover page, the identity of the writer as the leader and founder of PKK and finally the content of certain pages indicated that the book was written to propagate the terrorist organizations. The applicant alleged that the region depicted on the cover of the book defined the Kurdistan geography where the Kurdish people lived. It did not refer to Kurdistan as a canton and depicted the borders were not political but cultural and geographical borders. And moreover, the region defined as Kurdistan in the content of the book was a cultural geography rather than a political idea. The Turkish Constitutional Court held that the depiction of a geographical region there asserting that a group of people living alone cannot be qualified as the declaration of an expression targeting the integrity of the country where the region is located. The Court sitting as Plenary examined each argument of the confiscation order in details. For the Court, the cover page, the identity of the writer and certain pages of the book that seem to incite violence must nıt be taken in isolation. On the contrary, the message and aim of the book must be evaluated as a whole. Although some pages of the book are very disturbing, or even shocking for certain parts of the society. The bulk of the book is about critical and historical analyses of the so-called Kurdish question or Kurdish problem. And the writer, among other things,

calls for recognition of the Kurdish reality and for peaceful solution of the problem without resorting to armed resistance. The Court also noted that just like it cannot be justified to interview someone for freedom of expression and dissemination of thoughts solely based on their identity, the mere fact that a member of a banned organization expresses his thought and opinions does not justify intervention in freedom of expression.

The book argues that the Turkish State aims to dissolve what he calls Kurdishness as an entity via political, military, cultural, ideological policies and defines the conflict between the PKK, which is a terrorist organization both in Turkey and according to the US, EU, and the security forces as a war of freedom. So, it refers to a clash of union between members of PKK and members of Turkish security forces as a war of freedom. The applicant also reflects historical events from his own perspective, very harshly criticizes the Turkish state's Kurdish policy and especially its activities in the South-East, and depicts a very bad picture regarding the State of the Republic of Turkey, especially its security forces. It frequently accuses the Turkish security forces of dealing with civilian Kurdish people very harshly, using all the means of torture and violating their human rights. Nonetheless, the applicant demands the recognition of, in his own words, the Kurdish right at the use of peaceful means for solution of the problem instead of resorting to other methods. The applicant who is influent over the terrorist organization still continues mainly advocating for a democratic solution and this solution needs to be given a chance. And again he argued that in his book there are two ways, either he will solve the problem through democratic means or the Kurdish people will resort to a huge rebellion against the Turkish State, so, there is a call of insurgency of certain segments of the population. But in spite of these sentences, the Constitutional Court ruled that the main theme of the book is not to call for an insolvency, is to solve this problem through democratic ways. As a result of this legal and political reasoning, the Court reached the conclusion that the freedom of expression of the applicant Mr. Öcalan was violated. And it was for the first time that, as far as I know, any Court in Turkey decided that

Mr. Öcalan's rights were violated. It was the first decision in favour of Mr. Abdullah Öcalan, coming out from a Turkish Court. So, in a way, that was a very historic decision.

The Court also pointed out that the copies of the book were destroyed despite the fact that there was no judicial decision in this regard. Having emphasized the importance of freedom of expression in a democratic society, the Court reached the decision that the freedom of expression of the applicant was violated.

In another incident the applicant was Peace and Democracy Party the Chief of Diyarbakır Province of this political party made a press statement in 2010 on the occasion of the anniversary of Abdullah Öcalan's arrest in Kenya and criticized the government policies in solving the Kurdish problem. According to the applicant, in solving the problem the government was unwilling to address Abdullah Öcalan and that denied Öcalan's role in solving the problem. Remember this was the speech made in 2010, that is 5 years ago. The applicant also called for improving the prison conditions of Öcalan, ceasing the military operations and government's consideration of Öcalan's suggestion and eventually his release and realizing democratization. The applicant was arrested after the press statement and charged of propagandizing and committing a political crime in the name of a terrorist organization. But the applicant was later released on probation. He was not acquitted. The applicant alleged that his release on probation for the opinions he expressed in the press statement was a violation of his freedom of expression. The Court first examined whether the ruling- although the applicant is convicted- constitutes an interference with freedom of expression or not. It must be taken into consideration that the applicants is a politician. So, again although he is on probation, in the future he may face further criminal challenges on the basis of his statement. The Court reached the conclusion that there was an interference with freedom of expression of the applicant within the context of Article 26 of the Turkish Constitution.

A similar case again is related to the books propagating views of Öcalan and PKK. This time the applicant was a prison inmate

who was convicted of being a member of PKK. The book was sent by another inmate from another prison and it was confiscated by this inmate's prison authorities. The interesting thing is that there was not any legal ground on the publication of the book. The prison authorities justified the barring and confiscation of the book on prison safety grounds, so, they argued that this book could threaten the safety of the prison. In addition, the prison authorities also argued that the book and his views of the organization he founded were expressed in a legitimatizing way. The applicant claimed that his freedom of expression was breached. The Court concluded that there was a violation of freedom of expression and emphasized that there need to be a limit to freedom of expression. In its judgment, the Court argued that the excess ban on the book upon the applicant's access to news and ideas are not in accordance with the democratic social order and it was not proportionate with the legitimate purpose. In addition, the Court also pointed out that it was unclear what sort of concrete risks and dangers in terms of prison safety led to confiscation of the book.

In a very similar case, this time, a letter was sent to an inmate convicted of again being a member of another terrorist organization. In that letter, there were some statements of the leader of the terrorist organization and the way in which the leader and founder of this organization led for their struggle to liberate the Turkish people. The Court, in this case, found that there was not any violation of freedom of expression. The prison authorities were justified in confiscating the letter because the statements in it were legitimatizing the views of the leader of this terrorist organization. Of course, it seems that there is a contradiction between this decision and decisions related to PKK and Abdullah Öcalan. But, in this letter there was a propaganda of armed struggle, armed insurgency. There was not anything about the democratic means of solutions to the political problems. The letter just emphasized the necessity of armed struggle, armed insurgency. So, that was, I think, that was the main reason why the Court sitting as a Plenary reached the conclusion there was not any breach of freedom of expression in that case. So far I have given some examples of cases related to the freedom of expression of the

people convicted of being members of terrorist organizations but the Court's jurisdictions in this field is wide. For example, in a very recent decision, the Court found a violation of freedom of expression of a medical professor. This professor published a report, criticizing the quality of drinking water provided by the Ankara Municipality and the Mayor of Ankara brought a long case against this professor and the Court found the Professor in charge of defamatory remarks against this political person, Mayor of Ankara. The Professor made an individual application, claiming that his freedom of expression and his freedom of scientific research was violated by the decision of the local Court. In his contemplations, the Constitutional Court found that there was a violation of freedom of speech of the Professor because public figures, especially public Professor figures should have a high level of tolerance of criticisms, so, the punishment of this Professor by a local Court was unlawful on the basis of the reasoning of the Turkish Constitutional Court.

There was another case related to economists, to journalists. The applicant wrote an article in one of the most widely-read newspapers on the protest of painting in the public streets in Istanbul. The Chief Public Prosecutor's Office of Istanbul filed a criminal case against the applicant on charge of insulting a public official. In the Court then the journalist brought an individual application to the Court. In the Court opinion, the article subject to application was a little as part of ongoing discussions made in the press organs and political spirit on the face of the incidents because this essay was written at the time in which there were a lot of public protests against the government two years ago, what it is known as "Gezi Protests". The applicant made a reference to the news in the media stating that colours of the General Assembly, the halls of the Turkish Grand National Assembly, especially red colour of the seats have a negative effect on the mood of the deputies and he criticizes that the colourful environment is not welcome by politicians. So, he was criticizing politicians, deputies to Parliament. Two or three deputies brought a case against this journalist and he was fired on the basis of this lawsuit. In its ruling, the Court noted that the public authorities should tolerate harsh criticisms considering the public

power they hold. In a healthy democracy, the government should not be checked by only legislative and judicial powers but by also non-governmental organizations through the media and other political actors. Considerably, the Court stated that the interference to the applicant's freedom of expression and freedom of press for the purpose of protection of human rights of others is not necessary in a democratic society and the Court ruled that the applicant's freedom of expression as well as freedom of press were violated.

So far I have told about some important cases related to freedom of expression. Let us move on to a few cases related to freedom of association and freedom of organization. As I said in my introduction, I concentrated on decisions related to labour unions or labour rights. For example, there was an individual application by a labour union about postponement of a strike. The union was organized in the glass industry and the strike decision take by this union was postponed by an executive decree for sixty days. The executive has the right to postpone strikes for sixty days. In the end these unions should apply for a compulsory arbitration. So, this means that if you cannot reach an agreement with the employer side, at the end of sixty-day postponement period you should go to the compulsory arbitration. So, this means the violation of the right to strike because you cannot strike. So, this union argued that his right to organization was violated and the Court in a unanimous decision reached the conclusion that the postponement of the right to strike for sixty days under the pretext of national security or public health was unlawful or unconstitutional. The government can postpone strikes if it deems that it violates or it causes some serious problems in the public safety or public security or public health area but the Court deliberated that it was extremely strange, a strike in the glass sector was related to public safety or public security or public health issues. So, the executive has used this pretext of public security and public health to diminish the right to strike of Turkish labour. In this decision, I think it would be extremely difficult for the executive to postpone strikes in a glass industry, for example, or in car industry having nothing to do with public security or public health in my personal view. They cannot easily postpone these strikes, so, this

could be a, in my view, this is a watershed or landmark decision in the field of labour rights. I think this could be a very important decision not just in Turkey but especially in many European and Asian countries as well.

In another case, the applicant was a public official who was absent without leave due to the call made by this union. The union called for an industrial action for all of its members throughout the country and this public official did not go to work that day. As a result of this act, the applicant was punished with a disciplinary penalty because of his complaints with the call made by the union. In that case, the Court implemented the three-stage test of the European Court of Human Rights and questioned whether the interim measure on freedom is prescribed by law, has a legitimate aim and whether it was necessary in a democratic society. The Court underlined the fact that even though freedom of assembly and association may lawfully be restricted on the exercise of these rights by the members of some sections of public service like armed forces or police. The Court concluded that although this disciplinary penalty implemented by the administration did not constitute a severe punishment, this sanction has dissuasive character in terms of the right to legitimate actions and strike rights and hence it was not necessary in a democratic society. So, it reached the decision that the freedom of association of this applicant was breached. So far we have been talking about cases coming out of individual application but there were also some cases which came out as a result of abstract or concrete norm review.

In one of these, for example, the Turkish Court found the ban on unionization of civil members of police and armed forces was constitutional. So, there was a prohibition of people working as civilian. For example, in factory facility belonging to the army or in a repair shop, or police forces, they were not entitled to organize under the previous legal norms. And the Court ruled that although the legislative authority can prohibit the right to organization of police forces and military personnel, it can be seen constitutional. But the banning of this freedom of the unionization of civilian people working in these authorities was unconstitutional. So, in

this way, the Court opened a new avenue for the improvement of the right to association, for the improvement of the unionization of working people. And again there were strike bans in certain sectors like banking, or urban transport. In a very recent ruling, the Court found that these bans in these sectors were unconstitutional. But just a year ago, in a case of concrete review, the same Court reached the decision that the strike ban, strike prohibition on workers employed in the stock exchanges are not unconstitutional. It is a clear contradiction. I mean, the same Court claims that prohibition of strikes in the banking sector is unconstitutional, but in the stock exchange sector it is constitutional. So, could you tell me what the difference is? There is not any difference. The strange thing is that the decision or the finding of constitutionality of the banning of strikes in stock exchanges was based on the necessity of economic conditions, economic circumstances but the same thing is also true for the banking sector.

So, I think my time is up. I would like to thank you for your attention, for your patience. Thank you very much.

FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION: THAILAND'S PERSPECTIVES

Vekin RATTANAPANT
Nitikon JIRATHITIKANKIT

THAILAND

FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION: THAILAND'S PERSPECTIVES

Vekin RATTANAPANT[*]
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İntroduction

Discussing about the freedom especially expression and association, it is not misleading to say that freedom of expression and freedom of association are one of the fundamental rights existing since a long time ago. The Republic (Plato) is a good example for freedom of expression which show the dialogues of sophists who discussed about what was the best regime. Freedom of association; meanwhile, has also been recognized as the basis of human nature and one of the vital factor of human society. It is related implicitly to Aristotle's Politics which wrote that "Man is by nature a political animal."

Since then, freedom of expression and freedom of association have been recognized internationally as the fundamental of democratic regime. In democratic countries, government should not restrict the expression which contain various types of communication, channel, and opinions and should allow associating beneath the law. These freedoms bring about democratic politics and encourage the effective democracy. Moreover, both of these freedoms are recognized as one of human rights by international laws and also by any modern states' constitution. For instance, Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, and European Convention on Human Rights as well.

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The main purpose of this essay is to discuss about background of freedom of expression and association in Thailand particularly in Thai Constitution, the essay will be divided in 5 parts. Firstly, the international laws concerning freedom of expression and association will be presented. Secondly, we will go into the provisions of Thai Constitution which recognize freedom of expression and association. The next one will be the Constitutional Court Rulings concerning these freedoms and, the current situation in Thailand under the military junta government, and the conclusion at last.

I. International laws on freedom of expression and association

The international laws concerning freedom of expression and association, and many modern states internationally agreed and implemented as domestic laws recognizing and protecting these freedoms such as ;

1) Universal Declaration of Human Rights 1948 (UDHR) is a declaration adopted by the United Nations General Assembly on 10 December 1948. The Declaration arose directly from the experience of the Second World War and represented the first global expression of rights to which all human beings are inherently entitled[1]. There are the provisions on freedom of expression provided by article 19 and also freedom of association by article 20 as follows;

Article 19 *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

Article 20 *"Everyone has the right to freedom of peaceful assembly and association."*

2) International Covenant on Civil and Political Rights 1966 (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force since 23 March

1 https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights

1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. Moreover, it is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights[2], where we find freedom of expression and association provided by article 19 and article 22 as follows;

Article 19 *"1. Everyone shall have the right to hold opinions without interference.*

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

Article 22 *"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

2 https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights

This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning freedom of association and protection of the right to organize1 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

3) European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity[3]. Freedom of expression and association stated on article 10 and article 11 as follows;

Article 10 *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11 *"1.Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

3 https://en.wikipedia.org/wiki/European_Convention_on_Human_Rights

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

By the provisions mentioned above, these laws could be considered that have the similar ideas and principles which are not only to regard freedom of expression and association as a basic human rights and liberties, but also protect these freedoms. Moreover, the restrictions on these freedoms shall not be imposed except by virtue of law for specific purposes (especially in the provisions of ICCPR and ECHR) for instance to protect the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. However, the essential substances of each law are (1) the recognition of the freedom of expression and association as the basic human rights, (2) the restriction on these freedoms is prohibited except by virtue of laws, and (3) other rights and liberties which are guaranteed and concerning with freedom of expression and association for instance freedom of peaceful assembly, rights to form and to join trade unions. To compare on each provision of international laws, we can consider the essential substances of each law in Table 1 as follow;

Table 1: Comparative provisions of each international law related to freedom of expression and association

Freedoms	The provisions of each international law			Notation
	UDHR	**ICCPR**	**ECHR**	
Expression	Article 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.	Article 19 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public	Article 10 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.	According to the provisions, UDHR only recognize freedom of expression, while ICCPR and ECHR also recognize and protect freedom of expression and various types of expression such as orally, printing, art are included. Moreover, the restriction on this freedom is prohibited except by virtue of law for national interests.

Freedoms	The provisions of each international law			Notation
	UDHR	ICCPR	ECHR	
Association	Article 20 Everyone has the right to freedom of peaceful assembly and association.	Article 22 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. 3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning freedom of association and protection of the right to organize1 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.	Article 11 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.	According to the provisions, UDHR only recognize freedom of association (and also peaceful assembly), while ICCPR and ECHR also recognize and protect freedom of association (especially trade union) and the restriction on this freedom is prohibited except by virtue of law for national interests.

However, as a member of United Nations - UN, Thailand has agreed the Universal Declaration of Human Rights and also the International Covenant on Civil and Political Rights 1966 having been implemented since 1997. Moreover, ideas and principles of each international law have been continually applied as the fundamental rights and liberties of Thai people in the Thai constitutional context which will be described in the next part.

II. Freedom of expression and association in Thai Constitutional Context

Even though freedom of expression and association has been recognized by UDHR since 1948, but in fact Thailand recognized these freedoms as the fundamental right and liberties of Thai people for decade. In 1932, the Constitution of the Kingdom of Siam B.E. 2475 (1932) – the first permanent Constitution - provided freedom of expression and association on section 14 as follow;

"Subject to the provision of the law, a person shall enjoy full liberty on his life, dwelling, property, speech, writing, publication, education, assembly; form an association, and occupation."

According to section 14 of 1932 Constitution, it could be considered that consistent with the principle of article 19 and article 20 of UDHR which recognized freedom of expression and association. Moreover, the recognition on this section was only guarantees these freedoms and not concerning to protect the exercise of these rights. After the first recognized by 1932 Constitution; however, freedom of expression and association have been recognized continually by previous Thai Constitutions and the protection on these freedoms and other concerned rights of expression and association has been also included for instance the restriction on these rights is prohibited except by virtue of law and the rights' protection of mass media. The table 2 shows about the provision (s) of previous Thai Constitutions since 1932 to 2014 which concerning freedom of expression and association as below;

Table 2: The provision (s) of Thai Constitutions which concerning

Freedom of expression and association since 1932 to 2014[4]

Thai Constitution (By year)	Provision concerning freedom of expression and association		Notation
	Expression	Association	
1932 Temporary Charter	-	-	-
1932 Constitution	Sec. 14	Sec. 14	both of freedoms included in one section
1946 Constitution	Sec. 14	Sec. 14	both of freedoms included in one section
1947 Charter	Sec. 23	Sec. 23	both of freedoms included in one section
1949 Constitution	Sec. 35	Sec. 38	
1952 Constitution	Sec. 26	Sec. 26	both of freedoms included in one section
1959 Charter	-	-	promulgated under military government
1968 Constitution	Sec. 33	Sec. 36	
1972 Temporary Charter	-	-	promulgated under military government
1974 Constitution	Sec. 40	Sec. 44	
1976 Constitution	-	-	promulgated under military government
1977 Charter	-	-	promulgated under military government
1978 Constitution	Sec. 34	Sec. 37	
1991 Charter	-	-	promulgated under military government
1991 Constitution	Sec. 37	Sec. 40	
1997 Constitution	Sec. 39	Sec. 45	

4 See also, The Secretariat of National Legislative Assembly, **Constitution of the Kingdom of Thailand (volume 1 and volume 2)**, (Bangkok; Bureau of Publication of the Secretariat of National Legislative Assembly, 2006).

2006 Interim Constitution	-	-	promulgated under military government
2007 Constitution	**Sec. 45**	**Sec. 64**	
2014 Interim Constitution	-	-	promulgated under military government

After the Thai revolution in 1932, Thailand under the constitutional monarchy regime has promulgated 19 Constitutions which continually developed ideas and principles to recognize and protect the rights and liberties of Thai people. However, there were 8 Constitutions (or charters) which promulgated under military junta government and the recognition and protection on these freedoms were not existed. Moreover, there were 4 Constitutions which had consisted of similarly principle to the 1932 Constitution and UDHR which only recognized and provided both of freedom of expression and association. Furthermore there were 7 Constitutions which not only provided freedom of expression and association separately, but also provided protection and guaranty concerned other rights which had similar principle to ICCPR and ECHR.

The previous 2007 Constitution of the Kingdom of Thailand – one of the vital Constitution of Thailand - recognized freedom of expression and association separately. The provisions on freedom of expression provided by section 45 and freedom of association (or liberty of association) by section 64. The restriction on these freedoms; in addition, shall not be imposed except by virtue of law specifically enacted for these purposes for instance (1) maintaining national security, public order or good moral (2) protecting the rights, liberties, dignity, common interest of public or preventing economic monopoly.

Thus, Freedom of expression of Thai people was provided in the past 2007 Constitution on section 45 as follow;

Section 45 *"A person shall enjoy the liberty to express opinions, speech, writing, printing, publication, and expressions by other means*

Restrictions on liberty under paragraph one shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the

security and safety of the State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public.

The closure of a newspaper of other mass media in deprivation of the liberty under this section shall not be made.

The prevention of a newspaper or other mass media from presenting news or expressing their opinions, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section shall not be made except by virtue of law enacted in accordance with the provisions of paragraph two.

Censorship of news or articles by a competent official before publication in a newspaper or other mass media shall not be made except during the time when the country is in a state of war; provided that it must be made by virtue of law enacted under the provisions of paragraph two.

The owner of a newspaper or other mass media shall be a Thai national.

No grant of money or other properties shall be made by the State as subsidies to private newspaper or other mass media."

The intentions of the provision provided by section 45 were to recognize and protect the freedom of expression as an important basis of democratic society. Individuals can express their opinion in various means and types of communication as far as not violate the other person, and mass medias can express their opinions or present their news freely and no censorship. To protect this freedom; moreover, State cannot restrict the exercise of these rights except by virtue of law for the public purposes such as national security, public order or good moral.[5] However, this section could be considered that consistent with article 19 of UDHR which only recognizes freedom of expression as same as article 19 of ICCPR and article 10 of ECHR.

Moreover, freedom of association; meanwhile, was provided by section 64 of the previous 2007 Constitution as follow;

5 Constitutional Drafting Assembly, **the Intention of the Constitution of Kingdom of Thailand B.E. 2550 (2007)**, pp. 37-38.

Section 64 *"A person shall enjoy the liberty to unite and form an association, union, federation, co-operative, farmer group, private organization, non-governmental organization or any other group.*

Government officials and State officials shall enjoy the same liberty to association as other persons generally provided that the efficiency of State administration and the continuation of public services are not affected, as provided by law.

The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of law specifically enacted for protecting the common interests of the public, maintaining public order or good morals or preventing economic monopoly."

The intentions of section 64 were to recognize and protect the freedom of individual to associate with others and also various form of association such as trade union, farmer group, private organization, and NGOs. Moreover, there was the first recognition for the government officers and state officers to exercise the rights to unite as individuals to form their association. The restriction; in addition, was also provided and was prohibited except by virtue of law for specific purposes for instance to protect the public interest, maintaining public order or good morals or preventing economic monopoly.[6] However, this section could be considered that consistent with article 20 of UDHR which only recognizes freedom of expression and also article 22 of ICCPR and article 11 of ECHR.

As mention above, the 2 sections of the previous 2007 Constitution have similar principle and consistent with international laws which are (1) the recognition of the freedom of expression and association as the basic human rights, (2) the restriction on these freedoms is prohibited except by virtue of laws, and (3) other rights and liberties which are guaranteed and concerning with freedom of expression and association for instance freedom to express opinion in various means or freedom to form trade unions. However, we can consider the essential substances of each law which shown in Table 3 as follow;

6 Ibid, pp. 56-57.

Table 3: Comparative provisions concerning freedom of expression and association between the previous 2007 Thai Constitution and International Laws

Freedoms	The provisions concerning freedom of expression and association			
	2007 Thai Constitution	**UDHR**	**ICCPR**	ECHR
Expression	**Section 45** A person shall enjoy the liberty to express opinions, speech, writing, printing, publication, and expressions by other means Restrictions on liberty under paragraph one shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security and safety of the State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public. The closure of a newspaper of other mass media in deprivation of the liberty under this section shall not be made. The prevention of a newspaper or other mass media from presenting news or expressing their opinions, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section shall not be made except by virtue of law enacted in accordance with the provisions of paragraph two.	**Article 19** Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.	**Article 19** 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rwights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public	**Article 10** 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedoms	The provisions concerning freedom of expression and association			
	2007 Thai Constitution	**UDHR**	**ICCPR**	**ECHR**
Expression	Censorship of news or articles by a competent official before publication in a newspaper or other mass media shall not be made except during the time when the country is in a state of war; provided that it must be made by virtue of law enacted under the provisions of paragraph two. The owner of a newspaper or other mass media shall be a Thai national. No grant of money or other properties shall be made by the State as subsidies to private newspaper or other mass media.			
Association	**Section 64** A person shall enjoy the liberty to unite and form an association, union, federation, co-operative, farmer group, private organization, non-governmental organization or any other group. Government officials and State officials shall enjoy the same liberty to association as other persons generally provided that the efficiency of State administration and the continuation of public services are not affect, as provided by law. The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of law specifically enacted for protecting the common interests of the public, maintaining public order or good morals or preventing economic monopoly.	**Article 20** Everyone has the right to freedom of peaceful assembly and association.	**Article 22** **1.** Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. **2.** No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.	**Article 11** 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the

Freedoms	The provisions concerning freedom of expression and association			
	2007 Thai Constitution	UDHR	ICCPR	ECHR
Association			3. Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning freedom of association and protection of the right to organize1 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.	armed forces, of the police or of the administration of the State.

The comparison between the provisions of each laws show that all of these laws have the same ideas and principles to recognize and protect freedom of expression and association as the basis of democratic society, and State should not restrict on these freedoms except by virtue of laws. In Thailand; however, the enforcement of article 45 and article 64 of 2007 Constitution has widely affected the exercise of the rights to expression and association. In fact, there are various types of communication as channels for expression in particular social network which is an effective channel for expression. Moreover, there are many mass media enterprises and providers to serve channels of the digital television, which are necessarily registered by law. Not only expression has been expanded, but liberty to unite and form an association has also been encouraged. Associations in Thailand have been formed by various groups such as religions, occupations, ethnic groups, and educations etc,. In 2014-15, there are more than 200 commercial associations and many religious associations in Thailand[7]. Most of associations; however, shall be official registered and regulated by concerned State authorities for instance Ministry of Interior, Ministry of Commerce, and Ministry of Finance.

As mentioned above, freedom of expression and association in Thailand have been recognized and protected continually by Thai Constitutions. However, the protection of rights and liberties was also been provided by the previous 2007 Constitution which provided by section 27 as follow;

"Rights and liberties are recognized by this Constitution explicitly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of ministers, the Courts, Constitutional organizations and State agencies with respect to the enactment, application and interpretation of all laws."

From this section; therefore, the Constitutional Court of the Kingdom of Thailand has a significant role to protect rights and

7 Statistic of commercial association in Thailand, see also, www.dbd.go.th

liberties of Thai people due to the effect of the decision of the Constitutional Court binding directly on all state agencies in the enactment of laws, application of laws and interpretation of laws. Thus the next part will describe the role of the Constitutional Court of the Kingdom of Thailand and the summary of the Constitutional Court's rulings concerning freedom of expression and association.

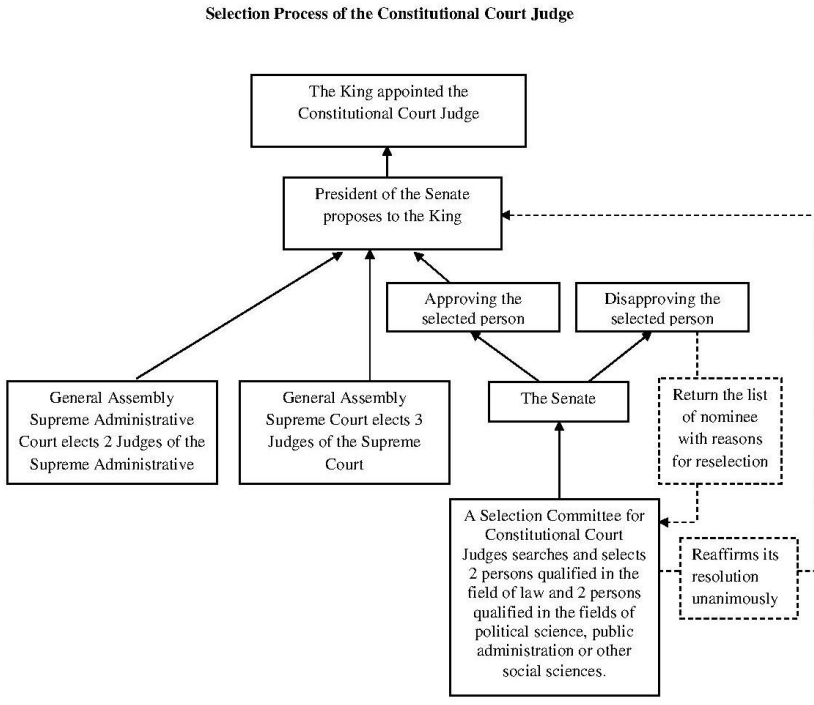
III. The Constitutional Court's Ruling concerning freedom of expression and association.

A) The Constitutional Court of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand B.E. 2550 (2007) in Brief.

The Constitutional Court of the Kingdom of Thailand is a specialized court which has been firstly established by the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and re-established by the Constitution of the Kingdom of Thailand B.E. 2550 (2007) to perform the function of safeguarding the supremacy of the Constitution. The Court consists of the President of the Constitutional Court and 8 Judges of the Constitutional Court who are appointed by the King upon the advice of the Senate from the following persons; three judges of the Supreme Court of Justice, two judges of the Supreme Administrative Court, two qualified persons in law having genuine knowledge and expertise in this field, and two qualified persons in political science, public administration or other social sciences having genuine knowledge and expertise in administration of State affairs.[8]

8 Section 204 of 2007 Constitution,

Picture 1: Selection Process of the Constitutional Court Judges[9]



The Constitutional Court has been entrusted with the function of ruling on the constitutionality of laws, also known as constitutional cases.[10] Moreover, the previous 2007 Constitution provided for the Constitutional Court to have powers and duties in adjudicating and ruling the constitutional cases. These powers and duties may be categorized into the following 9 functions;[11]

1) Constitutionality review of bills of law and draft rules of procedure of the legislature prior to promulgation so as to prevent any contrariness or inconsistencies with the constitution (under section 141, 154, 155 of 2007 Constitution);

2) Constitutionality review of laws already in force so as to

9 Composition of the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2550 (2007), www.constitutionalcourt.or.th/english/

10 Office of the Constitutional Court of the Kingdom of Thailand, **A Basic Understanding of the Constitutional Court of the Kingdom of Thailand**, (Bangkok; P.Press, 2008), p. 1.

11 Ibid, pp. 4-5.

prevent any contrariness or inconsistencies with the constitution (under section 211, 245, 257, 212 of 2007 Constitution);

3) Constitutionality review of the conditions for enacting and Emergency Decree so as to avoid any contrariness or inconsistencies with the constitution (under section 184 of 2007 Constitution);

4) To rule on whether or not a member of the House of Representative, senator or committee member has committed an act which results in a direct or indirect interest in the use of budgetary appropriations (under section 168 of 2007 Constitution);

5) To rule on disputes of conflicts pertaining to the powers and duties of two or more organs with respect to the National Assembly, Council of Ministers or non-judicial constitutional organs (under section 214 of 2007 Constitution);

6) To rule on resolutions or regulations of political parties, to consider appeals of members of the House of Representatives and to rule on cases concerning persons or political parties exercising political rights and liberties unconstitutionally (under section 65, 106 (7), 68 and 237 of 2007 Constitution);

7) To rule on the membership or qualifications of the members of the National Assembly, Minister and Election Commissioners (under section 91, 182, 233 of 2007 Constitution);

8) To rule on whether or not a treaty must be approved by the National Assembly (under section 190 paragraph two of 2007 Constitution);

9) Powers and duties stipulated by the Organic Act on Political Parties B.E. 2550 (2007).

Moreover, the procedure of the Constitutional Court shall be in accordance with the "Rule of the Constitutional Court on Procedures and Ruling B.E. 2550 (2007)" which provided the procedure for an inquisitorial system. A quorum of the Constitutional Court in hearing and giving of a decision; in addition, must comprise no fewer than five Constitutional Court Judges (from a total of 9

Judges)[12]. The ruling of the Constitutional Court shall be made by a majority votes unless otherwise provided an exception by the Constitution.[13]Furthermore, the ruling of the Constitutional Court is final and binding on the National Assembly, Council of Ministers, the Courts and other State organs[14] and the effects of the Constitutional Court Ruling may be divided into 2 instances are (1) a ruling of the Court is final, the parties, related persons or applicant may not file an appeal to another Court or object such ruling or file an action to reverse such ruling, (2) the decision of the Court would also be binding upon third parties who are not parties, related persons or applicant; in the other words, all State organizations[15].

As mention above, the Constitutional Court of the Kingdom of Thailand serves as a body which realizes the recognition and protection of Thai people's rights and liberties in practice through ruling of the Constitutional Court. The roles of the Constitutional Court are apparent from the provisions of section 27 and section 216 paragraph five of 2007 Constitution which not only safeguarding the principle of the constitutional supremacy, but protect rights and liberties also.

B) The Constitutional Court Rulings concerning freedom of expression and association

According to the provision of the previous 2007 Constitution which freedom of expression and association had been recognized and protected by section 45 and section 64, the Constitutional Court has been entrusted the powers and duties in adjudicating and ruling the constitutional cases whose the case decisions concerning freedom of expression and association for instance the Constitutional Court Rulings No. 4-5/2009, 44-45/2011, 28-29/2012,

12 Ibid, p.52.

13 The only exception provided in the 2007 constitution is the constitutionality review of the conditions for enacting an Emergency Decree, which requires the votes of no less than two-thirds of the total number of the judges, under section 185 paragraph four of 2007 Constitution.

14 Section 216 paragraph five of the past 2007 Constitution stated that;
"The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs."

15 Ibid., pp. 50 – 51.

30/2012 concerning freedom of expression and Ruling No. 34/2011, 42-43/2011 concerning freedom of association. And now for what we will describe about example summaries of these rulings as follows;

Example 1 : **The Constitutional Court Ruling No. 4-5/2552 (2009)**[16]

Whether or not section 254 of the Civil Procedure Code was contrary to or inconsistent with section 27, section 29, section 36, section 45, section 63, and section 87 (3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case is concerning freedom of expression on section 45 of 2007 constitution. The Office of the Court of Justice referred the objections of defendants in 2 applications to the Constitutional Court for a ruling under section 211 of 2007 constitution. According to summarized fact, the People's Alliance for Democracy organized and assembly in the area of the Democracy Monument, Bangkok Metropolis and closed off traffic in public ways in that vicinity. A state was set and speakers took turns in addressing the crowd present by means of sound amplifiers, attacking the government and making defamatory comments on the plaintiff (Police Lieutenant Colonel Thaksin Shinawatra), who was a citizen, and not a holder of a political office. Moreover, the defendants arranged for advertisements through live broadcasts of the speeches delivered from such state by means of the ASTV News One Satellite Television Station, through the Manager Online internet website, ASTV Dotcom website and ASTV Radio Station, in order to keep the public informed at all times. One of defendants was one of speakers who took the stage to make defamatory remarks causing detriment to the plaintiff, i.e. stating or disseminating news containing false statements which caused damage to the plaintiff's reputation or honor as well as to his work prospects or advancement, resulting in the plaintiff suffering from hatred by the general public.

Thus the plaintiff (Police Lieutenant Colonel Thaksin Shinawatra) requested for a Court order to prohibit all of defendants from

16 Office of the Constitutional Court of the Kingdom of Thailand, **the Constitutional Court Ruling 2009**, (Bangkok: P.Press, 2011), pp. 19 – 24.

committing the tortuous act on the plaintiff by restraining defendants from use of the plaintiff's name or other words that would induce the people's understanding that a reference was made to the plaintiff in a detrimental way until the case was final, and also prohibit defendants from continuing the broadcast of pictures and sounds or advertisements by any other means of the defendants' speeches in both the gathering and speeches in other places through ASTV Satellite Television Station, all internet websites and all radio broadcasting frequencies operated. The injunction was sought to relieve the plaintiff's distress and damage that could be suffered by the plaintiff as a consequence of the acts committed by all of defendants, as well as damage that could be affected upon the society and the nation, until the case was final or ordered otherwise by the court.

The plaintiff's attorney filed a motion in the Civil Court seeking interlocutory relief pursuant to section 254 (2) of the Civil Procedure Code[17]. It was requested that the Court issue an order against the defendants to refrain from repeating or continuing the tortuous acts, while defendant's attorney filed a motion in the Civil Court requesting for a referral of the plaintiff's motion for interlocutory relief under section 254 of the Civil Procedure Code to the Constitutional Court for a Ruling under section 211 of the 2007 constitution prior to an order of the Court on this matter.

The Constitutional Court found that section 254 of the Civil Procedure Code was a provision relating to procedures for providing interlocutory relief to a plaintiff filing a motion in Court in request of an interlocutory relief prior to a judgment, subject to the conditions prescribed for the relief or mitigation of grievances

17 Section 254 of Civil Procedure Core stated that

"In a case other than a pretty case, the plaintiff is entitled to file with the Court, together with his plaint or at any time before judgment, and ex parte application requesting the Court to order, subject to the conditions hereinafter provided, all or any of the following protective measures;

……

(2)A temporary injunction restraining the defendant from repeating or continuing any wrongful act or breach of contract or the act complained of, or other order minimizing trouble and injury which the plaintiff may thenceforward sustain on account of the defendant's act, or a temporary injunction restraining the defendant from transfer, safe removal or disposal of the property in dispute or the defendant's property, or an order stopping or preventing the wasting or damaging of such property, until the case becomes final or until the Court has otherwise ordered;

……"

of damage caused by the acts of a defendant in violation of the plaintiff's legal rights. In such as event, the plaintiff had exercised the right to file as action in Court with the intent of the seeking the Court's protection of his/her rights and liberties which were violated. The interlocutory relief was therefore a necessary and appropriate legal measure which empowered the Court to prescribe any interlocutory relief as provided by law. Thus, section 254 of the Civil Procedure Code was neither contrary to nor inconsistent with the principle on the protection of the people's rights and liberties under the constitution, and was not a provision which restricted the rights and liberties of the applicants in a way that affected the essential substances of the rights and liberties beyond necessity, being provisions of general applicability and not intended to apply to any particular case or person as provided under section 27 and section 29 of the 2007 Constitution.

Moreover, this provision relating to procedures for providing interlocutory relief prior to a judgment, empowering the Court to order the restraint of a defendant in a Civil Case from repeating an act or to continue an act that was an infringement or an act subject to proceedings, or issue any other order to mitigate the grievances or damages which could be suffered by the plaintiff as a result of the defendant's acts. Furthermore, the Court's consideration in giving such an order amount to an exercise of discretion in balancing the grievances or detriment suffered by the plaintiff as a result of the repeated or continued infringements or acts of the defendant subject to proceedings, against the exercise of rights and liberties of the defendant that could be restricted by provision of law. The Court order was merely a temporary safeguard for the rights and liberties to the plaintiff, and the restriction of rights and liberties were not affected absolutely. The applicants still enjoyed the liberty to communicate, express opinions and assemble peacefully without arms to the extent that the rights and liberties of others as recognized by the constitution were not violated and the acts were not inconsistent with the law.

As mention above, the Constitutional Court held that section 254 of the Civil Procedure Code was neither contrary to nor inconsistent

with section 27, section 29, section 36, section 45, section 63, and section 87 (3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Example 2 : The Constitutional Court Ruling No. 42 – 43/2554 (2011)[18]

Whether or not section 28, section 29 and section 30 of the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) were contrary to or inconsistent with section 56, section 57, section 58, section 60, section 64, section 85 and section 87 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case is concerning freedom of association on section 64 of 2007 Constitution. According to summarized fact, Khon Kaen Administrative Court and the Central Administrative Court referred the objections of 2 plaintiffs in total of 2 applications to the Constitutional Court for a ruling under section 211 of 2007 Constitution. Plaintiffs objected that due to grievances suffered as a consequence of a notification prescribing an electricity transmission line zone which prevented the full use of land that was now subject to compliance with safety regulations applicable to the electricity transmission line zone. No opportunity was given for the plaintiffs to participate in a hearing, so the objection was also raised that section 28 and section 29 of the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) which were the empowering provisions of such notification, were provisions which restricted the rights of person. There was; however, no provision on the right of the community to obtain information, express opinions and participate in proceeding as provided under the constitution This constituted a restriction of the right of the community to participate with the state in the management and utilization of natural resources and the environment, contrary to or inconsistent with section 56, section 57, section 58, section 60, section 64 of 2007 Constitution.

The Constitutional Court found that section 28 of the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) provided

18 Office of the Constitutional Court of the Kingdom of Thailand, **the Constitutional Court Ruling 2011**, pp.83 - 86.

that notice should be given or a notification published to inform the owner or possessor of immovable property or other rights holder before entry for survey, stating that entry would be made to conduct a survey of such area. Moreover, section 29 provided that a letter should be sent to the owner of possessor of the relevant property before the installation of electric transmission line or electricity distribution line, and a right was given to submit a petition to show reasons why such actions were not appropriate to the committee for a decision. Section 30 was a provision which required EGAT to pay fair compensation to the owner or possessor of property in the event that EGAT entered the land to use or perform an act which caused damage to the property of the owner or possessor. The provisions in all three sections provided for the giving of notice, explanation and reasons from the state enterprise before undertaking a project or any act which could affect the essential interests of relevant persons. These principles were consistent with section 56 and section 57 paragraph one of the 2007 Constitution.

Even though EGAT Act was enacted prior to the 2007 Constitution provisions on the protection of people's rights by way of a public hearing, as a result such principles were not clearly stated in section 28 and section 29, there were provisions on giving notice and notifications to interested persons before taking any action in the survey zone and electricity transmission line zone. The enforcement of such provisions therefore has to be consistent and in accordance with the principles stated in the constitution. However, section 64 of the 2007 Constitution protected the liberties of persons to assemble, so section 28, section 29 and section 30 of the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) were not provisions which restricted the liberty to congregate and associate. The provisions were therefore not contrary to or inconsistent with section 64 of the 2007 Constitution.

Finally, the Constitutional Court held that section 28, section 29 and section 30 of the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) were contrary to or inconsistent with section 56, section 57, section 58, section 60, section 64, section 85 and section 87 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Example 3 : The Constitutional Court Ruling No. 44-45/2554 (2011)[19]

Whether or not section 116, section 215 and section 216 of the Penal Code were contrary to or inconsistent with section 26, section 27, section 28, section 29, section 39, section 45, and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)?

This case is concerning freedom of expression on section 45 of 2007 Constitution. According to the summarized fact, Pattaya Provincial Court referred the objection of 2 defendants in 2 applications to the Constitutional Court for a ruling under section 211 of 2007 Constitution. The defendants objected that State officials had prosecuted the defendants and the public charging them of unlawful assembly, an offence under section 216 of Penal Code. The expression of opinion in an assembly was the liberty of a person to express opinion as provided under section 45 of the Constitution. The application of section 116[20] of the Penal Code to the defendants; therefore, was not allowed because of its being contrary to or inconsistent with section 45 of 2007 Constitution.

The Constitutional Court found that the Penal Code provided for the characteristics of acts constituting offences and the penalties imposable as criminal sanctions. Section 216[21] were provision on offences relating to public peace and order which stated that once and officer ordered the participants of an unlawful assembly under section 215 to dissipate, any person who refused to obey would be

19 Office of the Constitutional Court of the Kingdom of Thailand, **The Constitutional Court Ruling 2011**, (Bangkok; P.Press, 2013), pp. 87-90.

20 Section 116 of the Penal Code of Thailand stated that

"Whoever makes an appearance to the public by words, writings or any other means which is not an act within the purpose of the Constitution or for expressing an honest opinion or criticism in order:

1. To bring about a change in the Laws of the Country or the Government by the use of force or violence;

2. To raise unrest and disaffection amongst the people in a manner likely to cause disturbance in the country; or

3. To cause the people to transgress the laws of the Country, shall be punished with imprisonment not exceeding seven years."

21 *Section 216 of Penal Code stated that*

"When the official orders any person assembled to gather so as to commit the offence as prescribed under Section 215 to disperse, such person not to disperse shall be imprisoned not out of three years or fined not out of six thousand Baht, or both."

regarded as having committed an offence and liable to penalties. Moreover, the provision in this section were in force at the time of the commission of the predicate acts in this case, the provisions neither had any retroactive effect to impose a criminal offence or criminal sanction on a person, nor was there any presumption of guilt or treatment of a person as if he/she were as offender prior to a final judgment. In addition the restriction of rights and liberties was imposed by virtue of law as permitted under section 45 paragraph two of the 2007 Constitution which to preserve national security and to preserve peace, order and good moral of the people. The restriction was also imposed to the extent of necessity without prejudicing the essential substances of the rights and liberties recognized under the constitution. Therefore the provision of section 116, section 215, and section 216 of the Penal Code were consistent with section 29 of the 2007 Constitution. In other words, the provisions restricted rights and liberties by virtue of laws enacted specifically for the purposes provided under the constitution and only to extent of necessity. The provisions also applied generally were not directed at any particular case or person, and the essential substances of rights and liberties recognized by the constitution were not prejudiced.

In finally, the Constitutional Court held that section 116, section 215 and section 216 of the Penal Code were neither contrary to nor inconsistent with section 26, section 27, section 28, section 29, section 39, section 45, and section 63 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

<u>Example 4</u> : The Constitutional Court Ruling No. 28 – 29/2555 (2012)[22]

Whether or not section 112 of the Penal code was contrary to or inconsistent with section 3 paragraph two, section 29, and section 45 paragraph one and paragraph two of the Constitution of the Kingdom of Thailand B.E.2550 (2007)?

This case is concerning freedom of expression on section 45 of 2007 Constitution. In this case, Criminal Court referred the objections of

22 Office of the Constitutional Court, **The Constitutional Court Ruling B.E. 2555 (Volume 3: Thai Edition)**, (Bangkok: Cabinet Publishing and Gazette Office, 2012), pp. 812-819.

defendants in 2 applications to the Constitutional Court for a ruling under section 211 of 2007 Constitution. The defendants objected that section 112 of the Penal Code[23] was contrary to or inconsistent with section 3 paragraph two, section 29, and section 45 paragraph one and paragraph two of 2007 Constitution. Moreover, they claimed that section 45 of 2007 Constitution has intention to protect liberty to express and the restriction on this liberty could not be imposed without the law for specifically public interests, and liberty to express was not restricted by section 112 of the Penal Code due to was not a special law in accordance with section 45 paragraph two.

From the objection, the Constitutional Court found that even section 45 paragraph one and paragraph two of the 2007 Constitution recognized and protected freedom of expressions and person shall enjoy the liberty of expression in so far as it is not violation of rights and liberties of other persons; however, restriction shall not be imposed except by virtue of laws. Moreover, section 112 of the Penal Code has enforced generally against whoever defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, and whoever violated this section shall be punished with imprisonment of three to fifteen years. The intention on this section is to protect the royal family who seems the Head of State as national security and this section was enacted for preserving the security and safety of the State; hence, the penalty on section 112 of the Penal Code is more than whoever defames commons individuals. Finally, the Constitutional Court held that section 112 of the Penal Code was neither contrary to nor inconsistent with section 3 paragraph two, section 29, and section 45 paragraph one and paragraph two of 2007 Constitution.

<u>Example 5</u> : The Constitutional Court Ruling No. 30/2555 (2012)[24]

Whether or not section 26 (7) and section 29 of the Film and Video Act B.E. 2551 (2008) were contrary to or inconsistent with section

23 Section 112 of the Penal Code provided that;
"Whoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years."

24 Office of the Constitutional Court, **The Constitutional Court Ruling B.E. 2555 (Volume 3: Thai Edition)**, pp. 865 – 871.

3, section 29, and section 45 of the Constitution of the Kingdom of Thailand B.E.2550 (2007)?.

This case is concerning freedom of expression under section 45 of 2007 Constitution. In this case, the Central Administrative Court referred the objection of 2 plaintiffs to the Constitutional Court for a ruling under section 211 of 2007 Constitution. The plaintiffs objected that the provisions of section 26 (7) and section 29 of the Film and Video Act B.E. 2551 (2008) which empowered the officers to restricted the liberty of express opinion on film that prohibited to projection for maintaining public order and good moral. However, the restriction was neither necessary and appropriate in accordance with the principle of proportionality nor inconsistent with the rule of law under section 29 and section 3 paragraph two of 2007 Constitution. In addition, there are other suitable measures for this case would be enforced. Section 26 (7) and section 29 of Film and Video Act thus violated to the essential substances of rights and liberties of expression which recognized by section 45 of the 2007 Constitution.

The Constitutional Court found that section 45 of 2007 Constitution provided person shall enjoy the liberty of expression, speech, writing, publication, and expressions by other means, and the restriction shall not be impose except by virtue of laws specifically enacted for the purpose of maintaining the security and safety of the State, protecting rights, liberties, dignity, reputation, family or privacy rights of other person, preserving public order or good morals or preventing or halting the deterioration of the mind or health of the public. Even though, film producers can express or reflect their opinion on film which was the expression by other means, and protected by section 45 of 2007 constitution. The exercise of liberty of expression; however, should be realized the extent of freedom which recognized by constitution. Section 26 (7) and section 29 of Film and Video Act were thus legal measure which empower state officer to consider the proper context of film before publicly projected, so to prevent any opinion which causing affect to violate on other person, national security, and also good moral. In addition, these provisions can be enacted which either consistent with section

45 paragraph two of 2007 constitution or not contrary to section 45 paragraph one of 2007 constitution. Moreover the provisions of this Act also applied generally and were not directly enforced to any particular case or person, and the restriction was also imposed to the extent of necessity without prejudicing the essential substances of the rights and liberties recognized by the constitution.

Finally, the Constitutional Court held that section 26 (7) and section 29 of the Film and Video Act B.E. 2551 (2008) were neither contrary to nor inconsistent with section 3, section 29, and section 45 of the Constitution of the Kingdom of Thailand B.E.2550 (2007).

C) Conclusion

According to the Constitutional Court Rulings mentioned above, we have found that all the examples shown some similar important points being;

(1) All of these rulings were requested for the ruling that a provision of law applied by a Court of Justice, Administrative Court, or Military Court in any case is contrary to or inconsistent with the constitution under section 211 of the 2007 Constitution.[25] Especially by Court of Justice in Rulings No. 4-5/2552 (2009), 44-45/2554 (2011) and 28-29/2555 (2012), or also by Administrative Court in Rulings No.42-43/2554 (2011) and 30/2555 (2012);

(2) All of these rulings concerning the powers and duties of the Constitutional Court on constitutionality review of laws already in force so as to prevent any contrariness or inconsistencies with the Constitution. In other word, these were the consideration on the provision of law whether or not contrary to or inconsistent with the 2007 Constitution especially the provisions of section 45 concerning freedom of expression in Rulings No. 4-5/2552 (2009), 44-45/2554 (2011), 28-29/2555 (2012) and 30/2555 (2012), and section

25 Section 211 paragraph one of 2007 Constitution stated that;

"In the application of the provision of any law in any case, if the Court by itself is of the opinion that, or the party to the case raises an objection with reasons that, the provisions of such law fall within the provision of section 6 and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision. During such period, the Court may continue the trail, but the adjudication to the case shall be suspended until the Constitutional Court has made its decision."

64 concerning freedom of association in Ruling No. 42 – 43/2554 (2011);

(3) All of these rulings have the same result namely, the Constitutional Court held that the provision (s) of law in any cases was neither contrary to nor inconsistent with the provision (s) of the 2007 Constitution in particular section 45 and section 64 concerning freedom of expression and association.

Even though the Constitutional Court Rulings could not indicate explicitly to protect freedom of expression and association, but each ruling was the case arisen by a party in Court procedure under section 211 of the 2007 Constitution. The parties had rights to object with reasons that a provision of law to be applied in a case was contrary to or inconsistent with the Constitution when realized that their rights and liberties would be violated by the applied law. On the other hand, freedom of expression and association of Thai people has been indirectly protected by the Constitutional Court which consistent with section 27 of the 2007 Constitution that rights and liberties of Thai people definitely recognized and protected by the decision of the Constitutional Court.

The Constitution of the Kingdom of Thailand B.E. 2550 (2007); however, was terminated by Announcement of National Council for Peace and Order (NCPO) No. 11/2014[26] after NCPO has taken control the national administration from the civil government, and the 2014 Interim Constitution was promulgated afterward. Thus, current situation in Thailand will be considered in the next part.

26 NCPO Announcement No.11/2014 Subject: Termination of the Constitution of the Kingdom of Thailand provided that

"In order to govern the country with peace and order, Announcement of the National Peace and Order Maintaining Council No. 5/2557 dated 22 May B.E. 2557 subject "Suspension of the Constitution of the Kingdom of Thailand" shall be nullified and replaced with the following announcements:

1. Termination of the Constitution of the Kingdom of Thailand B.E. 2550 except for provisions under Chapter 2;

2. Caretaker cabinet shall be terminated;

3. The Senate, comprising of current members as of the date this announcement takes effect, shall continue to function as usual;

4. All Courts shall continue to function and adjudicate on cases as prescribed by the law and the Announcement of the National Peace and Order Maintaining Council;

5. Independent agencies and other organizations established by Constitution B.E. 2550 shall continue to function."

IV. Current Situation of expression and association in Thailand: under the military junta's government

The National Council for Peace and Order – NCPO has taken control the national administration of civil government – Miss Yingluck Shinnawatra as PM. - since 22 May 2014 onwards and the 2007 Constitution of the Kingdom of Thailand was terminated. Thai's political regime has been known worldwide as constitutional monarchy under military junta[27]. Moreover, NCPO has promulgated the new constitution namely, The Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)[28] which has been provided that all human dignity, rights, liberties and equality of the people were protected by the past 2007 Constitution shall be still protected by this 2014 Interim Constitution in section 4 which stated that;

"Subject to the provisions of this Constitution, all human dignity, rights, liberties and equality of the people protected by the constitutional convention under a democratic regime of government with the King as the Head of State, and by international obligations bound by Thailand, shall be protected and upheld by this Constitution."

Moreover, the Constitutional Court and the other Courts have still performed in accordance with NCPO Announcement No. 11/2014 which issued that "All Courts shall continue to function and adjudicate on cases as prescribed by the law and the Announcement of the National Peace and Order Maintaining Council". The Constitutional Court; in particular, has been prescribed powers and duties by section 5, section 23 and section 45 of the 2014 Interim Constitution. The power and duty under section 5[29] is to decide the

27 See also, https://en.wikipedia.org/wiki/Thailand

28 Published in the Government Gazette Vol. 131, Part 55a, date 22th July B.E. 2557 (2014)

29 Section 5 of the 2104 Interim Constitution stated that;

"Whenever no provision under this Constitution is applicable to any case, it shall be done or decided in accordance with the constitutional convention under a democratic regime of government with the King as the Head of State, but such constitutional convention shall not contrary to, or inconsistent with, this Constitution.

In the case where the question concerning the decision under paragraph one arises in the affairs of the National Legislative Assembly, it shall be decided by the National Legislative Assembly. If the question does not arise in the affairs of the National Legislative Assembly, the National Council for Peace and Order, the Council of Ministers, the Supreme Court or the Supreme Administrative Court may request the Constitutional Court to make decision thereon, but the request of the Supreme Court or the Supreme Administrative Court shall be approved by the plenary session of the Supreme Court or the Supreme Administrative Court and on the matter related to the trial and adjudication of cases."

performance of duties of State organizations in order to contrary to or inconsistent with the 2014 Interim Constitution and the convention of the constitutional monarchy. While section 23[30] is the function of the Constitutional Court to consider whether or not any treaty is accordance with conditions under paragraph two or paragraph three of section 23 which must be approved by the National Assembly. Section 45[31] of the 2014 Interim Constitution is the power and duty to decide whether any law is contrary to, or inconsistent with, the 2014 Interim Constitution which as similar principle as powers and duties to constitutionality review of laws already in force so as to prevent any contrariness or inconsistencies with the constitution under the provisions of the past 2007 Constitution. The Constitutional Court thus still has a significant role to protect rights and liberties of Thai people so far as the new drafted constitution will be promulgated.

According to the 2014 Interim Constitution, NCPO planned to restore national peace and order and the plan was divided into three phases. The first and most urgent phase was to deter the use

30 Section 23 of the 2014 Interim Constitution stated that;

"The King has the prerogative to conclude a peace treaty, armistice and other treaties with other States or international organizations.

A treaty which provides for a change of the territories of Thailand or the external territories that Thailand has sovereign rights or jurisdiction thereon under any treaty or an international law, or requires an enactment of an Act for its implementation or has wide scale effects on economic or social security of the country, shall be approved by the National Legislative Assembly. In this case, the National Legislative Assembly shall complete its deliberation within sixty days as from the date of receipt of such matter.

The treaty with wide scale effects on economic or social security of the country under paragraph two means a treaty related to free trade or customs cooperation area, to the use of natural resources, to waive the rights in any natural resources of the country, wholly or partly, or other matters as prescribed by law.

If there is in doubt whether any treaty is a treaty under paragraph two or paragraph three, the Council of Ministers may request the Constitutional Court to make a decision thereon. In this case, the Constitutional Court shall have a decision within thirty days as from the date of receipt of the request."

31 Section 45 of the 2104 Interim Constitution stated that;

"Subject to section 5 and section 44, the jurisdiction of the Constitutional Court is to decide whether any law is contrary to, or inconsistent with, this Constitution as well as the jurisdiction conferred thereto by the Organic Act on Ombudsmen and the Organic Act on Political Party. In case of the Ombudsmen, the matter to be submitted to the Constitutional Court is restricted to the matter that any law is contrary to, or inconsistent with, this Constitution.

The rules of procedure and judgment of the Constitutional Court shall be in accordance with the law on such matter. In the absence of that law, it shall be made in accordance with determinations of the Constitutional Court on rules of procedure and judgment which is in force prior to the date this Constitution comes into force if it is not contrary to, or inconsistent with, the provisions of paragraph one or this Constitution"

of illegal force and lethal weapons, to cease public mistrust and to alleviate economic, social, political and administrative problems accumulated for more than six months. The second phase was to bring into force the Interim Constitution in order to establish the National Legislative Assembly to exercise the legislative power and the Council of Ministers to exercise the executive power so as to restore national peace and order, public unification and justice, to solve economic, social, political and administrative problems and to enact urgent and necessity legislations. The National Reform Council and other necessary entities shall be established to drive political and other reformations systematically. The new Constitution laying down appropriate political system, measures for prevention and suppression of corruption and efficient, effective and fair measures for examination of the exercise of State powers shall also be drafted and completed within this phase. All these missions shall be handed on to the representatives and the Council of Ministers under the new Constitution in the last and final phase.[32]

To achieve the plan on each phrase, NCPO has necessarily proclaimed order or announcement which restricted some activities concerning exercise of rights and liberties especially expression and association to prevent harmful activities that might be against the performance of duties of the NCPO for instance;

(1) NCPO Announcement No.18/2014 provided that all mass media enterprises and providers are required to refrain from transmitting the information and news which might causes confusion or provokes further conflict or division within the Kingdom and assembles in order to oppose NCPO is prohibited;

(2) NCPO Announcement No. 97/2014 provided that every media outlet is prohibited from criticizing the coup-maker and presenting information which contravenes the junta's measure to maintain national security;

(3) NCPO Announcement No. 103/2014 issued to amend certain clauses of Announcement No. 97/2014, 'honest and constructive'

32 Prologue of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)

criticism of the junta is allowed, but any information discrediting the coup-maker is still prohibited and people who violate the Announcement will be investigated.

Even though, the exercise of rights to expression and association of Thai people have been restricted by NCPO announcement, but to encourage political and other reformations systematically and peaceful society would be return ASAP. NCPO's roadmap is drafting the new constitution which contains the appropriate political system and the protection on rights and liberties of Thai people would be included by the new constitution.

Fortunately the new drafted constitution has the similar principles as the past 2007 Constitution especially the recognition and protection of rights and liberties. The recognition of rights and liberties is provided on drafted section 4 which has the same principle as section 4 of the past 2007 Constitution stated that;

"Human dignity, rights, liberties, and equality of the people shall be protected"[33]

Moreover, the protection of rights and liberties has still similar principle as section 27 of the past 2007 Constitution, and provided on section 29 of the new drafted constitution stated that;

"Human dignity, rights and liberties recognized by constitution explicitly, by implication, or by decision of the Constitutional Court shall be protected and directly binding on National Assembly, Council of Ministers, the Courts, Constitutional organizations, and State agencies with respect to the enactment, application, and interpretation of all laws

The exercise of powers by all State authorities shall pay due regard to human dignity, right and liberties in accordance with the provisions of this Constitution"[34]

From this provision, the Constitutional Court has still a significant role to protect rights and liberties of Thai people due to the effect

33 The Secretariat of the House of Representatives, **Comparison between the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and B.E. 2550 (2007) and Drafted Constitution B.E. 2558 (2015)**, (Bangkok: Bureau of Publication, 2015), p. 1.

34 The provision of section 29 of the new drafted Constitution is consisted of provisions of section 26 and section 27 of the past 2007 Constitution. See also, Ibid, p.10.

of the decision of the Constitutional Court binding directly on all governmental authorities.

Freedom of expression and association; moreover, have also been recognized on the new drafted constitution, there are provided on drafted section 42 for freedom of individual expression, section 48 for freedom of the mass media expression and drafted section 54 for freedom of association which also have the same principle as section 45 and section 64 of the past 2007 Constitution. In each provisions are stated that;

Section 42 *"A person shall enjoy the liberty to express opinion, speech, writing, printing, publication, and expressions by any other means.*

The restriction on liberty under paragraph one shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public."

Section 48 *"Liberty of mass media to practice in accordance with professional ethics for the benefit of the public in knowing information and news correctly, thoroughly and holistically upon public accountability shall be protected.*

The closure of mass media business in deprivation of the liberty under this section is prohibited.

The prevention of mass media from printing news or expressing opinion, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section, shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, private data, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting the deterioration of mental or health of the public.

The censorship by a competent official of news or articles before their publication in mass media shall not be made except during the time when the country is in a state of war; provided that, it must be made by virtue of law enacted under the provisions of paragraph three.

The owner of mass media business shall be citizen. No citizen shall own or hold shares in many mass media business, directly or indirectly, in a manner that may control or monopolize the presentation of information, news or opinion to the public or obstruct an access to information or news of the public or hinder the public from obtaining information or news from various sources as prescribed by law.

No person holding political position shall be owner or shareholder in mass media business whether in his own name or through his nominee, and no such person shall act in any manner whatsoever so as to control such business as if he is the owner or shareholder thereof.

No grant of money, property or any other benefit shall be made by State as subsidies to private mass media. The advertisement in or buying of any other service from, private mass media by State shall be made by virtue of law specifically enacted for that purpose."

Section 54 *"A citizen shall enjoy the liberty to unite and form an association, union, federation, a co-operative, farmers' group, private organization, a non-governmental organization or any other group.*

A government official holding permanent position or receiving a salary and other officials of the State shall enjoy the same liberty to association so long as the efficiency of State administration and the continuation in providing public services are not affected as provided by law.

The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of law specifically enacted for preventing common interests of the public, maintaining public order or good morals or preventing economic monopoly."

Table 4: Comparative provisions of the previous 2007 Constitution and the new drafted Constitution concerning freedom of expression and association

Freedoms	The Provisions of Thai Constitution	
	2007 Constitution	**Drafted Constitution**
expression	**Section 45** A person shall enjoy the liberty to express opinions, speech, writing, printing, publication, and expressions by other means Restrictions on liberty under paragraph one shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security and safety of the State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public. The closure of a newspaper of other mass media in deprivation of the liberty under this section shall not be made. The prevention of a newspaper or other mass media from presenting news or expressing their opinions, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section shall not be made except by virtue of law enacted in accordance with the provisions of paragraph two. Censorship of news or articles by a competent official before publication in a newspaper or other mass media shall not be made except during the time when the country is in a state of war; provided that it must be made by virtue of law enacted under the provisions of paragraph two. The owner of a newspaper or other mass media shall be a Thai national. No grant of money or other properties shall be made by the State as subsidies to private newspaper or other mass media.	**Section 42** (Expression of Individual) A person shall enjoy the liberty to express opinion, speech, writing, printing, publication, and expressions by any other means. The restriction on liberty under paragraph one shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting the deterioration of the mind or health of the public. **Section 48** (Expression of Mass media) Liberty of mass media to practice in accordance with professional ethics for the benefit of the public in knowing information and news correctly, thoroughly and holistically upon public accountability shall be protected. The closure of mass media business in deprivation of the liberty under this section is prohibited. The prevention of mass media from printing news or expressing opinion, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section, shall not be imposed except by virtue of law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, private data, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting the deterioration of mental or health of the public. The censorship by a competent official of news or articles before their publication in mass media shall not be made except during the time when the country is in a state of war; provided that, it must be made by virtue of law enacted under the provisions of paragraph three.

Freedoms	The Provisions of Thai Constitution	
	2007 Constitution	Drafted Constitution
expression		The owner of mass media business shall be citizen. No citizen shall own or hold shares in many mass media business, directly or indirectly, in a manner that may control or monopolize the presentation of information, news or opinion to the public or obstruct an access to information or news of the public or hinder the public from obtaining information or news from various sources as prescribed by law. No person holding political position shall be owner or shareholder in mass media business whether in his own name or through his nominee, and no such person shall act in any manner whatsoever so as to control such business as if he is the owner or shareholder thereof. No grant of money, property or any other benefit shall be made by State as subsidies to private mass media. The advertisement in or buying of any other service from, private mass media by State shall be made by virtue of law specifically enacted for that purpose.
Association	**Section 64** A person shall enjoy the liberty to unite and form an association, union, federation, co-operative, farmer group, private organization, non-governmental organization or any other group. Government officials and State officials shall enjoy the same liberty to association as other persons generally provided that the efficiency of State administration and the continuation of public services are not affect, as provided by law. The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of law specifically enacted for protecting the common interests of the public, maintaining public order or good morals or preventing economic monopoly.	**Section 54** A citizen shall enjoy the liberty to unite and form an association, union, federation, a co-operative, farmer group, private organization, a non-governmental organization or any other group. A government official holding permanent position or receiving a salary and other officials of the State shall enjoy the same liberty to association so long as the efficiency of State administration and the continuation in providing public services are not affected as provided by law. The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of law specifically enacted for preventing common interests of the public, maintaining public order or good morals or preventing economic monopoly.

According to the provisions mentioned above, it could be considered that the principle of the recognition and protection on expression and association have been obviously assured by the new draft Constitution. In addition the essential substances of each provisions not only consistent with previous Thai Constitutions, but also in accordance with the principles of international laws such as UDHR, ICCPR and ECHR.

V. Conclusion: Will freedom of expression and association of Thai people be recognized and protected in the future?

Freedom of expression and association has been recognized globally as the fundamental human rights which is a basis of democratic society. The provisions of international laws for instance UDHR, ICCPR and ECHR have recognized freedom of expression and association, and many modern States have also recognized and protected these freedoms and provided in their Constitution that consistent with such international laws.

In Thailand, freedom of expression and association has been recognized by the first permanent Constitution – The Constitution of the Kingdom of Siam B.E. 2475 (1932) - even before UDHR was declared. Moreover, these freedoms have been recognized and protected continually by previous Constitutions, and the principles of recognition and protection of Thai people in any Constitution also consistent with the principles of international laws.

The Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2550 (2007) has performed the function of safeguarding the supremacy of the Constitution, and served as a body to realize the recognition and protection of the rights and liberties of Thai people in practice through the rulings of the Constitutional Court. Even though the Constitutional Court had decided the cases concerning freedom of expression and association, but these rulings could not indicate explicitly the role of the Constitutional Court to protect freedom of expression and association. Due to each ruling was the case which arisen by a party in Court procedure under section 211 of the 2007 Constitution. The party has rights to object with reasons that a provision of law to be applied in a case was

contrary to or inconsistent with the Constitution when realized that their rights and liberties would be violated by the applied law. Thus, freedom of expression and association of Thai people has been indirectly protected by the Constitutional Court which consistent with section 27 of the 2007 Constitution that rights and liberties of Thai people definitely recognized and protected by the decisions of the Constitutional Court.

However, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was terminated by the NCPO Announcement, and the national administration has been taken control by the military government, including promulgated the 2014 Interim Constitution which has been provided that all human dignity, rights, liberties and equality of Thai people was protected by the previous 2007 Constitution shall be still protected by this 2014 Interim Constitution. Moreover, the vital plan of NCPO is drafting the new Constitution which prescribed appropriate political system, measures for prevention and suppression of corruption and efficient, effective and fair measures for examination of the exercise of State powers, and also included the measures for protection of Thai people's rights and liberties. These principles of the new drafted Constitution are consistent with the principles of the past 2007 Constitution in particular the principle of protection of rights and liberties. However, the recognition and protection of freedom of expression and association are also definitely included, and the Constitutional Court has been still prescribed to protect rights and liberties of Thai people. Finally, rights and liberties of Thai people will be definitely recognized and protected as the fundamental human rights by the new drafted Constitution which consistent with the principles of modern democracy.

CLOSING SPEECH ON THE THIRD SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

We met all the delegations previously on the occasion of a dinner. On behalf of Asian Constitutional Courts and Equivalent Institutions, I can say that we have come to the end of the Summer School held for the 3rd time this year. We are very pleased that we continue to conduct the Sumer School under more well-established and better working conditions every time. We are thinking of continuing this School, in which not 23-24 but 13 countries have participated this year, with more countries and more participants in the coming years. Of course, we are so happy that you have attended such an organization here in Ankara, Turkey. In addition, I hope you have liked Turkey and Ankara. I see that you have a lot of knowledge on various sciences including the whole Constitutional Law in particular and Turkish Law in general. I believe that you will present your countries how the Turkish legal system operates. We want you to know that we regard you as representatives of Turkey from now on. So, we have finished the 3rd Summer School with these wishes. We thank you for the attention and effort you have shown. We always expect to see you in our country.

Burhan ÜSTÜN
Vice-President of the Constitutional
Court of the Republic of Turkey

3rd SUMMER SCHOOL OF THE AACC
30 AUGUST - 9 SEPTEMBER 2015
LIST OF PARTICIPANTS

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Mr. Serhat Köksal	Former Deputy Secretary General
Mr. Dr. Mücahit Aydın	Rapporteur Judge / Moderator
Mr. M. Serhat Mahmutoğlu	Rapporteur Judge

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Name-Surname	Institution
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1. Ms. Samara Samsalieva (Senior Cosultant) 2. Ms. Baktygul Arykova (Senior Cosultant)	Constitutional Chamber of the Supreme Court of the Kyrgyz Republic
1. Ms. Wang Sung (Research Judge) 2. Ms. Soojin Kong (Research Judge)	Constitutional Court of Korea
1. Ms. Dato' Anita binti Harun (Sessions Court Judge of Kuala Lumpur) 2. Mr. Tengku Shahrizam bin Tuan Lah (Deputy Registrar, High Court of Kuala Lumpur)	Federal Court of Malaysia
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