



Constitutional Justice in Asia

“Respect for Private and Family Life”

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4th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions
2 - 9 October 2016

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MESSAGE FROM THE PRESIDENT

The Constitutional Court of the Republic of Turkey holds the 4th Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of “Respect for Private and Family Life” in Ankara between 2 - 9 October 2016 within the scope of the AACC activities.

We are pleased to host the 4th 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 FOURTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE” ORGANIZED BY THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY¹

Grand Tribunal Hall, Ankara, 3 October, 2016

Distinguished Participants,

Welcome to Turkey and welcome to the Turkish Constitutional Court,

I would like to first of all express my pleasure and gratitude in your participation in the 4th Summer School that we are hosting as the Constitutional Court of the Republic of Turkey.

At the end of the 3rd Congress of the Association that was successfully organized in Bali, Indonesia between 9 and 12 August 2016, the Bali declaration was signed and it was decided that a permanent secretariat be established for the Association of Asian Constitutional Courts and Equivalent Institutions. It was further decided that the centre for training and human rights development, which is one of three branches of the Secretariat, be established in Turkey.

The Turkish Constitutional Court successfully organized three summer school events first of which was held in 2013. This year we are holding the forth summer school. This event has become traditional, with the appreciation of members of the Association. We have undertaken great efforts to deserve appreciation and confidence of the members of the Association, and we are once again pleased to represent and bring together representatives of our members in a program that would be efficient and productive for all the participants.

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



Valuable participants,

I would like to in particular thank our esteemed colleagues and academicians who will be contributing by sharing their experiences and knowledge on the right to respect for private and family life, which is the theme of the summer school program. I would like to also thank all valuable guests attending this event.

Certainly, every information and knowledge is also a power and light for the holder of information. However, as Cervantes said “experience is the universal mother of all knowledge”. So I believe that the knowledge that would be built through your interaction, the valuable participants, as you will consider and share the local practices and experiences. In this respect, we attach great importance to the work undertaken by the experienced participants who are gathered here under the sentiment of cooperation to ensure that peace, justice and rule of law become dominant in the continent of Asia.

Esteemed colleagues,

We live in an era where it is very easy to get information about any topic, any person or any incident thanks to modernization and technological advancements. However, it is also true that scientific and technological advancements with countless benefits also lead to easier interference with the individuals’ private lives.

As a result of these advancements, the right to ask for protection of their private lives was granted to individuals that can become vulnerable from time to time, and the scope and assurances of this right have been extended within time. Indeed, various aspects ranging from physical and moral integrity to physical and social identity, from communication to occupation, from name to sexual orientation, from personal information and data to family life, all of these subjects fall under the scope of private life. Therefore, the right to respect for private life, as accepted to be a universal right, is ensured and safeguarded by the highest norms.

In cases where information is collected about the private lives and privacy of the individuals in a way that is not informed and in



an untrue manner and in cases where the individuals do not have the opportunity to correct such information, then this situation leads to certain unwanted consequences where the weak is oppressed by the strong or the strong tries to keep the weak under control. So this right, which is a broad concept with no complete definition yet, will actually contribute to many other issues and to the ideal of social peace and reconciliation as well as a protection mechanism of the privacy areas of individuals. This is particularly so considering the flexibility and characteristics of this right that can also extend to the public domain in certain circumstances.

Valuable guests,

The primary and common duties of the constitutional courts of the world are to promote and develop the fundamental human rights and freedoms, which are our universal values, without making any distinction on the basis of race, color, language, religion or belief.

Those who pursue this principle and those who present the richness of experience at the local level to the use of humanity will leave a rich and unique heritage to the next generations who will have a hopeful and happy outlook to the future. That is why the judicial institutions around the world are joining their forces and acting in an understanding of solidarity in order to achieve this goal.

In this context, I believe that it is very meaningful to discuss the right to private and family life determined as the theme of our summer school this year. Because I believe that every information that will be shared on this topic with its evolving content and differences in terms of its practices in every country will be authentic, and that it would also shed light on practices around the world starting with, first of all, the countries that are members of our association. Especially, I believe that the countries that have introduced the human rights mechanisms into their domestic law such as the individual application remedy will advance experiences.

It is my experience and wish that this event will be concrete expression of very significant effort for establishing more just and peaceful world through exchanges of knowledge and experiences among the participants.



As is the case in our previous events, also at the end of this event, the presentations and contributions provided by our guests will be collected in a book which would be distributed to all the members of the association to be benefitted by them.

Thus, the works which is actually a product of the work of all valuable participants will be published and will also be provided to our colleagues who do not have the chance to personally participate in this event. And these outputs which are an integral part of our summer school event, which has now become traditional in our association, will also be a valuable source in the common interest areas of our institutions.

Taking this occasion, I would like to once again welcome our guests from various countries and to express my gratitude towards those who will contribute the academic program through their presentations and efforts.

I wish that the program to be held will be fruitful for both the participants and our colleagues in the institutions that are members of our association.

I thank you all for listening and convey my respects and best regards.

Burhan ÜSTÜN

Vice President of the Constitutional
Court of the Republic of Turkey



OPENING SPEECH ON THE FOURTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Wyndham Ankara Hotel

Ankara, 3 October 2016

Esteemed Ladies and Gentlemen,

As the Secretary General of the Constitutional Court of Turkey and the President of the Executive Committee of the 4th Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions, I would like to welcome you all on behalf of my Country and the Court, and I greet you with respect.

The Association of Asian Constitutional Courts and Equivalent Institutions Summer School Programmes which are coordinated by our country and the fourth of which is organized this year will be held in the Centre for Training and Human Resources Development established within our Court as of this year, in accordance with the decision taken in the last Board of Members Meeting of our Association which was held in Bali, Indonesia in August.

You have come from afar to attend the 4th Summer School Programme that will be organized for the first time after the decision on establishing a training centre. At the expense of being away from your families and homes for a week during the summer school, you accepted our invitation and contributed to the synergy that our Association is trying to create, and I would like to especially thank you for honouring the programme in this period after the recent villainous coup attempt in our country and this is very important for us, so I would like to express my gratitude to you all.

As you know, the Association of Asian Constitutional Courts and Equivalent Institutions held its first congress in 2011, and although it is a new composition when compared to the other institutions operating in the same field, it has made a great progress in terms of institutionalization in a short period of time.



The Summer School Programmes that we have organized in the past years with your participation and positive feedback and the fourth of which we are organizing this year contribute to the institutionalization endeavours of our Association and create a sharing platform for the members of the Association.

With the contribution of such activities, the works on the idea of setting up a Permanent Secretariat that was discussed last year have been finalized and an important step was taken in institutionalization through the decision on establishing a Joint Permanent Secretariat taken in August during the Board of Members meeting.

The theme of the 4th Summer School is identified as the right to respect for private and family life.

We live in an era when due to modernization and technological developments, access to information and data on any subject, person or incident becomes easy, far becomes near and the world becomes a global village thanks to the internet. It is a reality that the scientific and technological developments with countless benefits also lead to easier interference with the individuals' private lives. As a result of these developments, the right to ask for protection of their private lives was given to individuals that can become vulnerable from time to time and the scope and assurances of this right has been extended within time. Indeed, various aspects ranging from physical and moral integrity to physical and social identity, from communication to occupation, from name to sexual orientation, from personal information and data to family life, all of these subjects fall under the scope of private life. Therefore, the right to respect for private life must be and is accepted and protected as a universal fundamental right.

I believe that the experience and approach of each country will contribute to the programme and the programme will be attentively followed by all participants and the presentations and discussions will be extremely beneficial for the attendees, although the right to respect for private and family life is a comprehensive issue that cannot be entirely examined in a week.



Furthermore, our programme is not only limited to academic meetings but also include some social activities for you our esteemed guests to have a better time. We are planning to have our bowling tournament that we organize traditionally each year. I also do not doubt that you will enjoy our social event that will be organized on 7-9 October in Istanbul, one of the most beautiful cities in the world. You can find details on the other activities in the programme you have been distributed.

I would like to especially underline that you should not hesitate to contact me or my other colleagues in the Executive Committee if you need help on any issue during or after the Summer School.

This year at the end of the 3rd Congress of our Association successfully held on 9-12 August 2016 in Bali Island of Indonesia with the theme “Promotion and Protection of Citizens’ Constitutional Rights”, the Bali Declaration was signed, and it was decided that a Permanent General Secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions would be established and as a Centre for Training and Human Resources Development, as one of the three branches of the Secretariat, be reformed and become operational in Turkey.

I hope that the decision on establishing the Permanent Secretariat would be fruitful for our Association. I also wish success for Indonesia and Korea, the two countries that will carry out the functions of the Permanent Secretariat apart from the training centre.

Before ending my speech, I would like to welcome you all once again and to thank our President Prof. Dr. Zühtü Arslan who has provided full support for the organization of the 4th Summer School and thank you, our distinguished guests, for your participation and contributions and all my colleagues who have shown great effort for the organization and I extend my regards to you all with the hope that the 4th Summer School Programme will be beneficial for you all.

Selim ERDEM
Secretary General of the Constitutional
Court of the Republic of Turkey

*THE RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE UNDER ARTICLE 8*

Şermin BİRTANE
TURKEY



THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER ARTICLE 8

*Şermin BİRTANE**

Distinguished participants,

Ladies and gentlemen,

1) I would like to thank Mr. Mücahit Aydın for his kind remarks and also I am very grateful for the opportunity to address such eminent participants. When I think of your deep experience and your respectable position of authority my hands are trembling. This is a huge honour for me to speak in front of such outstanding attendants.

2) My name is Şermin Birtane and I am a judge rapporteur at the Constitutional Court and I am responsible for preparing the case reports and writing draft judgements related to the right to private and family life.

3) My presentation is about the Right to respect for private and family life under the Article 8 of the European Convention on Human Rights.

4) According to the programme I was given 40 minutes to talk and after that 10 minutes are allocated for questions.

5) If there are any questions you'd like to ask, please leave them until the end, when I'll do my best to answer them.

6) Now, if you allow me, for the sake of obeying time limitation for my speech, I will shortened the term of "the right to respect for private and family life" into "right to private life".

* Rapporteur Judge of the Constitutional Court of the Republic of Turkey.



7) My speech consists of two main parts. In the first part, I will try to explain general aspects of the right to respect for private and family life.

8) The second part of my speech is devoted to case-based analysis of the Turkish Constitutional Court's approach to the right to respect for private and family life.

A. GENERAL REMARKS ON THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Scope

1) This right is very broad in scope and covers many different situations. Also it extends to many areas of life and has an impact on different legal fields reaching from family law to criminal law.

2) Article 8 relates to the following main interests:

- **Privacy**

- **Family life**

- **Physical, psychological and moral well-being** – this covers the right to wellbeing through retaining autonomy, choice and dignity. It requires that there is access to information and participation in decisions that affect an individual's life

- **Home** – this is not about a right to ownership of a house but rather a right to respect for the home life of an individual

- **Correspondence** – this covers all forms of communication with others such as phone calls, letters, emails etc.

3) Now, let's start by briefly looking at these main interests.

a. Private life

This is defined broadly and relates to all aspects of privacy both in and outside of an individual's private home.



The concept of a right to a private life encompasses the importance of personal dignity and autonomy and the interaction a person has with others, both in private or in public.

Respect for one's private life includes:

- respect for individual sexuality (so, for example, investigations into the sexuality of members of the armed forces engages the right to respect for a private life);
- the right to personal autonomy and physical and psychological integrity, i.e. the right not to be physically interfered with;
- respect for private and confidential information, particularly the storing and sharing of such information;
- the right not to be subject to unlawful state surveillance;
- respect for privacy when one has a reasonable expectation of privacy; and
- the right to control the dissemination of information about one's private life, including photographs taken covertly.

b. Family Life

Article 8 also provides the right to respect for one's established family life. This covers all close and personal ties of a family kind - not only those of a blood or formalised nature.

This includes close family ties, although there is no pre-determined model of a family or family life. It includes any stable relationship, be it married, engaged, or de facto; between parents and children; siblings; grandparents and grandchildren etc. This right is often engaged, for example, when measures are taken by the State to separate family members (by removing children into care, or deporting one member of a family group).

c. Respect for the home

Home is the physically defined place where private life and family life develops. It does not matter whether this space is the



property of the affected person or even legally inhabited. The notion also may also encompass business premises, temporarily inhabited spaces or caravans.

Right to respect for the home includes a right not to have one's home life interfered with, including by unlawful surveillance, unlawful entry, arbitrary evictions etc.

d. Respect for correspondence

Everyone has the right to uninterrupted and uncensored communication with others – a right particularly of relevance in relation to phone-tapping; email surveillance; and the reading of letters.

2. Negative and Positive Obligations of the State

The obligation on the State under Article 8 is to refrain from interfering with the right itself and also to take some positive measures, for example, to criminalise extreme breaches of the right to a private life by private individuals.

3. Limitations

Article 8 is a qualified right and as such the right to a private and family life and respect for the home and correspondence may be limited. So while the right to privacy is engaged in a wide number of situations, the right may be lawfully limited. Any limitation must have regard to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

In particular any limitation must be:

in accordance with law;

justified by one or more of the following legitimate aims:

the interests of national security;

the interests of public safety or the economic well-being of the country;



the prevention of disorder or crime;
the protection of health or morals; or
the protection of the rights and freedoms of others.

Also a limitation must be necessary in a democratic society and proportionate.

B. CASE-LAW ANALYSIS OF THE TURKISH CONSTITUTIONAL COURT'S (TCC) APPROACH TO THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Scope

While all of those legal interests guaranteed under the right to private life is written in one Article of the Convention which is the Article 8, they are regulated in different articles of the Constitution of Turkey. In this regard;

Right to protection of physical and psychological integrity is regulated in the first paragraph of Article 17 of the Constitution.

Right to private and family life is regulated in Article 20 of the Constitution,

Right to Respect for Home is secured in the Article 21.

And the right to respect for privacy of communication is regulated in Article 22.

In addition other relevant provisions of the Constitution are referred especially when the State's positive obligation is in question. For example Article 5 which states "Fundamental aims and duties of the State" and also Article 56 which regulates "Health services and protection of the environment".

Constitutional Court's Principles of Examination on the Right to Private Life

Right to private life is understood and applied in a very similar way to the European Court of Human Rights.



This right covers same interest in parallel with the Article 8 of the Convention. Also the interpretation of this right by the Constitutional Court is hand in hand with the European Court of Human Rights.

As I mentioned before the right to private life is a qualified right which means it might be restricted by the State.

The Turkish Constitution stipulates that the right to private life may be restricted for certain reasons stated in the relevant provisions of the Constitution. In evaluating the restrictions on the right to private life, the TCC considers two elements.

First of all, the Court decides whether a certain measure or action falls within the scope of the right to private life.

And secondly, does it interfere with one of the interests protected by the relevant provisions of the Constitution.

If there has been an intervention to the right to private life, then the Court applies a three-level test.

Firstly, the Court examines whether the intervention is prescribed by law, which is by an act of parliament.

Secondly, the Court examines the existence of a legitimate aim for restricting the right.

Thirdly, the Court applies the democratic necessity test by referring to the jurisprudence of the European Court of Human Rights. And the Court decides whether the intervention is necessary in a democratic society and proportionate to the legitimate aim pursued.

Statistics:

According to the Annual Report of the Constitutional Court in 2015, from 2013 to 2015, Constitutional Court has examined 103 application related the right to private life on the merits.

And, from 2013 to 2015, the number of decision on violation of the private life is 27.



The number of application on freedom of communication is 14; the number of application on material and spiritual entity is 5;

The number of application on private/family life is 8.

It is difficult to select significant judgments from the Constitutional Court's case-law to cover the rich variety of cases on right to private life. However I chose the judgements according to the main interests of the right to private life such as privacy, Physical, psychological and moral well-being home and correspondence.

You can reach all of these judgements on our Court's official website and database.

Here is a link of Constitutional Court's database:

<http://www.constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication.html>

CASES SELECTED IN THIS PAPER

JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO PROTECT AND DEVELOP THE MATERIAL AND SPIRITUAL ENTITY AND THE INVIOABILITY OF PHYSICAL INTEGRITY

1. Judgment of *Ahmet Acartürk*, Application No: 2013/2084, 15/10/2015

The Facts

The applicant underwent an operation for the extraction of his sperms within the scope of the in-vitro fertilization treatment. Thereupon, he brought an action for compensation for pecuniary and non-pecuniary damage by maintaining that he suffered from certain diseases subsequent to this operation due to the fault of his physician and that he had not been informed of the risks inherent in this operation.

The case was dismissed by the decision of the Civil Court of General Jurisdiction on the ground that according to the expert



report, the operation had been performed in accordance with the medical requirements.

The applicant lodged an individual application to the Constitutional Court alleging a violation of his right to protect the material and spiritual entity.

The Court's Decision

In the present case, the Court has observed that the applicant and his wife signed a document indicating that they permitted for the in-vitro fertilization (IVF-ET) and embryo transfer; that this document includes the medical effects and results of the IVF-ET procedure. The Court has underlined that although the processes which the applicant's wife would undergo and the risks likely to occur thereof are stated therein, there is no information or explanation concerning the operation applied to the applicant.

The Court is of the opinion that it is beyond doubt that the liability to prove that the patients have been informed of each procedure and treatment to be applied and have given informed consent thereto is incumbent on the physician or the hospital. It has been revealed that any document indicating the applicant's informed consent was taken after being informed of medical results, risks and potential complications of the operation which the applicant underwent was not submitted in the course of the proceedings.

Besides, any assessment concerning the applicant's allegation that he had not been informed of the said operation is included neither in the first instance decision nor the judgment of the supreme courts. Therefore, the Court has reached the opinion that the applicant did not give consent to the said operation freely and in an informed manner.

The Constitutional Court has consequently held that there has been a breach of the right to protect and develop the individual's material and spiritual entity.



2. Judgment of *Halime Sare Aysal*, Application No: 2013/1789, 11/11/2015

The Facts

The applicants did not allow their child to be vaccinated during her babyhood. Hence Provincial Directorate of the Ministry of Family and Social Policies applied to a court requesting a court order for mandatory vaccination. And the request was accepted by the Civil Court of General Jurisdiction.

However Before the public authorities take further steps, the applicants lodged an individual application to the Constitutional Court alleging that the first instance court's decision for applying a health measure in respect of this child infringed the child's physical and psychological integrity.

The Court's Decision

The provision which is set out in Article 13 of the Constitution and provides that the fundamental rights and freedoms may be restricted only by law occupies an important position in the constitutional jurisdiction. In case of any interference with any right or freedom, the matter which must be primarily ascertained is whether or not there is any provision permitting the interference in question; that is to say, whether the interference has any legal foundation or not.

And this is where jurisprudence of the Constitutional Court is separated from European Court of Human Rights. European Court of Human Rights accepts "the lawfulness criterion" refers to any legal basis for the interference and ECHR observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law¹. However according to the Constitutional Court "the law" must be a written and in the formal sense law, which is an act of parliament. Hence The Court is of the opinion that regulations, directives or instructions are not recognized as "law" in the context of limitation of a freedom or a right.

¹ Case of *The Sunday Times v. The United Kingdom* (no. 1), B. No: 6538/74, 26/04/1979, p.46-50.



However other than this difference the interpretation of “lawfulness criterion” is similar to ECHR. In this context, the content, aim and scope of a legal arrangement must be definite and explicit in a manner which would enable the addressees to foresee their legal status. Although it is possible to leave certain level of discretionary power to the legal practitioners by the provision interfering in any right or freedom, certainty must be ensured in the wording and interpretation of the law which forms a basis for the interference with a view to effectively protecting the right.

Accordingly, in the present case, there was a Regulation about mandatory vaccination but the Constitutional Court has noted that because there is not a statute of the Parliament providing any explanation as to type and scope of the medical intervention to be applied, the legal arrangements of the interference in the present case are not foreseeable.

The Constitutional Court has consequently noted that there is no foreseeable legal arrangement concerning the compulsory vaccination procedure within the above-cited scope and purposes and accordingly held that there has been a breach of Article 17 of the Constitution.

JUDGMENTS RENDERED IN RESPECT OF THE CONFIDENTIALITY OF THE PRIVATE LIFE

1. Judgment of *Serap Tortuk*, Application No: 2013/9660, 21/1/2015

The Facts

A disciplinary investigation was initiated against the applicant who was serving as a civilian nurse in the military hospital upon the unconfirmed information that sexually explicit images alleged to belong to the applicant were posted, on her behalf, via an account opened on a social networking site. At the end of the disciplinary investigation conducted, she was removed from her public office.

The case filed by the applicant before the Supreme Military Administrative Court with the request of the suspension and



annulment of the execution of the disciplinary punishment was dismissed.

The applicant has maintained that these images were posted via a social networking account opened on her behalf; that she does not know who created this account; that these images did not belong to her; and that posting of these images via an account opened on her behalf was contrary to the ordinary flow of life. The applicant has also alleged that even if it is accepted that these images belonged to her, the discretionary power executed in the form of imposing a punishment on the applicant was not proper as these images are completely related to her private life.

The Court's Decision

In the Constitutional Court's opinion, the notion of private life is a broad term which does not have an absolute definition. In this context, the legal value which is under protection is principally personal independence. This protection, on one hand, indicates that everyone has the right to live free of all undesired interferences in an environment specific to himself whereas, on the other hand, sets forth that the notion of private life may not be construed in a way that everyone maintains his personal life in the way he desires and isolates the external world from his own circle. In this respect, Article 20 of the Constitution guarantees maintenance of a private social life. Private life indicates a notional and physical field in which individuals may improve themselves and establish private relations with others.

This privacy sphere consists of a private field in which the state may interfere, to the minimum extent, only for legitimate purposes. The space of the individual's right of privacy is, in principle, private sphere. However, the right to respect for private life may, in certain circumstances, extend to the public sphere.

In the present case, the Court has observed that the applicant was not removed from public office as a result of a disciplinary investigation conducted for professional grounds; and that, as inferred from the disciplinary investigation process, the decision for removal of public office and the decisions given by the instance



courts, especially the applicant's acts alleged to fall into scope of the private life are the determinant in the process which is subject-matter of this individual application.

Accordingly, the Court has held that the applicant's removal of public office on account of the matters concerning her private life constituted an interference in the right to privacy of private life.

The allegations brought forward against the applicant was not pertaining to her profession; but mainly concerning her private life acts taking place in the privacy sphere. Therefore, the scope of the investigation which is in dispute went beyond the boundaries of professional life.

Stating that the balance applied to the restriction of all fundamental rights and freedoms in the Constitution by virtue of Article 13 of the Constitution must also be taken into account for restrictions to be imposed on the privacy of private life, the Court has indicated that the right to privacy of private life may be restricted; however, there must not be any disproportionality between the legitimate aim pursued in the restriction and the means of restriction. It has been further underlined that a fair balance must be struck between the general interest likely to be obtained through restriction and the loss sustained by the individual whose fundamental right and freedom has been restricted.

The Court has observed that the penalty imposed on the applicant at the end of the disciplinary procedure for her removal of public office has become more significant as this penalty has influenced her economic future, to the same extent with her professional life, for being deprived of her main source of income. The Court has accordingly reached the conclusion that, within the scope of the disciplinary penalty imposed on the applicant, a fair balance was not struck between the general interest likely to be obtained through the restriction and the loss sustained by the individual whose fundamental right and freedom was restricted. The Court has therefore concluded that there has been a breach of the applicant's right to privacy of private life guaranteed under Article 20 of the Constitution.



2. Judgment of *Ata Türkeri*, Application No: 2013/6057, 16/12/2015

The Facts

The applicant was a staff member of the Turkish Air Force and an investigation was initiated against him after an anonymous notice had been received concerning the allegations as to his private life. Within the scope of this investigation, the statements of the applicant and other two personnel were taken. Certain information concerning the sexual life of the applicant was obtained upon this statement.

The applicant was heard without being informed that an administrative investigation had been initiated and also without being informed of the scope of his questioning. However, it has been revealed that the applicant replied to the questions addressed to him and signed his statement in which he explained his sexual life from his pupillage.

A penalty of being subject to obligatory retirement on account of moral conditions was imposed on the applicant. The case filed by him for the annulment of this penalty was rejected by the Supreme Military Administrative Court.

The applicant has maintained that his statement was taken under the name of an interview during which he was given the impression that he was heard as a witness, he was assured that he would not be subject to any disciplinary penalty and during which he was subject to moral coercion. He has also alleged that he was made to sign his statement without being allowed to read it; and that he was subject to obligatory retirement on the basis of information pertaining to his private life. He has therefore alleged that his constitutional rights have been breached.

The Court's Decision

The Court has pointed out the principles about privacy and respect for individual sexuality as I mentioned just now.

Also the Court has considered that there must be especially serious grounds for justification of the interference in private life.



According to the judgement, Taking the applicant's statement, which formed a basis for the disciplinary action against him, without mentioning of any definite and concrete acts and without providing any information as to for which legal action his statement would form is serious fault of the public authorities.

Consequently, the Court has held that there has been a breach of the right to privacy of private life which is guaranteed under Article 20 of the Constitution.

JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO RESPECT FOR FAMILY LIFE

1. Judgment of *Hayriye Özdemir*, Application No: 2013/3434, 25/6/2015

The Facts

The applicant filed a case for the replacement of the surname of her child, whose custody was awarded to her upon the divorce case, with her own surname instead of her ex-husband's surname.

Although first instance court found the applicant's request for the replacement of her children's surname with her own surname was justified., the case was dismissed upon the quashing judgment of the Court of Cassation in which it was stated that, under Article 321 of Turkish Civil Code no. 4721, *"a child born as a result of the marriage shall bear the father's surname (family surname); that even if the child's custody is awarded to the mother upon divorce or the death of the father, it may not cause any change in the surname; and that the child's surname cannot be changed"*.

The Court's Decision

The Constitutional Court has noted that the applicant's request for the replacement of the surname of the child, whose custody was awarded to her, with her own surname is a legal issue related to the right of custody and the exercise of authority in this context and therefore must be considered under Article 20 of the Constitution.

The judgment of the Constitutional Court states that issues concerning the gender equality and gender-based discrimination,

including the right of custody and the exercise of powers related thereto, are dealt with in various international legal documents concerning human rights; that the relevant provision of the Surname Law no. 2525, which set out that the child shall adopt the surname chosen/to be chosen by the father even if the child's custody was awarded to the mother in cases of the termination of marriage or divorce, was annulled by the Constitutional Court on 8/12/2011 finding it contrary to Articles 10 and 41 of the Constitution; and that besides, the Turkish legal system allows for making a change in the name or surname on the basis of certain grounds, and in this context, Article 27 of Law no. 4721 provides that the name may be requested to be changed by relying on justified reasons.

The Constitutional Court has concluded that the dismissal of applicant's case for changing the surname of the child whose custody was awarded to her has constituted an interference in the applicant's right to respect for family life.

The Court has noted that the criterion "fundamental rights and freedoms may be restricted only by law" has an important role in the constitutional jurisdiction and, in case of an interference in any right, it must be primarily ascertained whether there has been a provision which authorizes such interference. The Court has also indicated that laws restricting fundamental rights and freedoms require a substantive content as well. Emphasizing that the relevant legal arrangement must be certain in terms of its content, aims and scope and clear enough so that those concerned can comprehend their legal status, the Court has recalled that relevant provision may grant discretionary power, to a certain extent, to the legal practitioners. However, in order to provide an efficient protection of the fundamental rights, a minimum level of certainty must be ensured with regards to the wording and interpretation of the provision constituting a basis of the interference.

In the Court's opinion, it is possible to use concepts which may be defined through interpretation methods. However, if a uniform implementation is not ensured for the relevant provision, this may be considered as an indication of uncertainty.



The Constitutional Court emphasizes in its judgment that its duty is limited to reviewing the constitutionality of such interpretation and implementation; that the provision which was shown as the legal basis of the interference in the present case. [and which states that *“The child bears the surname of family if the mother and father are married (...). However, if the mother bears two surnames due to her previous marriage, then the child bears her maiden surname”*] has become subject-matter of cases similar to the present case by the parents, who have been awarded the custody of the children upon divorce. The Court also notes in its judgment that the legality of such interference has been widely discussed and different legal interpretations have arisen in those proceedings.

Consequently, considering that there is no clear legal arrangement on the issue of changing surname of the child whose custody has been awarded to the mother upon divorce; and that there are different judicial decisions on this matter, the Court has stated that [Article 321 of the Law no. 4721 shown as] the legal basis for the interference in the present case has not met the criterion of certainty in the context of the interference resulting from the dismissal of the applicant’s request for the replacement of the surname of the child under her custody; and therefore, the interference failed to pass legality test. The Court has accordingly held that there has been a breach of the applicant’s right to respect for family life guaranteed under Article 20 of the Constitution.

2. Judgment of *Gülbu Özgüler*, Application No: 2013/7979, 11/11/2015

The Facts

The applicant wished to change the surname of her child whose custody was granted to her. The decision on dismissal of the case opened by her to that end became final upon the appellate review.

The applicant has maintained that she herself met all special care and education costs of her sick child; and that her child whom the father did not take care of after divorce was unhappy for bearing different surname with the mother. The applicant has accordingly

referred to the Constitutional Court's judgment dated 8/12/2011 and no. E.2010/119, K.2011/165 which has removed all obstacles before the mother to change the surname of her child under her custody. She has therefore alleged that her child's surname must be replaced with her own surname; and that the instance court decisions breached the right to respect for family life and the right to a reasoned decision.

The Court's Decision

The Court has noted that the applicant's relationship with her child must be handled within the scope of the family life. The Court has related the applicant's request for replacing her child's surname with her own surname to the right of custody and the use of powers in respect thereof and underlined that this matter must be assessed within the scope of the positive obligations pertaining to the right to respect for family life.

On the other hand, the Court has stated that discrimination based on gender constitutes an explicit contradiction to the principle of equality.

The Court has stated that the provision which provides that the husband is the head of the conjugal union was abolished by the Law no. 4721; and that the spouses have equal rights and obligations within the conjugal union. In this context, the Court has recalled the judgment on annulment of the first sentence of Article 4 § 2 of the Law no. 2525 in which it is underlined that the spouses are in the same legal position in respect of the rights and obligations they have in the conjugal union; and that as the right vested in the father to determine the surname of the child under his custody is not vested in the mother, this practice constitutes a discrimination based on gender with regard to the enjoyment of the right of custody.

The Court has primarily pointed out that the grounds requiring discrimination between woman and man with regard to the change of the child's surname after divorce were not indicated in the judicial decisions which are subject-matter of the present application and accordingly noted that the practice, in which it is not by any means



possible to change the child's surname until the child attains maturity or the father changes his surname even if the woman-spouse has reasonable grounds in this regard, cannot be accepted to be proportionate. The Constitutional Court has therefore held that there has been a breach of the prohibition of discrimination set out in Article 10 of the Constitution read in conjunction of Article 20 therein.

3. Judgment of *Marcus Frank Cerny*, Application No: 2013/5126, 2/7/2015

The Facts

The applicant who is an American citizen applied to the US Department of State, with the allegation that his child in common had been taken by his mother, who is a Turkish citizen, from the USA, the habitual residence of the child, and the child was not allowed to return to the USA, for initiation of the procedures to enable his child's return within the scope of the Hague Convention.

The action for return of the child was brought after the applicant's request seeking the return of his child had been transmitted to the Ministry of Justice, the Directorate General for the International Law and Foreign Affairs.

The first instance court dismissed the applicant's request for the return of his child by stating that the conditions requiring prompt return of the child in question, which is set out in Article 12 of the Hague Convention, were not fulfilled and by taking into account the child's age and dependence on the mother. The first instance decision became final after being upheld through the available legal remedies.

The Court's Decision

Indicating that the primary element of the family life is the ability of developing the family relationships in a normal way and in this context, the family members' right to live together, the Court has observed that the family relationship between the parents and the child would continue even if the parents decide to terminate

their marriage. The obligation incumbent on the state within the scope of the right to respect for family life is not only limited to abstaining from arbitrary interference in the designated right; but also includes the positive obligations to ensure effective respect for the family life.

The Constitutional Court has stated that the Hague Convention, a part of the Turkish law, includes guiding provisions for determination and implementation of positive obligations under the right to respect for family life; and that therefore, the provisions of this Convention must be taken into consideration in determination of positive obligations incumbent on the state within the scope of the right to respect for family life guaranteed under Articles 20 and 41 of the Constitution.

The Court has accordingly noted that the restriction imposed with regard to the applicant's right to establish relationship with his child by means of dismissing the request for the return of the child amounted to an interference in the right to respect for family life; that the interference was understood to be relied on the Hague Convention and the Law no. 5717 entered into force in this respect, and therefore had a sufficient legal ground; and the instance courts pursued a legitimate aim, such as maintaining the child's health and security, in their decisions on dismissal of the return of the child.

Underlining that, in spite of the above-cited legitimate grounds, there must be proportionality between an interference in the individual's fundamental rights and the legitimate aim pursued within the scope of this interference, the Constitutional Court has indicated that in the present case, it is of importance to ascertain whether the state struck a fair balance among the competing interests of the child, the mother, the father and the public order within the scope of the discretionary power granted to it.

Consequently, the Court has observed that, in the decisions of the instance courts, any assessment was not made and explanation was not provided as to whether staying of the child in Turkey was lawful or not according to the provisions of the Hague Convention, on the determination of the habitual residence to be taken as a



basis for the decision on the return of the child, on the provisions of the Hague Convention concerning the exceptions to the return of the child and as to whether these exceptional provisions may be applied to the applicant's case or not.

Taking into account these factors, the Constitutional Court has found out that the grounds specified in these decisions were not relevant and sufficient within the scope of the right to respect for family life and accordingly held that there has been a breach of the right to respect for family life guaranteed under Article 20 of the Constitution.

JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO REQUEST THE PROTECTION OF HONOUR AND DIGNITY

Balancing rights

The right to respect for a private life often needs to be balanced against the right to freedom of expression. For example a public figure does not necessarily enjoy the same respect for their private life as others, as matters of public concern might justify the publication of information about that person that might otherwise interfere with the right to privacy.

It is generally accepted that speech acts such as insult, libel, defamation and hate speech are not protected by the free speech provisions of constitutions. There is, however, no global consensus as to the legal sanctions to be imposed on these speech acts. The Turkish Penal Code, for instance, provides imprisonment for insult and defamation, even though in most cases the terms of imprisonment are either postponed or converted to a "judicial fine".

In some admissibility decisions, the TCC has referred to the Parliamentary Assembly's resolutions towards decriminalization of defamation, and ruled inadmissibility by pointing out the non-exhaustion of legal remedies. Accordingly, in cases of insult and defamation, civil law remedies must *also* be exhausted before lodging a constitutional complaint.



JUDGMENTS RENDERED IN RESPECT OF THE FREEDOM OF COMMUNICATION

1. Judgment of Mehmet Koray Eryaşa, Application No: 2013/6693, 16/4/2015

The Facts

The applicant was held in a military prison [on remand pending appeal in the Special Type Military Prison and Detention House of the Army Corps] in Ankara.

The applicant requested Army Corps to make a phone conversation with his lawyer concerning the pending trial against him. He underlined in his request that as his lawyer's office was located in Izmir, it was impossible for his lawyer to continuously visit him in the prison and therefore, it was important for him to make phone conversation with his lawyer.

The applicant's request was dismissed on the grounds that whereas all phone conversations of the prisoners were wiretapped and recorded, the applicant's conversation with his lawyer could not be wiretapped and recorded for being prohibited; and that there was no right prescribed in the law providing the applicant with the right to make a phone conversation with his lawyer.

The applicant also requested from the Army Corps to allow him to receive contact (open) visits by means of removing the limitation on the period of visits as he complained that his rights to accept visitors had been restricted, to remove the restriction imposed on the number of person, day and time in respect of the phone conversations and to enable him to get access to internet which was needed by him to prepare his defence submissions.

The applicant's requests were dismissed in pursuance of the provisions of the Regulation on the Administration of the Military Prisons and Detention Houses and Execution of the Sentences.

The applicant has maintained that his right to respect for private life and the freedom of communication were violated as his interviews with his lawyer and family were restricted; that he was



monitored and he was denied access to internet in spite of informing the authorities that he had to get access to internet for preparation of defence submissions in the Military Prison where he was held on remand pending appeal.

The Court's Decision

The Court examined the applicant's allegations that he was prevented from making phone conversations with his lawyer and that the privacy of his communications with his family and other persons were infringed within the scope of the freedom of communication guaranteed under Article 22 of the Constitution whereas his allegations that his communication with his visitors and family by phone and during contact or non-contact visit were restricted and he was denied receiving phone calls outside were examined within the scope of the right to respect for his private and family life set out in Article 20 of the Constitution.

The Court has emphasized that the prisoners, in principle, have all fundamental rights and freedoms except for the right to liberty and security of person, which may be considered as lawful detention under Article 19 of the Constitution.

It has also added that these rights may be restricted where there are acceptable and reasonable requirements for maintaining order and security such as the prevention of offence and securing disciplinary, as an inevitable consequence of being held in a prison; however, the restrictions to be imposed on the rights vested in prisoners must comply with the guarantees set out in Article 13 of the Constitution.

In this context, noting that the legislator is required to make foreseeable arrangements which do not allow for arbitrariness in the field of fundamental rights and freedoms; and that vesting very broad discretionary power to the extent it would lead to arbitrary practices in the administration may be contrary to the Constitution, the Constitutional Court has stated that existence of the laws on the restriction of fundamental rights and freedoms in appearance cannot be deemed sufficient and nature of such laws must also be taken into consideration.



The Court has underlined that the law must set the basic principles, rules and framework in respect of the matters which may be allowed to be restricted only by law, as prescribed in the Constitution; and that only after designating basic rules in this respect, the law may leave certain issues requiring specialization and concerning the practice to the executive power.

In the instant case, the Court has observed that, in spite of non-existence of any prohibitive provision in respect of the applicant's interview with his lawyer on the phone, the applicant's freedom of communication was infringed on the ground that there was no provision in the legislation which allowed the prisoners to make phone conversations with their lawyers. The Court has stated in this context that the justification put forth by the administration cannot be considered reasonable *vis-a-vis* the explicit provision set out in Article 114 § 5 of the Law no. 5275 and on the Execution of Penalties and Security Measures; and that there was no adequate legal arrangement in the provisions of the applicable Law forming a basis for preventing the applicant, who was held on remand pending appeal, from interviewing with his lawyer through phone.

Consequently, the Court has held that the applicant's freedom of communication guaranteed under Article 22 of the Constitution has been violated whereas there has been no breach in respect of the other allegations of the applicant.

On the other hand, in its examination in pursuance of Article 20 of the Constitution, the Court dealt with the matter by examining the fair balance between the restriction imposed on the applicant's right to respect for his private life and family life as an inevitable and inherent consequences of being imprisoned and the public interest on the basis of the legitimate aims such as maintaining the order and security in prison and the prevention of offence.

The Court has observed that it cannot be concluded the prison administration did not ensure the prisoners to meet with their families and other relatives within the scope of the legislation; and that nor did the applicant assert any allegation in this respect. The Court has accordingly indicated that the applicant was entitled to



have four visits, one of which was a contact visit, in a month and to make phone conversation for ten minutes in a week; and that it cannot be said that his status of being detained on remand enabled him, by virtue of legislation, to have much broader facilities to get in contact with the outside world compared to the convicts.

The Court has accordingly noted that the applicant's phone conversations and face-to-face communications with his family and other relatives were allowed to be held in the regular order.

Consequently, the Constitutional Court has held that there has been no breach of the right to respect for private life and family life guaranteed under Article 20 of the Constitution insofar as relating to this part of the application.

2. Judgment of *Eren Yıldız*, Application No: 2013/759, 7/7/2015

The Facts

The applicant was a prisoner. Two letters in one folder sent to the applicant by his friend who was also in prison at the relevant time was not handed out to him. Because the said letter was considered to be unfavourable by the Disciplinary Board of the Prison Administration.

The objection to this decision given by the disciplinary board was dismissed by the relevant courts.

The applicant has stated that the letter in question was sent by his friend who was also in prison at the relevant time; that if there had been any unfavourable statement in the letter, then the administration of the prison where his friend stayed would not have allowed it to be sent; and that he was deprived of his means to exchange opinions by the prison where he stayed. He has also stated that the decisions rendered did not clearly indicate which statements in the letter were found unfavourable. Accordingly, he has alleged that his freedom of communication was violated.

The Court's Decision

The Constitutional Court reviewed the applicant's allegations under the scope of the freedom of communication guaranteed under

Article 22 of the Constitution. In the Constitutional Court's opinion, while reviewing the interferences in the freedom of communication, the legislation forming a legal basis for the interference must be "accessible", sufficiently explicit and "foreseeable" in respect of results led by a certain act. The Court has also emphasized that the interference in question must pursue "a legitimate aim", must be proportionate and necessary in a democratic society.

The Court has considered the seizure by the prison administration of the letters sent to the applicant as an interference in his freedom of communication. The Court has subsequently concluded that Article 68 of the Law No. 5275 constituting the basis of the interference in the present case met the criterion of "legality"; and that the interference pursued the legitimate aims of maintaining public order and preventing offences as set out in Article 22 of the Constitution.

In its examination as to whether the said interference was proportionate and necessary in a democratic society, the Court has considered that there were two separate letters sent to the applicant in the same envelop by the same person.

In the Court's opinion, in the first letter sent to the applicant, the actions of an ex-leader of an illegal organization were praised and, while the said actions were described, the framework of the illegal organization's aims was set and the addressee were led to such aims. In line with these aims, the armed attacks, violent content of which were beyond dispute, were justified and qualified as "fight" and even "war". By indicating that this war was still going on, violence was being promoted by means of formulating the illegal acts and actions of the illegal organization leader as "ordinary course of conduct".

Within the frame of these findings, the Constitutional Court has concluded that seizure of the first letter on the ground that it incited offence was not contrary to the requirements of the democratic order of society and the principle of proportionality.

Accordingly, the Court has held that the applicant's freedom of communication has not been violated in respect of the first letter.



However, in respect of the second letter in which a convict mentioned of his days in prison, other convicts he was staying with, his family life and state of health, it could be deduced neither from the content of the letter nor from the justifications given by the Disciplinary Board of the Prison and the instance courts which statements included in the letter were found unfavourable.

The Court has concluded that seizure of the second letter for the pursued aims was not necessary in a democratic society; and accordingly, that the applicant's freedom of communication has been violated in respect of the second letter.

3. Judgment of *Mehmet Seyfi Oktay*, Application No: 2013/6367, 10/12/2015

The Facts

The applicant is a former Minister of Justice. The applicant's communications were intercepted based on a court decision. Also, the applicant has been taken into police within the scope of the investigation known to the public as "Ergenekon investigation", however he was released immediately.

In the meantime, the applicant's phone conversations were published and broadcasted, on different national newspapers and TV channels and news reports and comments were published and broadcasted with regard to the allegations against him.

The applicant filed a criminal complaint against the journalists making the above mentioned news reports and unknown officers who leaked the information within the scope of the investigation to the press.

After the Fatih and Bakırköy Chief Public Prosecutor's Offices had given a decision for lack of venue, statements of thirty three law enforcement officers were taken by the Fatih Chief Public Prosecutor's Office. However, upon the legal arrangement which was subsequently introduced, the relevant Chief Public Prosecutor's Office dealing with the case gave a decision of non-prosecution. The objection made to this decision was dismissed.



The applicant has maintained that, on account of the news reports which appeared on the press, he was subject to defamation and aspersion as a former Minister of Justice; that his phone conversations recorded within the scope of the investigation conducted against him were leaked to the press and thereby, he was reflected as an offender and tried to be degraded before the public; that he filed a criminal complaint against those who had leaked the information pertaining to the investigation for ensuring their identification and being punished; that the administrative investigation against those unknown persons was conducted by the Security Directorate to which the potential suspects were affiliated; and that the Chief Public Prosecutor's Office gave a decision of non-prosecution resulting from an insufficient and incomplete investigation. For these reasons, the applicant has alleged that there has been a breach of his fundamental rights and freedoms.

The Court's Decision

Stating that one of the guarantees enshrined in the Constitution provides that the public authorities shall not arbitrarily interfere in the individuals' freedom of communication and the privacy of their communications, the Court has underlined that monitoring of the content of the communication amounted to a severe interference in the privacy of the communication and, thereby, in the freedom of communication.

Stating that the security measures applied in respect of the privacy of the communication, which entail the risk of being abused for being applied confidentially, its scope of application and procedure must be regulated by explicit law provisions, the Court has noted that the interference in the freedom of communication must be primarily prescribed by law; the relevant legislation must be "accessible" "sufficiently clear" and "foreseeable" in respect of consequences of a certain act.

The Court has underlined that in the second place, this interference must pursue "a legitimate aim" and be necessary in a democratic society and proportionate; and that the state has the positive obligations to prevent personal data or communication records



from being disclosed and to conduct an effective investigation and punish those who are responsible in case of an interference in the privacy of communication by means of being published or broadcasted in the media.

JUDGMENTS RENDERED IN RESPECT FOR THE HOME

Judgment of *Mehmet Kurt*, Application No: 2013/2552, 25/2/2016

The Facts

The applicant has owned a four-story building in Soğuksu village of town Tetovo of the province of Rize.

The Ministry of Environment and Forestry (the Ministry) issued a positive decision on environmental impact assessment for the project of Hydroelectric Power Plant to a private energy company.

The applicant filed a lawsuit in the Rize Administrative Court on the grounds of the protection of environmental health, by alleging that in the scope of the project of the Regulator and Hydroelectric Power Plant a switchyard was built near his four-story building in his village and power lines of high voltage passed just over the roof of his house and according to the scientific researches these transmission lines cause many diseases, including cancer of the radiation emitted. Also he claimed that the sound generated when running the facilities in question is so loud that it is not possible to get night sleep and because of the noise pollution he and other residents could not continue their daily lives.

Rize Administrative Court rejected the claims in the lawsuit on the grounds that the amount of impacts to the environment is not exceed acceptable limitations and there is no need to reevaluate the results of the prior environmental impact assessment of the Ministry. The objection to this decision given by the First Instance judgment was dismissed by the appellate court (the Council of State).

The Court's Decision

According to the Court environmental issues have impact on right to protect and improve their material and spiritual existence



under paragraph one of article 17 of the Constitution, also other relevant provisions of the Constitution such as Inviolability of the domicile (Article 21) and Health services and protection of the environment (Article 56) should be taken into consideration.

Stating that the balance applied to the restriction of all fundamental rights and freedoms in the Constitution by virtue of Article 13 of the Constitution must also be taken into account for restrictions to be imposed on the right to private life, the Court has indicated that the right to private life may be restricted; however, there must not be any disproportionality between the legitimate aim pursued in the restriction and the means of restriction. It has been further underlined that a fair balance must be struck between the general interest likely to be obtained through restriction and the loss sustained by the individual whose fundamental right and freedom has been restricted.

The court assessed whether the authorities approached the matter with due diligence and gave consideration to all competing interests should carefully evaluate whether public authorities and especially judicial authorities approached the issue carefully and balance the interests of all concerned.

According to the Constitutional Court in the present case requests and claims related to noise pollution and effects of power lines on his house have not been evaluated by the degree courts. Also, the conclusion and the grounds about EIA report in the decision of the First Instance Court are very limited.

In the light of these findings, the Court concluded that public authorities failed to approach the matter with due diligence or to give proper consideration to all competing interests, and thus to discharge its positive obligation to ensure the applicants' right to respect for their homes and their private and family lives.

Assessments

In these judgments, the Constitutional Court adopted an approach which broadens the scope of protection and improves the standards for rights and freedoms.



All these judgments ruled by the Court with a “rights-based” approach serve to improve the standards of human rights in Turkey.

The judgments rendered by the Constitutional Court of Turkey have increased the international recognition of its successful performance with regards to promoting the rule of law, fundamental rights and freedoms and democracy in Turkey.

With its judgments The Court has proved that its impact to promoting human rights in Turkey is not fall short of high standards of the Court of European Human Rights.

That concludes my presentation

Thanking for your interest and patience, I greet you all with my deepest respect.

***THE RIGHTS OF THE FAMILY IN THE
CONSTITUTION AND OTHER LAWS OF
AFGHANISTAN***

***Qazi Muhammad Arif "HAFEZ"
AFGHANISTAN***



THE RIGHTS OF THE FAMILY IN THE CONSTITUTION AND OTHER LAWS OF AFGHANISTAN

*Qazi Muhammad Arif "HAFEZ"**

الحمد لله وكفى و الصلاة والسلام على عباده الذين اصطفى

اما بعد

Dear Mr. President, Dear Members of summer school, Dear Academicians, Dear Friends, Ladies and Gentlemen.

السلام عليكم ورحمة الله وبركاته

I am glad to see you today and I welcome you on behalf of the Independent Commission Overseeing the Implementation of the Constitution of Islamic Republic of Afghanistan and on behalf of its Director.

Independent Commission for Overseeing the Implementation of Constitution was established according to article 157 of the Constitution of Islamic Republic of Afghanistan and the members of this commission starts to their duties after President propose them to the Parliament and they obtained a vote of confidence from Parliament. According to the Commission Law, the Commission have 7 members and after receiving vote of confidence from Parliament they elect Director, Deputy Director and Secretary of the Commission. The Commission has the authority to monitor the implementation of the constitution by President, Parliament, Government, State organs and Non-State organs. Fortunately, at the end of 2016 Commission members received vote of confidence and have begun to their active duties. I'm happy to present the regards of the Head of Commission Dr. Mohammad Qaseem Hashimzy and members of the Commission to all of you.

* Commissioner of Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan.



Now, I want talk about "family law" from the perspective of the constitution and other laws of Afghanistan.

First of all, I want to talk about family and importance of institution of family.

The importance of family

Family is social unit, resulting from the marriage of a man and a woman. Islam describes family as group of people that have legal personality and its nucleus is legitimate marriage of man and woman. In the Civil Code of Afghanistan, it's stated that: "The family is made up of relatives that are gathered together by a common principle". According to the definition above, the Afghanistan constitution obligated state to support and protect the rights of the family. So, Article (54) of the constitution states: (Being a fundamental unit of society, family are supported by state). State takes all necessary measures for a physical and mental health of family, especially for children and mother, for upbringing children and the elimination of traditions contrary to the principles of the holy religion of Islam.

Of course there were many debates about the purposes and the importance of family and I want to mention some of them:

1. Theology. The main goal of the Theology, recognition of God, starts with family. In this case Allah says:

(و ما خلقت الجن و الانس الا ليعبدون) آيه 56 سورة الذاريات .

(And I did not create the jinn and mankind except to worship Me) One of the main goal of establishing family is to fulfill and perfect a society that forms basis for peace and order, so in the end enables to recognize a God.

2. Survival and development of a generation. Reproduction and survival of generation is basis that empowers a family. In this case Allah says:

(و من آياته ان خلق لكم من انفسكم ازواجا) آيه 21 روم

(And of His signs is that He created for you from yourselves mates that you may find tranquility in them). Reproduction gives



birth to new families and societies which are consisting of thousands of families, as the result, Human race survives and develops.

3. Source of stability and serenity of heart and soul, God says: (لَتَسْكُنُوا إِلَيْهَا) "find peace". Achieving the rank of peace, serenity, center of tranquility is main goal of family. The phrase in the Koran refers to the fact that human must achieve peace and from perspectives of Quran, family leads up to this is dignity.

4. Sincerity and Unity. The Quran, its stated that:

(وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً) Make friendship with each other. Love between husband and wife is the important point in a family. Their friendly relationship and cooperation in the course of self-knowledge and recognition of God leads them to peace, and their place would be secure divine valley. So, this family that provides vital ground for responsible and healthy relationship.

The role and importance of the family in the community

Family is the keystone of all social institutions and organizations. For example,

- 1) creation of civilization
- 2) Hereditament
- 3) Growth and prosperity of humanity, relevant to institution of Family.

All the traditions, beliefs, personal and social characteristics will be transferred to the new generation via family. In Quran community was described via the creation of man and woman and in two cases they considered equal:

First, Equality in terms of creation.

In Quran God says:

إِذَا قَالَ الْإِنْسَانُ إِنَّهُ رُبَّمَا بَرَّكَهُمُ اللَّهُ الَّذِي خَلَقَهُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً

O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), and from him (Adam) He created his wife [Hawwa (Eve)], and from them both He created many men and



women and fear Allah through Whom you demand your mutual (rights).. So, in principle of creation both man and woman are equal.

Second, Equality in terms of action and rewards.

In Quran God says:

(يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا، إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاهُ) آية 13 سورة حجرات

O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allah is that (believer) who has At-Taqua. So, without a doubt it is very important that healthy family in the body of society must be free from sexual discrimination.

The first step of establishing of family

Family begins with a marriage vow. Marriage is a contract between man and woman and if there is no hindrance from point that of Shariah, this marriage is Helal or legal.

22 - الزحيلي , الفقه الاسلامي وادلتاه، ج: 9 . ص : 6514

In the article 60 of the Civil Code of Afghanistan it is stated that: "Marriage is a social contract between men and women that forms legitimate blessed families and provides them with rights and obligations". Marriage in Afghanistan must be in accordance with the Islamic law (Shariah) and the Hanafi school. The forms of the marriage contract subordinate the unique customs and traditions in Afghanistan.

Family Law

While the family establishes according to the contract, this contract has legal effect that has been discussed in detail in Afghan civil Code.

The second chapter of the Civil Code discusses marriage laws and its effects and provision of alimony. The eighth chapter of Civil Code discusses about Dissolution of Marriage (dissolution, divorce, Divorce in Exchange for Property) and other family law.



I would like to mention the laws which protect family law in Afghanistan:

1. Constitution
2. Civil Code
3. Criminal Procedure Code
4. Civil Procedure Law
5. Law on Elimination of Violence against Women
6. Penal Code
7. Regulation of the Ministry of Public Health to Support Maternal and Child Health

Civil Procedure Code and Criminal Procedure Code are the form of laws which discuss the implementation of family cases in courts.

When the case that referred to the court has legal aspects, first the claim will Litigate. In response, the lawsuit alleges, the defendant submit his claim to the court's disposal. The court will investigate both sides' claims from the relevant authorities. Then the court hold a final session, after reading the lawsuit and the defenders of the parties, the decree will be issued. If the cases have originated from a criminal act, first the prosecutor should investigate the case, prepare the criminal indictment and present them to the court. In this case, the defendant will be given a right to defend himself at all stages of trials. The primary court order subordinated in three stages, the sentenced person can re appeal or request for sealing criminal record in second and third court.

Respect of the Family law in the Legal system of Afghanistan

Family law regulates family relations. As Family law has direct connection with basic rights and duties of citizens. For this purpose the second quarter constitution law is dedicated to the rights of citizens. Therefore, requires that family should be protected from any damages. In this connection article 38 states that Personal residences shall be immune from trespassing. No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law. In case



of an evident crime, the responsible official shall enter or search a personal residence without prior court.

Following the provisions of the constitution, insists on maintaining material and intellectual rights. In this context, Article 119 of the Criminal Code Afghanistan orders: 1. No one including Police, National Security and Attorney shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court

If police or public prosecutor wants to inspect the residence of person, they should present search warrant to the authorized court which includes this requirements: 1. Type crime 2. The goal and the case of inspection 3. Place and Time of inspection 4. Duration of inspection.

The provisions of this Article prohibited judicial authorities to enter to the house and home of family without permission of the authorized court .Also Abu Hurairah (May Allah be pleased with him) reported:

The Messenger of Allah (ﷺ) said: "The blood, honor and property of a Muslim is inviolable for another Muslim."

The philosophy of the above provisions in the criminal Procedure Code maintain respect for the family rights, ensures the preservation and protection of private life.

Result

With consideration of above mentioned words we come to the conclusion that family law in the constitution and other laws of the country and Islam as an only source of law in Afghanistan, owns very important place in Afghanistan. In this situation Afghanistan Justice system efforts are to remain the family law and to punish every type of aggression to the family in accordance with the Criminal Law and the Law on Elimination of Violence Against Women.

Once again on behalf of the Afghan delegation I would like to thank Republic of Turkey which recently demonstrated tremendous symbol of democracy in the world, for organizing such a great program.

***RESPECT FOR PRIVATE AND
FAMILY LIFE***

***Prof. Dr. Engin YILDIRIM
TURKEY***



RESPECT FOR PRIVATE AND FAMILY LIFE

*Prof. Dr. Engin YILDIRIM**

Hello to everybody,

I am very pleased to be here with you today. I hope my lecture will be beneficial for you. My topic is the jurisprudence of the Turkish Constitutional Court with regard to a significant move in constitutional democracies. This is what a leading American academician called “rights consciousness”. It is within this framework that the right to privacy, as a fundamental right, is recognized in many international human rights treaties and in national constitutions. This concept underpins human dignity and other key values such as free development of personality.

As far as I know, the concept of privacy was first used by two American lawyers in the late 19th century, so it was for the first time that the concept of privacy was published in an American law journal, and since then, it has been one of the most fundamental rights recognized all over the world.

In the early seventies, countries began adopting laws intended to protect individual privacy. Throughout the world there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection of the individual right to privacy. Most of these laws are based on the models introduced by the OECD (Organization for Economic Cooperation and Development) and the Council of Europe.

The right to respect for private life is the right to privacy, the right to live in a way protected from publicity. However, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships

* Prof. Dr., Vice President of the Turkish Constitutional Court.



with other human beings, especially in the emotional field, for the development and fulfilment of the ones on personality.

In the Turkish constitutional system, the right to privacy is attributed a special importance as illustrated by the existence of a separate Article in the Turkish Constitution. Article 20 stipulates that every person has the right to confidentiality and personal privacy, and these rights are untouchable. It also says that every person has absolute freedom to decide whether to provide or not his or her personal data, and that he or she cannot be compelled to do so.

Restriction and limitation of these rights are possible in exceptional circumstances by governmental authorities, the police, courts and some other legal entities. However, such particular restrictions must be legitimized with a court decision or with a state of emergency, or restriction conditions must be defined explicitly in a regulation. Unless these restrictions are legitimized with a court decision on the grounds of national security, public order, prevention of crimes, protection of public health and public morals or protection of rights and freedoms of others, they would be illegal.

In addition to the Constitution, we have a recently promulgated special law governing the use of personal data. It was promulgated in March this year. This law sets a definition for personal and sensitive data laying out the firms' or companies' responsibilities in managing information and regulates the international transfer of data. The legislation also established a dedicated data protection authority, but as far as I know, this authority has not started to operate yet.

This law is in accordance with the Council of Europe's Convention for the protection of individuals with regard to automatic processing of personal data, which Turkey signed but had not been ratified yet. Its crucial section regarding data processing, transfer or storage is very much in line with the Directive 46 of the European Community or the European Union. This existing law contains regulations taken from the Council of Europe and the European Union directives on regulations, so it is in line with the modern European regulations.



Now, let me give a brief outline of the jurisprudence of the Turkish Constitutional Court with regard to the right to privacy. As probably you all know, the Turkish Court has competences in relation to abstract review, concrete review and individual application. When we look at these cases, we can see that the Turkish Constitutional Court has struggled to develop a coherent privacy jurisprudence. But whether it has achieved this so far is open to debate.

A search in the Court's database produced 35 decisions regarding the right to privacy in abstract and concrete review cases. When we conduct the same search in the individual application cases, we find that there have been so far more than 100 decisions. But out of 100 decisions, in approximately 33 of them, violations were found by the Court's Chambers or Divisions. The Court has two Divisions/Chambers; First Chamber and Second Chamber. They deal with these issues.

When we look at the abstract and concrete review of cases, we can see that the first decision was issued in 1967. In 1967, the Court for the first time in its history mentioned in its decision the concept of privacy and private life. But since then, this concept has not been used very frequently.

We found another decision in the late 1990s. This issue was about religion section on identity cards. There were two decisions in this respect. In both decisions, the Constitutional Court concluded that the obligation to have religion section in family registers and identity cards were not unconstitutional. This decision was heavily criticized at that time by lawyers.

Another case is a recent case of a concrete review. If a person stocks or sells movies or pictures related to unnatural sexual conduct, he is liable to have a prison term up to four years. In this concrete review case, the Court decided that there was not any unconstitutionality. The Court based its decision on the grounds of public morality, but this decision was not unanimous. There were four or five dissenting votes. This decision was also heavily criticized by the public.

In addition to these, a judgment made by the Court in 2008 clearly indicates that the protection of personal data is considered



within the frame of the protection of privacy of personal life and the freedom of thought. In this ruling, the Court found two provisions of the relevant law which is in this case the Statistics Law of Turkey which requires statistics units, namely real and legal persons, to submit to the Turkish Statistics Institute all information or data completely, accurately and free of charge in the form, period and standard specified by the Presidency and Statistics Unit. The Statistics Unit that refuses to fulfil these obligations will be imposed a fine for acting unconstitutionally.

Unfortunately, the legislator did not comply with this ruling of the Court. So, there was another challenge before the Court. In the new provision, the legislator just only added the sentences within the fundamental rights and duties determined in the Constitution. So, you have to give all information required by the Statistics Institute as long as it is within the fundamental rights and duties determined in the Constitution. But the Court in this new challenge found this regulation unsatisfactory and reached an unconstitutionality decision again.

Another case from the concrete reviews is related to the fingerprints. When you apply to a hospital to get a medical service, you are required to give your fingerprints through biometric metals. For example, a person did not want to give his fingerprint, and therefore he was denied health service. In this case, the Court ruled that this requirement was constitutional because of social security purposes. But again in this case we have seven dissenting votes. In these privacy cases, in concrete and abstract reviews, the Court is far from rendering unanimous decisions. There have been always some kind of dissenting votes. It shows that the Court has not made its mind in these matters yet, so the jurisprudence is unsettled. Probably in the near future, the Court will change some of its jurisprudence related to the right to privacy.

In another case, the issue was related to a regulation in the Military Penal Law. The relevant Law stipulated that if a member of the Armed Forces lived with a woman -let me say that this is a very sexist provision- without getting married, he would be discharged from the army services. The Court unfortunately found this



constitutional. However, in this case we also have seven dissenting votes. Therefore, the situation can change in the near future.

Another case is related to counter-terrorism. There is a special Government body called Under-Secretariat of Public Order and Security. It has a special branch called Research and Development Department. This Department is assigned with collecting, classifying, analysing and evaluating data, information and documents. These include personal data as well. The aim of this provision was to fight against terrorism.

The Court in another non-unanimous decision ruled that this provision was justified and that it was within the Constitution's recognized boundaries. The Court argued that if the personal data is collected illegally, the relevant persons can be subject to criminal proceedings. This provides enough assurances for wrongful usage of collecting personal data. In this case there was not any disproportionate interference with the right to private life. This decision was reached while there were four dissenting votes.

A similar case is related to the Turkish Ministry of Health and a comprehensive tracking system data. The Ministry of Health established a comprehensive medication tracking system for the purposes such as ensuring drug safety, accounting for the use of medications and engaging in pharma-covigilance. This system is based on a regulation of the Ministry of Health, titled "Medicine Tracking and Evaluation".

Under this scheme, massive amounts of personal data including name, age, diagnosis, hospitals visited, medicine purchased and adverse effects are collected and stored in a centralized database.

Not only healthcare practitioners but also pharmacies are able to query the database about a patient's prescription history as well as additional information such as her/his address and social security payments. Even more sensitive health data are collected and stored by the Turkish Social Security Administration.

We see here a kind of hangar by the Turkish Public Authorities to collect data. They want to collect data as much as possible, but they are unwilling to provide assurance to protect your personal data,



as well as your right to privacy, and this creates lots of tensions between administrative bodies and the Constitutional Court.

So far, the Constitutional Court, unfortunately, has usually been in favour of the legislative bodies collecting data. The Court has argued that in this age of global terrorism, it is necessary to collect data, mass amounts of data, as long as they are within a constitutional framework. However, as we can see, this constitutional framework has not been sufficient so far. This is my personal view.

In this case, this tracking system fails to clearly articulate the purposes for collection of patients' data, roles and responsibilities of various actors involved, procedures for reporting adverse medicine effects to the third parties and the scope of access authorizations.

Moreover, the system appears to violate data protection principles such as proportionality and data minimization. Collecting large amounts of personal data and making them available to numerous parties without apparent necessity and without consent of the person is in question.

In principle, you have to collect data as little as possible. You have to obey the rules of data minimization, but in the Turkish case, we can see that the public authorities prefer collecting data as much as possible.

These are the cases related to abstract and concrete review. Now, let me give some examples from individual application cases. But I was told that some of them were also told to you yesterday by one of our colleagues. So, I will try to select untold individual application cases.

In one of the most important decisions in this regard, the Court held that an employer monitoring an employee's institutional e-mail account did not violate the employee's constitutional rights. The Court held that the employer had monitored these accounts prudently, since it was done to verify the allegations that the employee had breached corporate regulations. The Court noted that the monitoring had not gone beyond verification purposes and the content of the correspondence was not made public.



In the relevant case, an employee's wife alleged an affair with her husband with another employee, and she complained about this affair to the general manager. The wife submitted the copies of e-mail correspondence to support her claim. Upon that claim, the employer terminated the related employee's agreement on the basis of the relevant provisions of the Labour Law. The employee in question filed a re-employment lawsuit arguing that his employment agreement had been wrongfully terminated, as the employer had monitored his e-mail account contrary to his constitutional right to privacy and communication.

The Constitutional Court held that terminating the employment agreement upon monitoring the applicant's e-mail accounts did not violate the right to privacy or the right to communication. The Court reasoned that the relevant employment agreement required to terminate the employee's agreement to comply with all corporate regulations, including the basic company regulation.

Sending explicit content from an institutional e-mail account violates the basic company regulation which requires employees to maintain professional relationships. The information security undertaking prohibits personal use of company computers and institutional e-mail accounts, specifically warning employees that e-mail correspondences and communications might be monitored when needed. The employer only monitored the e-mail accounts to confirm the wife's claim about the alleged violation of the employment agreement.

In this case, although the Court did not find a violation, it discussed the scope of the right to privacy in workplaces. This discussion provided a guideline for the Labour Law practitioners. This decision was not heavily criticized and most of the commentators agreed with the result. Because, in a workplace, you have to obey the rules of the workplace and you cannot use the employees' time with your private affairs.

A very recent decision is related to the right to be forgotten. It has been one of the hot topics recently in the field of privacy and data protection. The Constitutional Court reached a decision where the



right to be forgotten was accepted by the Court at the constitutional level. This was for the first time in Turkey that the right to be forgotten or the right to delete was recognized at the constitutional level.

In the relevant case, the applicant requested the removal of three news articles dated 1998 and 1999 on the online arcade of a nationwide newspaper about her use of drugs and the relevant judicial fine she was imposed. Since the newspaper rejected to remove the news articles, the applicant applied to the first level court for removal of the content. The first level court accepted this request and decided for the removal of news articles, as the news articles were not up to date, not newsworthy and there was no public interest in keeping those articles on the website. The court further stated that such content was damaging the private life of the applicant, therefore it should be removed.

Upon such decision, the newspaper objected to this again before the second level court, and the latter decided for the removal of decision given by the first level court. Therefore, the applicant lodged an individual application due to the violation of her constitutional right to privacy.

In its review, the Court accepted the applicant's request by making reference to the above-mentioned decisions of the second level court and the decisions of the European Court of Justice.

As you all know, the European Court of Justice issued a very recent decision with regard to the right to be forgotten in a case involving Google. In the decision, the Constitutional Court stated that although the right to be forgotten is not stipulated in the Constitution, the Constitution assigned the task of providing the conditions required for the development of individuals' material and spiritual existence to the State with Article 5 of the Constitution.

In this case, the Court made an innovative interpretation by using Article 5 of the Constitution. It created a new right which is not written in the Constitution, the right to be forgotten. This is one of the very few cases in which the Turkish Constitutional Court was able to make a creative interpretation.



The Court, in its decision, argued that the State must give individuals an opportunity to open a clear sheet in their lives by associating the right to protection of individuals' reputation in Article 17 with the right to request protection of personal data in Article 20 of the Constitution.

Thus, the right to be forgotten has been a part of the Turkish constitutional jurisprudence. The decision is significant due to the fact that individuals are becoming more defenceless everyday against unfair practice of personal data processing and storage.

Since the right to be forgotten has been in the agenda on the European Union for a long time, the decision of the Court is also an important step towards Turkish precedence to catch up with the European Union precedence and practices.

In a recent individual application case, the Court has emphasized the importance of the right to respect for privacy. The applicant was a female public servant working as a prison officer. She was fired from her work following the broadcasting of her sexual explicit videos on the internet. She was discharged from her office because of her behaviours not compatible with the public service.

The Constitutional Court held that the right to privacy of public officers might be restricted to maintain discipline and public order. However, such restrictions must be proportionate to the legitimate aims. For the Court, such a harsh administrative measure as firing the applicant from her office was likely to cause a devastating effect on her future life.

Reaching a violation of the right to respect for privacy, the Court held that firing the applicant constituted an interference, which was not proportionate to the legitimate aims concerned. In this case, the Court successfully used proportionality analysis and did not find any difficulty in reaching a violation ruling.

In these cases, the Court does not always use proportionality analysis. However, when it uses proportionality analysis, it is likely that it will find a violation of a constitutional right.

Another interesting case is related to the National Intelligence Agency. This National Intelligence Agency collected data about



a lawyer's private and professional life. The Intelligence Service prepared a report about this lawyer as part of its investigation of an extreme left-wing terrorist group. The report claimed that the lawyer was acting as a kind of liaison officer between convicted terrorists and those who were still at large. The report was classified and labelled as "This report cannot be used as evidence in a court of law". This was a special report prepared by the Intelligence Service and it was not supposed to be used in the court.

Despite this, unfortunately the Public Prosecutor used this information in the report and the report became publicly available. The applicant claimed that his personal data and the data related to his professional activities were illegally collected and the report was used during the trials as evidence by the Prosecutor.

The Constitutional Court ruled that data gathered through intelligence the correctness of which could not be verified would not be used in a court of trial open to the public. The applicant was not accused of any illegal activity and only the information about his activities as a lawyer were put in the Prosecutor's files. Therefore, it was an easy decision for the court to reach a violation of Article 20 in this case. There have been many cases related to the violations of privacy by the members of the Armed Forces.

If I remember correctly, about 50 or 55 applications are still pending before the Court with regard to the activities of some Army officers, because these people were discharged from their posts due to immoral activities that are not in line with the Armed Forces Code of Discipline. These activities usually involve some allegations regarding their intimate sexual lives.

In these cases, the Court found violation by the public authorities because these officers conducted their sexual activities in their private time and their employment contracts were terminated by the armed forces on the basis of immoral activities which they thought that it was not in line with the armed forces' code of discipline. But the strict understanding of discipline is not in line with today's realities. Even a member of armed forces is free to pursue his life in his private time as he wishes. In my view, the State does not have any right to interfere with this sphere which is very intimate.



Another case also concerned army officers. However, in this special case the Court did not find a violation because in the specific case the applicant was a temporary officer who was working in the army on the basis of a temporary employment contract. Because of his private sexual activity in his free time, the army decided to terminate his employment contract. That is why the army is entitled to choose its own staff. As in the case the applicant was a temporary officer, majority of the court reached a decision of non-violation. In this case, a very narrow margin of appreciation was enjoyed because there were seven dissenting votes.

Again, in another case from the army, the applicant was a civilian nurse working in a military hospital. She was discharged due to the allegation that her sexually explicit photos were broadcasted on the internet. She claimed that those photos did not belong to her but, even if they were, they were made available on internet without her consent. That is way her firing was found unconstitutional and disproportionate by the Court. So, in the Court's jurisprudence, we can see that even if some of your intimate photos were broadcasted through internet without your consent, the relevant public authority should not have the right to discharge you. The Court considers that otherwise constitutes an interference with the right to privacy of the person in question. As I have mentioned before, when the Court uses the proportionality analysis, it finds it easy to reach a violation decision. As we all know, proportionality requires a rational connection between the means and purposes of a law –the less restrictive means to achieve that purpose, called necessity, and the proportional relationship between the purpose and the means, called balancing. Proportionality and the criterion of pressing need in a democratic society are widely used in the Turkish Constitutional Court's jurisprudence in dealing with cases related to the right to privacy. So, the Court accepts that the restrictions imposed on the right to privacy are possible only when they are allowed by law, the requirements of the democratic order of the society and the principle of proportionality. And Article 20 also imposes positive obligation on the part of the State to protect privacy. So, the majority of violation decisions reached by the Court puts a positive obligation on the State to protect this right. Hence, the relevant article enshrined in



the Constitution is not only restricted to negative obligation on the part of the State but also requires the State to take necessary measures within the scope of its positive obligations.

These are the main cases concerning the private life issues which have been examined by the Turkish Constitutional Court in its history. So, I guess that in future we will receive more cases regarding this issue. It is highly likely that in some of the issues especially with regard to struggles against terrorist activities, the Court will have more pro-privacy stance. And also, as you all know, we are trying to closely follow the jurisprudence of the European Court of Human Rights. As a matter of fact, in individual application cases, as far as I can see, our jurisprudence is in line with the European Court's jurisprudence. However, when it comes to the abstract and concrete review cases, the Court is unwilling to follow the European Court's case-law. It prefers adopting, in my view, a restrictive approach when the right to privacy is at stake *vis-à-vis* the State's need to deal with terrorist activities. So, this is beyond a question of freedom, liberty and security. In harsh times as we are now passing through in Turkey, the Court tends to favour security of side of this equation. When conditions turn to normal, I consider that the Court will adopt a more comprehensive jurisprudence protecting the right to privacy. However, it is not easy to protect the right to privacy as it usually clashes with the other rights especially the freedom of expression. So, there is the freedom of expression, on the one hand, and the right to privacy, on the other.

In this respect, a court's duty is to render balancing decisions when it confronts cases concerning these issues. But I have to indicate that it is not an easy task and it depends on general climate of the society of the country and the world. Nowadays, we have been living in a world where security issues tend to predominate over liberty issues. Therefore, inevitably the Turkish Constitutional Court also gets affected by this kind of climate that exists all over the world. So, it would be wrong to unjustly criticize the Court; but as you can see, most of the decisions are non-unanimous and there are always dissenting votes. Actually, I am one of the dissenting judges. In these issues, I usually disagree with the majority and



I like writing dissenting vote in these matters. However, in some cases, it is really difficult not to disagree with the majority. I mean, there is an activity which is an open threat to the basic tenets of the society and the State. In such a case, you feel obliged to decide in favour of the State but not the favour of the individual concerned. Again, I hope this would be an exceptional situation.

To sum up, I consider that the Turkish Constitutional Court has been relatively successful to protect the individuals' right to privacy especially in the individual application cases. Besides, I sincerely hope that the Court will be more willing to protect the right to privacy in cases originating from abstract and concrete reviews.

I would like to thank for your patience.

Thank you for listening to me.

***THE PROTECTION OF THE RIGHT FOR
PRIVACY AND FAMILY LIFE:
THE ALGERIAN EXPERIENCE***

Meriem BENABDALLAH

ALGERIA



THE PROTECTION OF THE RIGHT FOR PRIVACY AND FAMILY LIFE: THE ALGERIAN EXPERIENCE

*Meriem BENABDALLAH**

First, it is a high honour and a great pleasure to be among you, here in Turkey. A dear country to my heart owing to the three (03) centuries of history, which bond it to my homeland Algeria.

I would like to thank the Turkish Constitutional Court for the invitation addressed to the Constitutional Council of Algeria, which falls within the framework of the cooperation agreement between the two institutions as well as the Memorandum of Understanding, signed here, in Ankara, on February 26, 2015.

The choice of this topic to be the theme of this 4th Summer School is particularly timely because the power, capacity and speed of information technology is accelerating rapidly. The extent of privacy invasion increases correspondingly with all its dramatic effect and repercussions on family, as they are linked together.

In the presentation, which I am proposing to deliver to the honourable audience, I will try, humbly, to shed some light on the right for the respect of privacy and family life in Algeria, through the successive Algerian Constitutions. Then, I will tackle the main guarantees in place to protect this right from infringements, and particularly in view of the latest constitutional revision and the introduction of the exception of unconstitutionality for the first time in the Algerian Constitution as a mechanism of controlling and, in the same time, protecting human rights and freedoms. We will see also if this right is absolute or there are exceptions that bound it; and finally, I will try to assess the reality of the respect for privacy and family life in Algeria.

* Senior Officer of the Constitutional Council of Algeria.



However, before delving in the core of this presentation, which is the Algerian experience, I want to go back in history as to this right and its enshrinement in the international instruments.

First of all, some historic background:

Of all human rights in the international catalogue, the right to privacy is perhaps the most difficult to define and circumscribe.

Privacy can be defined as a fundamental (though not an absolute) human right.

The law of privacy can be traced as far back as 1361, when the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers. In 1765, British Lord Camden, striking down a warrant to enter a house and seize papers wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."

Parliamentarian William Pitt wrote, "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow though it; the storms may enter; the rain may enter - but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement".

The Coran and the Bible have numerous references to privacy. There was also substantive protection of privacy in early Hebrew culture, Classical Greece and ancient China. These protections mostly focused on the right to solitude.

The origins of the right to privacy, as a full right, can be traced to the nineteenth century. The growing use of the word "privacy", in its English original form or in the translated one in juridical norms (treaties, constitutions, laws, judicial decisions,...) of countries from the five 5 Continents awake the sense of wonder of the comparatist and the astonishment of the contemporary law historian. It is rare to see such a development of a recent legal notion. In 1890, Samuel D. Warren and Louis D. Brandeis published "The Right to Privacy," an influential article that postulated a general common-law right of privacy. Before the publication of this article, no U.S. court had



expressly recognized such a legal right. Since the publication of the article, courts have relied on it in hundreds of cases presenting a range of privacy issues. He articulated a general constitutional right “to be let alone,” which he described as the most comprehensive and valued right of civilized people.

The UN Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and many other international and regional treaties recognized privacy as a fundamental human right. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age, and family life is located squarely within the private sphere.

The right to respect for privacy and family life mirrors the liberal concept of the individual’s freedom as a self-governing being as long as his/her actions do not interfere with the rights and freedoms of others and the right to have a respected family life, that is violated when States interfere with, penalise, or prohibit actions that essentially only concern the individual.

The right to privacy and family life encompasses the right to protect a person’s intimacy, identity, name, gender, honour, dignity, appearance, feelings, family etc.

In the early 1970s, countries began adopting broad laws intended to protect individual privacy. Throughout the world, there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection.

Nowadays, nearly every country in the world recognizes a right of privacy explicitly in their Constitution. At a minimum, it includes rights of inviolability of the home and secrecy of communications. Other countries, international agreements that recognize privacy rights such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights have been adopted into law.

Like other countries, Algeria has acceded, after her independence, to the Universal Declaration of Human Rights, and



endorsed all the fundamental rights that were advocated, in order to allow the Algerian people to breathe freedom and rejoice the right for a decent life within the State's protection of family.

Secondly, right to privacy and family life in the international instruments:

The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights, which specifically protected family, territorial and communications privacy. Article 12 states:

"No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks".

On the regional level, these rights are becoming enforceable. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 states:

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

There shall be no interference by a public authority with the exercise of this right except as 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 of morals, or for the protection of the rights and freedoms of others".

The Convention created the European Commission of Human Rights and the European Court of Human Rights to oversee enforcement. Both have been particularly active in the enforcement of privacy rights. The Commission found in its first decision on privacy:

For numerous Anglo-Saxon and French authors, the right to respect "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. In the opinion of the Commission, however, the right to respect for private life does



not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.

This give rise to many questions, since this right seems elastic and may encompass other rights, as Fernando VOLIO observed, "in one sense, all human rights are aspects of the right to privacy¹".

Definitions of privacy vary widely according to context and environment. In many countries, the concept has been fused with Data Protection, which interprets privacy in terms of management of personal information.

Outside this strict context, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs, life or family. It can be divided into the following facets:

- **Information Privacy**, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records.

- **Bodily privacy**, which concerns the protection of people's physical selves against invasive procedures such as drug testing;

- **Privacy of communications**, which covers the security and privacy of mail, telephones, email and other forms of communication; and

- **Territorial privacy**, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space.

The right to family is also specifically protected by international instruments. It embraces the right to marry and create family, the right to fully and freely consent to the act of marriage and to the choice of spouse, equality of the rights of the spouses after marriage and the right of protection of the family and the children. A number of international and domestic instruments, such as the

1 Fernando VOLIO Legal Personality, Privacy and the family, THE INTERNATIONAL BILL OF RIGHTS (Henkin ed. 1981).



instruments focused on women, children, and the equality of rights aim at the protection of the family through the protection of its individual members.

Article 16 of the Universal Declaration of Human Rights stipulates:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

At the heart of the right to privacy lies the notion of personal freedom. It is a value that underlies human dignity and other key values, such as freedom of conscience and religion and freedom to create family.

General overview about the right to privacy and family life in Algeria:

Algeria being part of this world acceded as soon as she get her independence to these instruments and strengthened her domestic law with constitutional, legal and judicial guarantees in this respect.

Respect for privacy and family life in the Algerian Constitutions:

Thus, the establishment of this principle in the fundamental law is in itself an extremely important act. By endowing it with a constitutional statute, we guarantee and protect its sustainability from political hazards and majority changes within Parliament.

Article 11 of its first Constitution (1963) stipulates: **“The Republic adheres to the Universal Declaration of the Rights of Man. Convinced of the necessity of international co-operation, it will give its support to any international organization which corresponds to the aspirations of the Algerian people”.**



Article 16 provides further that **“Family, the basic unit of society, is placed under the protection of the State”**.

Yet, it was the 1976 Constitution that spoke clearly about the private life, honor, home, the secrecy of correspondences and communications (Art 49) and stipulated in Art. 71 sanctions against who infringe those rights. Family also enjoyed state protection as well as motherhood, youth, childhood and the elderly.

The 1989 Constitution was the turning point in the consecration of democracy and the laying down of principles of human rights and fundamental freedoms in accordance with the democratic and economic openness of the Algerian State at that epoch. Article 37 stipulates: **“The private life and the honour of the citizen shall be inviolable and protected by statute. The secrecy of correspondence and private communications, in all their forms, shall be guaranteed”**.

As far as family is concerned, Article 55 provides that: **“The family shall enjoy the protection of the State and of the society”**.

The 1996 Constitution came as well to strengthen the Rule of law, enhance individual and collective rights and reinforce the protection of privacy (Art. 39) and family life (Art 58).

Finally, the 2016 constitutional revision took place to complete the major reforms process initiated by the President of the Republic and to consolidate the establishing of a strong Rule of law, where everyone fully enjoyed their rights and participate in the development of the country.

Article 46 stipulates:

“The private life and the honour of the citizen shall be inviolable and protected by law.

The secrecy of correspondence and private communications, in all their forms, shall be guaranteed.

It shall be emphatically forbidden to infringe these rights without a reasoned requisition by the judiciary authority.

The breach of this rule shall be punishable by law.



The protection of individuals when handling personal data shall be a fundamental right guaranteed by the law; its violation shall be punishable by law”.

Family also has its part of protection in light of the 2016 Constitution. Article 72 stipulates:

“The family shall enjoy the protection of the State and society.

The family, society and the State shall protect the rights of children.

The State shall take responsibility for abandoned or non-affiliated children.

The law shall punish violence against children.

The State shall work towards assisting vulnerable persons with special needs in enjoying all the acknowledged rights of the citizens and in gaining social integration.

The family and the State shall protect the elderly”.

But here, it should be stressed that family is man and woman, children, the elderly, the domicile or home, the environment they live in, school, education and healthcare, etc... it may encompass all these elements which permit the flourishing of the human personality. All these elements received a particular attention from the Algerian Constituent, who provided many Articles to enhance and protect those rights. For instance, the promotion of women to public positions (Art. 36) and their chances of access to representation in elected assemblies (Art. 35).

The guarantees of protection of the respect for privacy and family life:

1- Constitutional guarantees:

The right for privacy and family life enshrined in the Constitution as a supreme norm in the legal order. This constitutional recognition is an essential guarantee of the protection of this right and its observance by all.

The Constitutional Council as an independent institution, both



as regards its organization and its operation, is another guarantee. The constitutional revision of 2016 consolidated its independence, which is a pledge of protection contributing to the accomplishment of its mission; it will devote more than before, the sovereignty of its decisions.

Along these lines, it should be recalled, to support this, an opinion of the Constitutional Council in 2004, on the occasion of controlling the conformity of an organic law on the electoral system² to the Constitution. In its opinion, the Council expressed a reservation concerning the interpretation of Article 4 (paragraph 3) of the Organic Law, subject of the referral read as follows:

“Furthermore, representatives duly authorized, political parties participating in elections, independent candidates and the control commissions, may examine the communal electoral list and obtain a copy”.

To achieve this reservation, the Constitutional Council has developed the following arguments:

“• Considering that by allowing some people to get a copy of the municipal voters list, the legislator grants a right to the candidates participating in the elections;

• Considering the enshrining of this right cannot be done without respecting the rights recognized to others, by the provisions of the Constitution, particularly Article 63;

• Considering that Articles 35 and 39 (paragraph 1) of the Constitution enshrined the principle of the inviolability of private life of citizens and its protection by law; consequently, offenses committed against the rights enshrined in this principle are punishable by law;

• Considering that the legislator has not provided for in the Organic Law, the subject of the referral, the criminal provisions penalizing the use of voter information for purposes other than those established by the Organic Law on the electoral system; he

² Opinion n° 01/ O.O.L/ 04 of 14 Dhou El Hidja 1424, corresponding 5 February 2004, on the control of conformity of the Organic Law modifying and completing the Ordinance n°97-07 of 27 Chaoual 1417, corresponding to 6 March 1997 establishing an organic Law on the electoral regime to Constitution.



did not also set the conditions, the field and methods of using these electoral lists;

• Considering, therefore, that providing the aforementioned reserve, paragraph 3 of Article 4 of the Organic Law, referral object is not unconstitutional”;

2- Legal and judicial guarantees:

The period from 2000 to 2010 knew the reform of justice, an ambitious program initiated by the President of the Republic, just after his rise to power in 1999. A series of measures had been taken in this regard, such as making justice more accessible to citizens, through the introduction of regional courts, using computing technologies, facilitating judicial procedures, and more respect for human rights during all the stages of the trial.

The family and woman were also in the core of the interest of the Algerian Government. The President of the Republic gave the green light to the amendment of the Family Code in accordance with the Chariaa, in a way that preserves the interests of the two spouses and the children. He also asked for the amendment of the Penal Code, especially the part dealing with violence practiced against women, the Nafaqa and child custody. Here, he ordered the establishment of an alimony fund³.

Concerning the respect for privacy, the Article 46 of the Constitution referred clearly to the judiciary to protect this right against any infringement. The protection is divided into

- Civil protection: which compensate the victim especially on moral damage (Art 47 of the Civil Code).
- Penal protection: which implies custody and fine (50000 DA to 300000 DA) to anyone who deliberately damages the privacy of persons by capturing, recording or transmitting, without the consent of the author, confidential words or spoken in private, or the image of a person in a private place (Art. 303 bis/ ter of the Penal Code).

³ Law n° 15-01 of 13 Rabie El Aouel 1436 corresponding to 4 January 2015 on the creation of an alimony fund.



After all, is the right for the respect of privacy absolute or are there exceptions?

It seems obvious, since it may be legally restricted, that the right to respect for private life is not absolute.

The Algerian Constituent conferred upon the judiciary, the power to limit this right in some specific circumstances, such as drug trafficking, organized transnational crime, violating automatic data processing systems, money laundering, terrorism etc.

Assessment:

The achievements of Algeria in the field of protecting individual rights and freedoms are undeniable. It is a longstanding commitment. My country remains faithful to the Declaration of 1 November 1954 which is her roadmap to set respect for human rights, in times of war as in times of peace.

On this regard, on the margin of the 27th African Union Summit, held in Kigali, Rwanda, on July 2016, **as part of its Human Rights Decade, with special focus on women's rights, the African Union granted to Algeria the Highest Award, in recognition of the efforts made by the President of the Republic, for the promotion of women's role within the society**, in four vital sectors, namely **health, education, justice and communication**.

However, as aforementioned, the achievements are countless, so, I will try to highlight her accomplishment in the light of the recent constitutional revision of March 2016, the key event of the year.

The 2016 constitutional review is the culmination of almost 5 years of hard consultations. They were actively involved political and social actors, lawyers and legal practitioners.

These successive consultations have taken the dimension of a national debate, confirming the will of the President of the Republic to promote a consensual way for constitutional amendment, with those who have agreed to be a partner in this project.

In addition to the enshrinement of rights and freedoms and the constitutionalisation of new rights, the establishment of the



exception of unconstitutionality, a mechanism similar to *“the individual application”*, constitutes one of the major innovations brought by the 2016 Constitutional revision.

Article 188 provides that: **“The Constitutional Council shall be called upon, based on the exception of unconstitutionality, upon a request by the Supreme Court or the Council of the State, when one of the parties, in a trial, claims before the jurisdiction that the legislative provision, upon which the issue of litigation relies, may adversely affect the rights and freedoms granted by the Constitution”**.

The Constitutional Council shall deliberate in a closed session and give its opinion or decision within thirty (30) days after a matter has been submitted to it. In case of emergency, and upon request from the President of the Republic, the deadline shall be shortened to ten (10) days.

When the Constitutional Council is called upon to rule based on Article 188, it shall render a decision within the four (4) months following the referral date. This deadline might be extended only once for no more than four (4) months, upon a decision of the Council notified to the jurisdiction that requested the referral (Art. 189).

However, Pending the all necessary conditions for the implementation of the provisions stipulated by Article 188 of the Constitution, and in order to guarantee its efficient management, the constitutional referral shall be put into place after a deadline of three (3) years following the entry into force of these provisions.

After its entry into force, this mechanism will permit, undoubtedly, to the Constitutional Council to play fully the role of guarantor for the supremacy of the Constitution and protector of human rights and fundamental freedoms, and achieve the control of constitutionality not only before the enactment of laws, but also after their implementation.

Another important achievement that is the establishment of a National Council of Human Rights, under the authority of the President of the Republic in his quality of guarantor of the



Constitution (Art. 198), to carry out a mission of monitoring and providing early warnings and evaluation in terms of the respect for human rights. It shall consider any case of violation of human rights it recognizes or is brought to its attention, and it shall proceed with the appropriate action. The results of its investigation are submitted to the concerned administrative authorities and, if necessary, to the competent judicial bodies.

The Council shall initiate awareness-raising activities, public relations and communication to promote human rights. It shall also give its opinion, suggestions and recommendations in relation to the promotion and protection of human rights (Art. 199).

The Council shall prepare an annual report to submit to the President of the Republic, Parliament and the Prime Minister, and publish it.

Ladies and Gentlemen,

To conclude, Algeria has come a long way in the field of protecting human and individual rights, but there is still much to be done. The legal reforms, already undertaken in this regard, the new Constitution and the organic laws stipulated by it, will strengthen this protection, particularly with the exception of constitutionality whose implementation will take place later in 2019.

Thank you for your kind attention.

**CONSTITUTIONAL COURT'S
ROLE IN RESPECTING AND
PROTECTING CITIZEN'S RIGHTS AS
CONSTITUTIONAL DEMOCRACY
MANIFESTATION**

Fransisca / Anna TRININGSIH
INDONESIA



CONSTITUTIONAL COURT'S ROLE IN RESPECTING AND PROTECTING CITIZEN'S RIGHTS AS CONSTITUTIONAL DEMOCRACY MANIFESTATION

*Fransisca**

*Anna TRININGSIH***

INTRODUCTION

The concept and regulation of human rights in the 1945 Constitution was passed in Annual Plenary Meeting of the People's Consultative Assembly (MPR) in 18 August 2000, related to many discussions about human rights in the period of 1999-2000. Strengthening human rights provisions in the Constitution was a result of major changes in Indonesia nation life after the fall of Soeharto and monetary crisis throughout Asia in 1998. Human rights regulation in the 1945 aimed to fulfill Indonesia's commitment in manifesting law state.¹ Human rights are particularly regulated in Chapter XI A which contains ten Articles, Article 28A-28J, and twenty six paragraphs. Of the twenty six paragraphs contained, twenty one of them regulate about rights, two paragraphs about obligation, two other paragraphs about right limitation, and one paragraph regulates about guarantee of human rights implementation.² All aspects of civil, politics, economy, social and culture have been regulated and guaranteed in this Chapter.

Rights of individuals in the Constitution have been formulated in the phrase "every citizen" in the Constitution. Individual rights

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1 Majelis Permusyawaratan Rakyat RI, *Panduan Pemasyarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia*, Jakarta, 2011, Sekretariat Jenderal MPR RI, page 166.

2 Isra, Saldi. "Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia", as delivered in Internasional Seminar entitled "Comparative Study on Constitution of Indonesia and Malaysia": *Human Rights Discourses* hosted by Law Faculty of Universitas Eka Sakti, Padang, Juli 2, 2012, page 413.



in the Constitution are in line with the provisions of Universal Declaration of Human Rights. Individual rights regulated in the Constitution are as followed:

1. Every citizen has right to live and defend his/her life and existence.
2. Every citizen has right to establish a family and procreate based upon lawful marriage.
3. Every citizen has right to self-develop through fulfillment of basic needs, has right to get education and to get benefits from science and technology, arts and culture, for the purpose of improving quality and welfare of human race.
4. Every citizen has right to advance him/herself through collective struggle for his/her rights to develop society, nation, and state.
5. Every citizen has right to recognition, guarantee, protection, and fair legal certainty, as well as equality before the law.
6. Every citizen has right to work and to receive fair and proper remuneration, as well as treatment in employment.
7. Every citizen has right to get citizenship status.
8. Every citizen has freedom to choose and conduct religious practices according to his/her belief or religion as well as to choose education, job, citizenship, residence within the state territory, and to leave and subsequently return to his/her residence.
9. Every citizen has right to freedom of belief, and to express his/her view in accordance with his/her conscience.
10. Every citizen has right to associate, to assemble, and to express opinions.
11. Every citizen has right to communicate and to gain information for self-development and social development, as well as to seek, obtain, possess, store,



process, and deliver information by using all available types of channel.

12. Every citizen has right to protection of his/herself, family, honor, dignity, and property, as well as right to feel secure and protected from threats of fear to do or not do something that is a human right.
13. Every citizen has right to be free from torture or abuse treatment, as well as right to get political asylum from other country.
14. Every citizen has right to live prosperous physically and spiritually, to reside, and to enjoy well and healthy environment, as well as to get healthcare services.
15. Every citizen has right to receive facilitation and special treatment to get equal opportunity and benefits in order to achieve equality and justice.
16. Every citizen has right to social security in order to develop him/herself fully as a dignified human being.
17. Every citizen has right to have personal property, and such right may not be unjustly taken by others.
18. Every citizen has right to be free from discriminative treatments based upon any grounds and to get protection from such treatments.

Recognition and guarantee on human rights, as stated in the Constitution, doesn't deny the existence of violations against the rights that committed by various interests, particularly interests related to short-term political interests of legislator. It is indeed that laws and regulations made by either the House of Representatives jointly with the Government or secondary legislators are not always sensible to human rights. Responding to potential violations through policy and regulation, the 1945 Constitution has provided space for citizens to file judicial review petition against the policy and regulation to either the Supreme Court or the Constitutional Court.

The Constitutional Court was established under third amendment of the 1945 Constitution. The establishment of the



Constitutional Court is not only to ensure the conformity of Acts to the Constitution as supreme law, but also to ensure that the Acts not contain human rights violation and as a means of strengthening checks and balances mechanism between branches of state power in order to minimize abuse of power. As known, according to Lord Acton, power tends to corrupt, absolute power corrupt absolutely.

This paper discusses about how the Constitutional Court of the Republic of Indonesia as constitution guardian exercises its constitutional tasks through court decisions that provide impact and improvement in law and constitutional reform in Indonesia. Several Constitutional Court Decisions provide good reference to assess how the Constitutional Court exercise judicial review jurisdiction for human rights development and protection. The Decisions are as followed:

CONSTITUTIONAL COURT DECISION NUMBER 011-017/PUU-I/2003

The decision that declared in 24 February 2004 has rehabilitated the rights of former members of the Indonesian Communist Party and their descendants who experienced arrest or imprisonment under alleged involvement, either direct or indirect, in the 30th September Movement (G 30 S/Gestapu). The Decision was about judicial review of Article 60 letter g Act No. 12 Year 2003 of Member Elections of the House of Representatives, the Regional Representatives Council, Provincial Legislative Councils and City/Regency Legislative Councils. As known, the Article regulated prohibition to be House and Councils members for citizens who were former member of Indonesian Communist Party including the Party's substructure groups and for citizens who directly or indirectly involved in the 30th September Movement or involved in other banned organizations.

Such limitation stated in the Article was not in conformity with Article 28J (2) the 1945 Constitution because it was only based on political consideration, didn't guarantee recognition on other people rights and freedom, and didn't fulfill justice under consideration of morals, religious values, security and democratic



public order. Imposition of legal responsibility, in this case is prohibition to be House and Councils member, to law subject who indirectly involved in the Movement under reason that the subject was a former member of the Communist Party or other banned organization, was contrary to law, justice, legal certainty and law state principles. The prohibition was also didn't relevant with national reconciliation attempt (particularly after the occurrence of event that cause a party or an organization declared prohibited/banned) that already became a common commitment for better democratic future. Banning on party or organization couldn't make its former members treated differently. The former members of banned party or organization should be treated equally without discrimination. The 1945 Constitution has ensured political rights of citizens to elect and to be elected, such as to be elected as House and Councils members, without discrimination [vide Article 27, Article 28D (1) and (3), and Article 28I (2)].

CONSTITUTIONAL COURT DECISION NUMBER 05/PUU-V/2007

This decision allows independent candidate to run regional election candidacy. It was declared by the Constitutional Court in 23 July 2007. It was about judicial review on Act No. 32 Year 2004 of Regional Governance which regulate that regional election candidate can only run candidacy by the support of political party or political party coalition.

In order to ensure equality as guaranteed by Article 28D (1) and (3) the 1945 Constitution, independent candidacy that determined by Article 67 (2) Act of Aceh Governance cannot be declared unconstitutional because the Constitution never prohibit independent candidacy. Equality can be done by synchronizing Act of Regional Governance to recent dynamics that had been done by legislators, which was by giving right to individual to run regional head and deputy head candidacy without support from political party or political party coalition as determined by Article 67 (2) Act of Aceh Governance. Independent candidacy outside Nanggroe Aceh Darussalam Province should be opened in order to



avoid dualism in implementing Article 18 (4) the 1945 Constitution because dualism can cause violation on fair legal certainty as guaranteed in Article 28D (1) and (3) the 1945 Constitution. Therefore, regional head and deputy head candidacy can also be done constitutionally via independent way under requirements that proportional to requirements applied in candidacy by political party or political party coalition.

CONSTITUTIONAL COURT DECISION NUMBER 102/PUU-VII/2009

This decision allows the use of identity card (*KTP*) or passport as additional voting requirement in presidential election. Technical problems potentially reduce citizen's right to vote. In 6 July 2009, the Constitutional Court declared that identity card or passport can be used for additional voting requirement for voters. The Decision was about judicial review of Act No. 42 Year 2008 of Presidential Elections. It generally ruled that administrative procedures cannot negate citizen's right to vote. The Court argued that citizen's right to vote is a part of human rights and constitutional rights of citizen. Right to vote cannot be hampered by administrative provisions or procedures which troubled citizens in using their right. The Decision was self-executing; it can be applied directly by the General Election Commission without Government Regulation in-Lieu-of Law (*Perpu*). It aimed to protect and fulfill citizen's constitutional right to vote.

CONSTITUTIONAL COURT DECISION NUMBER 46/PUU-VIII/2010

The Decision No. 46/PUU-VIII/2010 was about judicial review on Act No. 1 Year 1974 of Marriage. As known, the Applicants challenged the constitutionality of Article 2 (2) and Article 43 (1) Act No. 1 Year 1974. Article 2 (2) stated "marriage is recorded according to the laws and regulations", while Article 43 (1) stated "a child born outside marriage only has civil relationship with his/her mother and his/her mother family". The Applicants were a mother and her child who was born in a legitimate marriage according to Islamic teachings but the marriage wasn't recorded by law.

Decision on marriage recording by law was about legal meaning of marriage recording. The main problem was, does a child that born in legitimate marriage which yet recorded or unclear recorded (due to dispute about the marriage's legitimacy), or a child born outside marriage should bear responsibility or become victim of a matter the child doesn't commit, whereas the child's born is initiated by a woman's pregnancy that caused by a man (which proved by science and technology tools)?

Every child has right to grow up, as well as to get protection from violence and discrimination [vide Article 28B (2) the 1945 Constitution]. The rights aforementioned can only be fulfilled effectively if law subject that responsible for it conduct protection. The law, in this case is Constitutional Court Decision, opens way to figure out the law subject responsible for obligation on nurturing and protecting child. Child is born innocent. Child should not become victim and bear stigma of 'illegal child', 'child without father', or any other stigmas that could hamper child dignity and equality. As known, equality before the law is one of the main principles of law state.³

A man who commits sexual intercourse with a women that later resulted in pregnancy should bear responsibility to the child who born by that. A man is also responsible to the child who born by artificial insemination. The implication of this Decision in field of marriage and family law, such as matter of trustee in marriage, inheritance, etc. in Act No 1/1974 is possibly regulated by religious law because the Act is formally unified but materially pluralist. Therefore, the Act gives opportunity to religions to form regulations for their followers respectively.

CONSTITUTIONAL COURT DECISION NUMBER 34/PUU-XI/2013

This Decision regulates that reconsideration (*PK*) may only be filed once. It was declared by the Court in 6 March 2014 and was about Act No. 8 Year 1981 of the Criminal Code. The Decision stated "(3) Request of reconsideration against a court decision may

³ *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Pasal 1 ayat (3).



only be done once”

Reconsideration as extraordinary legal remedy historically and philosophically is a remedy that aims to protect convict's interest. Reconsideration is different from ordinary legal remedies such as appeal or cassation. Ordinary legal remedy should be related to the principle legal certainty. Because without legal certainty, namely to determine the limitation of time in filing a regular legal remedy, it will create legal uncertainty that would spawned injustice and the legal process is not completed. Thus, requirements of ordinary legal remedy are related to material truth that willing to be achieved and related to certain period of time after a court decision declared formally. On the other hand, extraordinary legal remedy aims to find justice and material truth. Justice cannot be limited by time or by formal provisions that limit reconsideration filing, because a new substantial novum might be found after reconsideration filed and adjudicated. Examination on whether a condition considered as novum is jurisdiction of the Supreme Court, which also has jurisdiction on reconsideration. Thus, it is very substantial to file extraordinary legal remedy because fundamental requirement of it is truth and justice in criminal proceedings.

CONSTITUTIONAL COURT DECISION NUMBER 55/PUU-VIII/2010

The petition of this case was filed by farmers. The farmers requested the Court to eliminate Article 21 and its elucidation, as well as Article 47 Act of Plantation. According to them, the Articles reviewed were ambiguous, didn't explain in detail about the activities which qualified as criminal offense, and the definition of criminal offense is very broad and complicated. Criminal provision of Article 47 also potentially criminalizes them because it provides criminal sentence to those who commit violation under Article 21.

According to the Constitutional Court, criminal sentence against indigenous people who resided in customary law land is not in accordance with the Constitution, because their customary law still in force and in line with people development within the framework of Unitary State of the Republic of Indonesia. The Constitution also



provides protection on marginalized people, including indigenous people, in order to uphold nation pluralism. Regarding the phrase “and/or other activities that disturb plantation business” in Article 21, the Court declared the phrase contains legal uncertainty, so it contrary to the principles of law state as stipulated in Article 1 (3) the 1945 Constitution that mandates fair legal certainty, as well as contrary to recognition of indigenous people’s rights and their customary law.

CONCLUSION

In conclusion, Constitutional Court Decision is a crown of judicial institution. Thus, Constitutional Court’s role and achievement in contributing to legal and constitutional reform in Indonesia are easily figured out in Constitutional Court Decision. In adjudicating cases, the Constitutional Court sometimes implements progressive law paradigm; emphasizes more on the importance of substantive justice than procedural justice. It also means that court decision doesn’t always bound by absolute legal formal, because court decision needs to achieve its main goal; fulfillment of justice values for people and protection of citizen’s constitutional rights.

***THE RIGHT TO RESPECT PRIVATE AND
FAMILY LIFE***

Kanat AKHANOV
KAZAKHSTAN



THE RIGHT TO RESPECT PRIVATE AND FAMILY LIFE

*Kanat AKHANOV**

Dear colleagues!

I want to thank the organizers of the Summer School for the perfectly organized event and I wish all participants fruitful work.

Article 1 of the Constitution of the Republic of Kazakhstan proclaims itself democratic, secular, constitutional and social state the highest values of which are the person, his life, rights and freedoms.

The rights and freedoms of the person and the citizen are guaranteed by the state in the limits set by Constitution, laws and other normative legal acts corresponding to it and are fundamental while elaboration and adoption of the laws and other normative legal acts determining conditions and a procedure of these rights and freedoms realization. The specified rule is a conceptual basis of acting law of Kazakhstan (normative resolutions of the Constitutional Council of October 28, 1996 No. 6, of June 10, 2003 No. 8 and of April 18, 2007 No. 4, of August 20, 2009 No. 5, etc.).

Inviolability of private life, the personal and family secret, honor and dignity protection of the person are the determining factors of constitutional legal status of the person and citizen in the Republic of Kazakhstan.

The constitutional consolidation of the right to inviolability of private life, personal and family secret, protection of the honor and dignity follows from the conventional international acts on human rights, the participant of which is the Republic of Kazakhstan.

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Therefore, in the Universal Declaration of Human Rights (art. art. 3, 12), in the Convention on human rights and fundamental freedoms protection of November 4, 1950 (art. art.5, 8), in the International Covenant on Civil and Political Rights (art. 17) it is enshrined that each person has the right for life, freedom and personal inviolability. Nobody can be exposed to any intervention in his private and family life, any infringement of inviolability of his dwelling, the secrecy of correspondence or of honor and reputation. Each person has a right for defense from such intervention or such encroachments.

The agreement on expanded partnership and cooperation between European Union and the Republic of Kazakhstan provides, including protection against intervention in private life of individuals while processing and distribution of personal data and protection of confidentiality of data on private life and accounts (it is ratified by the Law of Republic of Kazakhstan of March 25, 2016 No. 475-V).

The right of a man and citizen for personal inviolability implies the protected in Constitution and legislation of the Republic subjective right of each person for every possible protection from the state not only physical, mental and spiritual life of the individual, but also those conditions which creates an opportunity to use freely the benefits to implementation of personal needs if it doesn't contradict interests of the individual, society and state.

Inviolability of a private life, personal and family secrets are protected by the Constitution and laws of the Republic Kazakhstan. The information about the person giving an assessment to his nature, character, health, material condition, marital status, a conduct of life, the separate facts of the biography is subject to such protection.

Personal and family secrets are the part of private life, the sphere of delicate and intimate aspects of life of the individual which announcement are considered by him undesirable: secrecies of the will, adoption, medical diagnoses, money deposit, etc.

For the purpose of protection against illegal invasion into private life of the personality, non-admission of a personal and family secrecy violation, ensuring honor and dignity protection

of the person and, concretizing constitutional legal principle of responsibility of the state for illegal actions (or failure to act) state bodies or their officials, in the current legislation of the Republic the order and conditions of non-admission, prevention and compensation or other proportional responsibility for the damage (harm) caused by such actions (failure to act) are established.

The personal secrecy means the right of the individual to determine the behavior in society, to regulate independently the mode of information and to demand from other persons observance of these rights.

Family secrecy is the right not just of several persons, but the persons connected by blood, other related bonds for concealment of the facts determining behavior of family members.

According to subparagraph 29) of article 1 of the Code of the Republic of Kazakhstan on marriage (matrimony) and a family, the family is a circle of people, connected by material and personal non-property rights and obligations following of marriage (matrimony), relatives, relationship by marriage, adoption or other form of acceptance of children for upbringing and designed to promote strengthening and development of the family relations.

In a family there can be both an all-family secret, and the personal secret of the certain family member. Under certain circumstances personal and family secrets can match or be separate. These concepts are closely connected among themselves and the border between them is represented rather conditional.

The regulations that personal privacy, a personal and family secret are under protection of the law are fixed by article 53 of the Code of the Republic of Kazakhstan on marriage (matrimony) and a family. The officials performing the state civil registration, and also other persons otherwise informed on private life are obliged to keep a personal and family secret. Disclosure of information on private and family life of citizens attracts the responsibility established by laws of the Republic of Kazakhstan.

In the national legal system of the Republic of Kazakhstan inviolability of private life found its reflection in regulations of



Civil, Civil procedural, Criminal procedure codes of the Republic of Kazakhstan, the Code on Administrative Offences, the Code on health of the population and a health care system, and also in a number of laws and other normative legal acts.

So, according to paragraph 3 of article 115 of the Civil code of the Republic of Kazakhstan (A general part) private life inviolability, the personal and family secret, advantage of the personality belong to the personal non-property benefits and rights. Judicial protection of these constitutional rights isn't limited to the term of limitation period (subparagraph 1) of article 187).

The right for a personal and family secret is the natural right of the person, belongs to everyone owing to the birth and belongs to the non-material benefits directed to inviolability of interior world of a man and its interests. Interior world of a man characterizes his private life.

The citizen of Kazakhstan, on the one hand, foreigners and stateless persons and state bodies, on the other hand, can be involved in realization of the specified rights.

The judicial obligation in legal relationship concerning protection of constitutional right for personal inviolability is assigned only to state bodies. However both competent state bodies (legal entities), and certain citizens (physical persons) and their associations shall observe the specified right.

The civil code of the Republic of Kazakhstan provides protection of the right for protection of private life (article 144) and the rights for own image (article 145).

The citizen has the right for protection of a secrecy of private life, including the secrecy of correspondence, telephone negotiations, diaries, notes, intimate life, adoption, the birth, a medical, advocate secret, the secrecy of bank deposits. Disclosure of a secrecy of private life is possible only in the cases established by legal acts. Publication of diaries, notes and other documents is allowed only with the consent of their author and the addressee. In case of death of any of them the specified documents can be published with the consent of the surviving spouse and children. Nobody has the right



to use the image of any person without his consent, and in case of his death – without consent of his heirs. Publication, reproduction and distribution of the graphic work (a picture, the photo, the movie and others) in which other person is represented, is allowed only with the consent of represented, and after his death with the consent of his children and the surviving spouse. Such consent isn't required if it is established by legal acts, or the imaged person posed for a certain fee.

By article 10 of the Code of civil procedure of the Republic of Kazakhstan it is specified that private life, a personal and family secret are under protection of law. Everyone has the right to the secrecy of personal deposits and savings, correspondence, telephone negotiations, post, cable and other messages. Restrictions of this right during civil procedure are allowed only in the cases and an order which are directly established by law.

The Code on Administrative Offences provides a number of articles on the matter.

Accordingly, the article 15 "Respect of personal honor and dignity" forbids the decisions and actions humiliating honor and derogating the dignity of the person participating in case, use and distribution of information about private life aren't allowed, and equally information of personal and business nature which the person considers necessary to keep in secret, for the purposes which aren't provided by this Code. The moral harm done to the person in a course of production on cases of administrative offenses by illegal actions of court, other state bodies and officials is subject to compensation in the order established by law.

By the article 16 "Private life inviolability and secrecy protection" it is fixed that private life, the personal, family, commercial and protected by the law other secret are under protection of law. Everyone has the right for secrecy of personal deposits and savings, correspondence, telephone negotiations, post, cable and other messages. Restrictions of these rights in a course of administrative proceedings are allowed only in the cases and an order which are directly established by the law.



The Code on Administrative Offences provides responsibility for violation of the legislation of the Republic of Kazakhstan on personal information and their protection (article 79), for disclosure by participants of the national preventive mechanism of the information about private life of the person which became known during preventive visits without consent of this person if this action doesn't contain signs of criminal act, provides a penalty in the amount of twenty monthly estimate indicators (article 508).

The Criminal Code of Kazakhstan provides responsibility for violation of personal privacy and the legislation of the Republic of Kazakhstan on personal information and their protection (art. 147), for disclosure of secrecy of adoption (art. 138), illegal violation of a secrecy of correspondence, telephone negotiations, post, cable or other messages (art. 148), violation of inviolability of home (art. 149), disclosure of a medical secret (321).

For example, according to article 147 part 1 of the Criminal Code of Kazakhstan illegal collecting of the information about private life of the person which is his personal or family secret without his consent or causing essential harm to the rights and legitimate interests of the person as a result of illegal collection and handling of other personal information - is punished by a penalty at the rate to two thousand monthly estimate indicators or curator (correctional) works in the same size, or restriction of freedom for a period of up to two years, or imprisonment for the same term.

Also, chapter 7 of the Criminal Code of Kazakhstan contains norms on illegal access and distribution of information of limited access.

The Code of Criminal Procedure of the Republic of Kazakhstan (further – the CCP of RK) in articles 13-18 determines an order of criminal trial on such questions as: respect of personal honor and dignity, inviolability of person, protection of the rights and freedoms of citizen while criminal proceedings, personal privacy, the secrecy of correspondence, telephone negotiations, post, cable and other messages, inviolability of home and property.

According to article 16 of the Code of Criminal Procedure of RK, private life of citizens, a personal and family secret are under



protection of law. Everyone has the right to the secrecy of personal deposits and savings, correspondence, telephone negotiations, post, cable and other messages. In case of implementation of criminal proceeding everyone is ensured the right for inviolability of private life (personal and family). Restriction of this right is allowed only in the cases and an order which are directly established by law. Nobody has the right to collect, to store, use and distribute information on private life of the person without his consent, except the cases provided by law. Information on private life of the person obtained in the order provided by this Code can't be used differently as for accomplishment of aims of criminal procedure.

Part 3 of article 241 of the Code of Criminal Procedure of the Republic of Kazakhstan specifies that the body of pre-court investigation uses all means provided by law for restriction of distribution of the information received as a result of secret investigative action if they touch upon the secrecy of private life of the person or concern other secret protected by law. According to article 17 of Code of Criminal Procedure of the Republic of Kazakhstan, the dwelling is inviolable. Entering into the dwelling against the will of the persons living there, search of the dwelling is allowed only in cases, established by law. The bases and an order of entering into the dwelling for search are set in chapter 31 of the Code of Criminal Procedure of the Republic of Kazakhstan.

According to article 21-10 of the Criminal Executive Code of the Republic, participants of the national preventive mechanism (The Commissioner for Human Rights, and also members of the public monitoring commissions and public associations performing activities for protection of the rights, legitimate interests of citizens, lawyers, social workers, medical workers selected by Coordination council) have no right to disclose the information on private life of the person which became known during preventive visits without consent of this person.

According to point 7 of article 87 of the Code of the Republic of Kazakhstan on health of the people and a health care system, the state guarantees to citizens of the Republic of Kazakhstan inviolability of private life, preserving information that is a medical secret.



Article 10 of the Law of the Republic of Kazakhstan “On the child’s rights in the Republic of Kazakhstan” affirms the child’s right to life, personal liberty, inviolability of dignity and private life. The state provides inviolability of the child, protects him against physical and (or) mental abuse, the cruel, rough or degrading human dignity treatment, actions of sexual nature, involvement in criminal activities and making of the antisocial actions and other types of activity violating the rights and freedoms of the person and the citizen affirmed by the Constitution of the Republic of Kazakhstan. According to article 47-10 of the Law of the Republic of Kazakhstan “On the child’s rights in the Republic of Kazakhstan”, participants of the national preventive mechanism have no right to disclose the information on private life of the person which became known during preventive visits without consent of this person. Disclosure by participants of the national preventive mechanism of the data on private life of the person which became known during preventive visits without consent of this person involves responsibility established by laws of the Republic of Kazakhstan.

In aims of ensuring protection of rights and freedoms of a man and citizen while collecting and processing ones personal information the law № 94-V “On personal data and its protection” was adopted on May 21, 2013 (further – Law of personal data and its protection).

According to a preamble, this legal act regulates the public relations in the sphere of personal data, and also determines the purpose, the principles and the legal basis of activities connected with collection, handling and personal data protection.

It should be noted that the Law on personal data and its protection establishes a general framework of legal regulation because the features of collection, handling and personal data protection can be regulated by other laws, and also acts of the President of the Republic of Kazakhstan (point 2 of art. 3).

In particular, laws on National archival fund and archives, on the state secrets, on operational search, intelligence activities, on law-enforcement service can be referred to other laws.



The separate provisions aimed at providing the rights of the citizens established in article 18 of the Constitution are set in the Law of RK on informatization which establishes the legal basis of informatization, governs the public relations arising while development, use and protection of electronic information resources and information systems.

According to point 2 of article 4 of the Law on informatization one of the basic principles of state regulation in the sphere of informatization is inviolability of private life of citizens and strict observance of constitutional rights and freedoms of citizens.

Thank you for attention.

*THE RIGHT TO RESPECT PRIVATE
AND FAMILY LIFE
(FROM THE PRACTICE OF THE
CONSTITUTIONAL COUNCIL OF THE
REPUBLIC OF KAZAKHSTAN)*

*Zaure N. SHARIPOVA
KAZAKHSTAN*



THE RIGHT TO RESPECT PRIVATE AND FAMILY LIFE (FROM THE PRACTICE OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

*Zaure N. SHARIPOVA**

Dear colleagues!

The Constitution grants everyone the right to protection of honor and dignity (para. 1, Art. 18) obligates everyone to respect the rights, freedoms, honor, and dignity of others (para. 1, Art. 34).

According to the regulatory decision of the Supreme Court of the Republic of Kazakhstan dated on December 18, 1992 № 6 “Application in judicial practice of defamation laws, dignity, and business reputation of individuals and legal entities,” “honor - a public esteem, a measure of its spiritual and social qualities. Dignity - the inner self-esteem of a person at own qualities, abilities, outlook, and social significance”. In this regulatory decision, also noted that the dissemination of information, discrediting the honor and dignity of a citizen or an organization, is their publication in the press, a message on the radio, television, and through other media, a statement in official parties and other characteristics, public speeches, statements, addressed to various organizations, officials, or other messages, including orally to several persons, or at least one person.

It should be noted that a publication in online resources is considered to be the proliferation of such information, as in accordance with the Law on the mass media where the Internet resources allocated to media outlets.

The message of such information to the person to which they relate, can't admit their distribution.

* Director of the Analysis Unit of the Constitutional Council of the Republic of Kazakhstan.



Discrediting such false information, which detract from the honor and dignity of the person or organization in the public opinion or the opinion of individuals with regard to compliance with laws, moral principles (for example, information about the commission of a dishonest act, improper behavior in the workplace, in the family; information, denatures the production and business activities, reputation, etc.).

At the same time can't be recognized as valid claim for denial of information containing untrue criticism of shortcomings in work behavior, in a public place, in the team, and at home. In establishing the inconsistency of false information discrediting the honor and dignity, the responsibility for their refutation on the responsibility of the respondent regardless of his guilt in the dissemination of this information.

The Basic Law of the country enshrines the right of everyone to the inviolability of private life, personal and family secrets, protection of human dignity and honor, to confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph, and other communications (paragraphs 1 and 2 of Article 18 of the Constitution). These human rights are the determining factors of constitutional-legal status of man and citizen in the Republic of Kazakhstan and belong to private life, the field of delicate sides of the individual life, the announcement of which is considered undesirable.

The Constitution does not preclude the admissibility of restrictions on these rights, in accordance with paragraph 1 of Article 39 of the Constitution of the rights and freedoms of man and citizen may be restricted by the law to the extent of it necessity in order to protect the constitutional order, public order, human rights and freedoms, health and morals.

In the Regulatory resolutions of the Constitutional Council of the Republic of Kazakhstan dated on August 20, 2009 № 5 given an official interpretation of paragraph 2 of Article 18 of the Constitution, in the part of everyone's right to confidentiality of personal deposits and savings.



It was noted: By the Constitution, an owner shall have the right to possess, use and dispose of personal contribution and savings to exercise these rights by placing its own amount of money or other property-related, including bank deposits and other accounts in the authorized capitals of economic entities and the use of other forms of business permitted by the law, and other activities.

Under the confidentiality of personal deposits and savings to be understood protected by law, any non-publicly available on equal terms to the general public, information about the depositor, owned him money or other assets, including bank deposits, other accounts, and savings of in authorized shares capital of businesses and other assets, as well as transactions with them. The constitutional right of everyone to the confidentiality in this context means that only the investor can dispose of it (including the transfer information to anyone) at its discretion.

The limits and the procedure for restrictions on the right of everyone to the confidentiality of personal deposits and savings, as well as the criteria for such limitation must comply with constitutional requirements, including those set in Art. 39 of the Constitution.

Established in the laws limits confidentiality of personal deposits and savings must be adequate to the nature of the relevant legal relationships, proportionate for the protection of the rights and freedoms of man and citizen, and comply with the principle of fairness.

Imposing by the state on banks, financial and credit institutions, business and other economic entities the duty to provide authorized by law to state bodies and their officials information constituting secrecy of personal deposits and savings, is permitted in the cases and in the manner required for the implementation referred to in para. 1, Art .39 of the Constitution purposes.

An exhaustive list of reasons should be determined in the law, which makes possible the existence of such restrictions and provide safeguards to ensure reclamation, preparation and use of information constituting secrecy of personal deposits and savings, with the exclusion of unauthorized disclosure of such information.

Also, by the above-mentioned Regulatory resolutions of the Constitutional Council, in terms of consideration of the



constitutionality of the Law “On counteraction to legalization (laundering) of illegally acquired incomes and financing of terrorism” found that *public authorities are obliged to ensure the rights of citizens related to the use of information outside Kazakhstan. The state should create an efficient mechanism to provide a maximum of citizens’ rights. This constitutional requirement refers to the need to establish a clear procedure in the law to provide information to foreign bodies, as well as the reasons for refusal in its granting.*

From the constitutional right to privacy of correspondence, telephone conversations, postal, telegraph, and other communications it is followed that everyone’s right to confidentiality of data and other information on his correspondence, telephone conversations, postal, telegraph and other communications should be provided, as well as the appropriate duty of public authorities, postal, telegraph, and other services involved in telecommunications services, to keep secret correspondence, telephone conversations, mail, telegraph, and other messages transmitted over networks and telecommunications, also it obligates the state ensure this right in the legislation and enforcement.

Thus, the Constitution defines the basis of the legal regime and legislative control as a condition of the guarantee and the method of protection of information about the private lives of citizens, including their privacy, secrecy of correspondence, telephone conversations, postal, telegraph and other messages sent by e-mail, networks communications and Media.

Institute of secrecy of correspondence, telephone conversations, postal, telegraph and other communications by their nature and purpose of a private-public nature, is aimed to ensure conditions for the effective functioning of the postal services and telecommunications systems, with the exception of cases of restriction of this right in accordance with the procedure established by the laws of the Republic of Kazakhstan.

With such an approach, the scope and content of the powers of public authorities and their officials who are carriers of public functions, in their relations with carriers, postal and telegraph



offices, as well as the scope and content of the rights and responsibilities of citizens in their relations with both organizations which are carriers of the postal, telegraph and other information, and with public authorities and their officials should be predetermined by the legislator to be able only to implement these functions to with use of a secret, thereby affecting the privacy and personal privacy of citizens.

The privacy of correspondence, telephone conversations, postal, telegraph, and other communications, is the protection by the postal and telecommunications organizations by virtue of the requirements of the law of information, disclosure of which could violate the rights of the individual.

Notwithstanding the obligation of these entities to provide the necessary secrecy, however, the current legislation provides derogations from the right to privacy on duties and responsibilities of postal and telecommunications service, on the basis of the constitutional principle of the rule of law, the State's obligation to respect and protect the rights and freedoms of man and citizen as the highest value and ensure their balance in legislation and law enforcement, the rule of the Constitution and its supreme legal force.

Such deviations (eg, providing information to state bodies and their officials) shall comply with the requirements of para. 1, Art. 39 of the Constitution, be appropriate, proportionate and necessary to protect the constitutionally significant values, including private and public rights and interests of citizens, not affecting the substance of the relevant constitutional rights, i.e. not to limit the scope and application of the core content of the right to perpetuate these constitutional provisions, and can be justified only by the need to ensure specified in para. 1, Art.39 of the Constitution purposes.

By virtue of paragraph 3 of Article 18 of the Constitution, to any citizen concerning the rights and freedom of information (except for information containing state secrets, information about the private life and sensitive information related to the official, commercial, professional and inventive activity) should be available to him



at provided that the legislator has not provided the special legal status of such information in accordance with the constitutional principles, justifying the necessity and proportionality of its special protection.

In the Resolution of the Constitutional Council dated on August 5, 2002 № 5 “On the conformity with the Constitution of the Republic of Kazakhstan Law of the Republic of Kazakhstan” On amendments and additions to some legislative acts of Kazakhstan on issues of public prosecutor’s supervision” it found that the constitutional right of everyone to get acquainted with documents, decisions and sources of information affecting their rights and freedoms, as well as the obligation of public authorities and officials ensures that this right is implemented in the systematic relations with other constitutional provisions, in particular the right of everyone to freely receive information by any means not prohibited by the law, on the legal regime of information constituting state secrets defined by the law, to limit the rights and freedoms of man and citizen only by the laws and only to the extent that this is necessary in order to protect the constitutional order, public order, human rights and freedoms, health and morals. Rights under Art. 18 of the Constitution are not included in the list of rights and freedoms cannot be restricted in any form (Article 39, paragraph 3 of the Constitution).

In accordance with the Administrative Procedure Act, the requirements for exchange of information are defined. The named Act states that information procedures should not allow the disclosure of proprietary and other information related to the interests of the state. For civil servants, service information is available only for the performance of their duties. Subparagraph 3) of paragraph 2 of Article 15 of the Act establishes procedures for the implementation of citizens’ rights, which suggests the possibility of preventing the disclosure without the consent of the citizens of their private information life and personal and family secret.

The regulatory resolutions of the Constitutional Council of the Republic of Kazakhstan dated on May 18, 2015 №3, it is noted that, in accordance with paragraph 1 of Article 27 of the Constitution



of the Republic of Kazakhstan marriage and family, motherhood, fatherhood and childhood are protected by the state and are among the fundamental constitutional Republic values, which naturally arise from the lofty goals and basic principles set out in the basic Law. Taken together, they provide the continuity of generations, are the conditions for preservation and development of the people of Kazakhstan, which is the bearer of sovereignty and the only source of state power.

In the Regulatory resolutions of the Constitutional Council has repeatedly emphasized that the rights and freedoms of man and citizen guaranteed by the state within the limits set by the Constitution and the corresponding regulatory legal acts, and are fundamental in the development and adoption of laws and other normative legal acts that determine the conditions and procedures for exercising these rights and freedoms. This legal position is the conceptual component of the current Kazakhstan law (from October 28, 1996 № 6/2, dated on June 10, 2003 № 8, dated on April 18, 2007, № 4, dated on August 20, 2009 № 5, and others).

In the Message of the Constitutional Council dated on June 12, 2012 № 09-3/1, the Constitutional Council noted the need to legally disclose the concept of “privacy” in paragraph 1 of Article 18 of the Constitution, which will promote a uniform approach to its use in the activity of courts and law enforcement agencies, as well as the protection of constitutional rights and freedoms of citizens.

In order to implement the Constitutional Council’s proposals on the disclosure of the concept of “privacy” in the Code of Criminal Procedure strengthened legal guarantee of non-interference in the private (personal and family) life during the criminal proceedings.

Thank you for attention.

***RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE***

Dzhamilia ABDYMOMUNOVA
KYRGYZ REPUBLIC



RIGHT TO RESPECT PRIVATE AND FAMILY LIFE

*Dzhamilia ABDYMOMUNOVA**

Dear Ladies and Gentlemen!

Let me on behalf of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic greet the participants of the Summer School and to express gratitude to the organizers for the invitation and success of the previous schools, which over the years have become a good platform to discuss topical issues on constitutional justice.

Before starting our presentation let me briefly tell you about the history of establishment of constitutional justice in the Kyrgyz Republic and activities of the Constitutional Chamber

The Constitution 1993 of independent Kyrgyzstan has defined the place and role of the judiciary in general and in particular of Constitutional Court, and laid the foundations of the judicial and legal reform in the country.

In connection with the events of the political character happened in the country, the Constitutional Court of the Kyrgyz Republic was disbanded in 2010.

Following the adoption of new Constitution of the Kyrgyz Republic on 27 June, 2010, Constitutional Chamber of the Supreme Court of the Kyrgyz Republic was established as a specialized judicial body of constitutional control.

Constitutional Chamber began its work on 1 July, 2013 when quorum was formed.

So, today Constitution chamber:

- declare unconstitutional laws and other regulatory legal acts in the event that they contradict the Constitution;

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- 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.

One of the most important competencies of the Constitutional Chamber to protect the constitutional rights of citizens is a normative control, whereas in the framework of this competence shall be considered and resolved issues regarding the constitutionality or unconstitutionality of normative legal acts.

According to the Constitution of the Kyrgyz Republic everyone shall have the right to challenge the constitutionality of a law or another regulatory legal act in case she/he believes that these acts violate rights and freedoms recognized in the Constitution. In turn, Constitution providing right to appeal to the Constitutional Chamber does not associate the action with a direct violation of the rights and freedoms of subject of appeal. This kind of constitutional review, called an abstract and aimed at compliance with rule-making body of the Constitution and its provisions that regulate human rights and freedoms in the process of adoption of legal acts.

Undoubtedly, abstract kind of control provides more citizens the opportunity to protect their rights through the constitutional justice. Analysis of received complaints to the Constitutional Chamber shows that the number of complaints from citizens whose rights have not been directly infringed by the impugned regulations, is one third of all complaints to the Constitutional Chamber.

From the moment of formation Constitutional Chamber has decided 62 cases, which are directly or indirectly related to the protection of the rights and freedoms of humans and citizen.

Now in Kyrgyzstan constitutional justice carried out more active than ever. Constitutional Chamber strives to create new traditions of constitutionalism.

In 2015 realizing the importance of the tasks which assigned to the Constitutional Chamber, it was developed and adopted the Strategy of the Constitutional Chamber which provide the



prospects for the development of the constitutional justice in the Kyrgyz Republic.

Constitutional Chamber in the framework of its Strategy identified the following activities:

- 1) High quality of constitutional justice;
- 2) Ensure openness and transparency of the activities of the Constitutional chamber;
- 3) Ensure the effectiveness and accessibility of constitutional justice.

In prospect, we hope that through the implementation of our goals and challenges the Constitutional Chamber will become the undoubtedly authority and a recognized guideline in ensuring the supremacy of the Constitution, protection of rights and freedoms.

Let me start directly to the theme of our Summer school.

The right to respect for private and family life - one of the most important universally recognized human rights, which protection provided by the majority of international documents and national legislation.

According to article 12 of the Universal Declaration of Human Rights "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."

Provision similar in meaning and content contained in Article 17 of the International Covenant on Civil and Political Rights.

The above-mentioned international treaties are the part of the legal system of the Kyrgyz Republic and their regulation on the private and family life are reflected in the national legislation.

So, according the article 29 of the Constitution of the Kyrgyz Republic everyone shall have the right to inviolability of one's private life and the protection of honour and dignity; everyone shall have the right to secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications. The limitation of these rights is allowed only in accordance with law and solely on the basis of a court



order; collection, storage use and dissemination of confidential information as well as information on private life of a person without his consent shall not be allowed except for cases envisaged in the law; everyone shall be guaranteed protection, including judicial defence, from illegal collection, storage and dissemination of confidential information and information on private life of a person; the right for the compensation of material and moral damage caused by illegal action shall be guaranteed.

Also, Constitution of the Kyrgyz Republic provided that the family shall be the foundation of the society. Family, paternity, maternity, childhood shall be the subject of care of the entire society and preferential protection by law; each child shall have the right to the level of life, necessary for his physical, mental, spiritual, moral and social development; person reaching the age of consent shall have the right to marry and create a family. No marriage may be entered into without voluntary and mutual consent of the couple. The marriage shall be registered by the state.

Constitutional chamber in practice considered 3 cases, concerning the right for the private life. I will tell you about them in detail. Right for private life hasn't been subject of constitutional proceeding, yet.

On 14 September 2015 Constitutional Chamber considered case concerning the constitutional review of provisions of the Law of the Kyrgyz Republic "On biometric registration of citizens of the Kyrgyz Republic" due to application lodged by of the Kyrgyz Republic and the "Association of non-governmental and non-commercial organization".

Constitutional chamber held that Law "On biometric registration of citizens of the Kyrgyz Republic" do not conflict with Constitution of the Kyrgyz Republic". At the same time Parliament was mandated to make the appropriate amendments and additions to the Law "On biometric registration of citizens of the Kyrgyz Republic", as they rise from the reasoning part of this decision.

The aim of the Law shall be to create an up-to-date database of citizens of the Kyrgyz Republic using biometric data. In turn, tasks are:



- 1) determination of the qualitative and quantitative composition of the Kyrgyz Republic citizens residing in the territory of the Kyrgyz Republic and abroad;
- 2) compilation of an up-to-date list of voters
- 3) timely registration of citizens and issuance of identity documents;
- 4) effective struggle against crime, illegal migration, terrorism and human trafficking;
- 5) timely and qualitative granting services to the population;
- 6) maximum personal identification using a biometric database.

Constitutional Chamber in decision gave constitutional and legal interpretation to the concept of “privacy”. The term “privacy” pertains to the sphere of personal discretion, which, legally speaking, is an intangible value that must be protected by law from any arbitrary encroachment, including on the part of the state, by establishing the boundaries of acceptable, legitimate interference.

Legal protection of the right to privacy is achieved, first and foremost, by introducing constitutional safeguards. The extent to which citizens’ privacy is safeguarded and observed determines the degree of individual freedom available in any given state, and the extent to which its constitutional system can be held to be democratic and humane. State interference in the exercise of this right is permissible only if it is performed on the basis of the law, with a mandatory guarantee of protection (including judicial protection) and solely for the purposes of protecting national security, public order, public health and morals, and the rights and freedoms of other persons.

So, the Constitution of the Kyrgyz Republic provided that the state guarantees the ability of citizens to control their information and prohibits the disclosure of information that is of a strictly personal nature, while at the same time allowing interference on lawful grounds.

The collection or dissemination of information about a person’s private life is permitted only in accordance with the procedure



prescribed by law and only in relation to information which has already been officially entrusted to someone by that person and which has been collected and is stored, used and possibly disseminated in a lawful manner. Otherwise the result would be an arbitrary, unlawful invasion of the person's privacy, a narrowing of the definition of private life and a reduction in the extent to which its protection is guaranteed.

One of the constitutionally significant purposes of the state is to ensure national security, meaning to ensure that individuals, society and the state are protected against internal and external threats, in such a manner as to secure constitutional rights, freedoms, a decent standard of living, sovereignty, territorial integrity and the sustainable development of the Kyrgyz Republic, national defence and security.

Constitutional chamber defines the concept that the elections are a basis of the constitutional system with regard to the organisation and functioning of state authority, are a matter of national security.

Biometric registration of citizens for the purpose of ensuring the timely registration of citizens and the issuance of ID documents, and compiling an up-to-date list of voters, as an integral part of the electoral process, so as to ensure honest, free and transparent elections, thus constitutes a proportionate restriction of the right to privacy, in the context of protecting national security.

The degree of implementation of the contested Law insofar as it relates to the issuance of ID documents to Kyrgyz citizens has no relevance in a legal analysis of the proportionality of the restriction in question.

At the same time, other objectives mentioned in the contested provision, while they are of national and social significance, are too general in nature to justify restricting the human and civil rights and freedoms enshrined in the Kyrgyz Constitution. The said objectives are essentially those aims of the contested Law which it is proposed to achieve by creating an up-to-date database of Kyrgyz nationals using biometric data. The references to determining the qualitative and quantitative composition of Kyrgyz citizens living in the Kyrgyz Republic and abroad, effective action against crime,



illegal migration, terrorism and human trafficking, and timely and efficient public service delivery do not reveal the full measure of the state's intentions, and contain no details of how the biometric database is to be used in order to achieve the objectives (aims) of the Law.

The legislator should therefore make the appropriate amendments to the Law "On biometric registration of citizens of the Kyrgyz Republic", setting out clear and precise aims for the Law, and how they are to be achieved. It is essential that, when drafting the amendments, the legislator make correct use of legal terminology, so that the provisions of the Law are not ambiguous or open to multiple interpretations.

When setting up the state information systems, the following conditions must be met: citizens' biometric data must be registered without causing detriment to personal dignity or health; there must no possibility of citizens' biometric data being reproduced, used or disseminated unlawfully; the confidentiality and security of information contained in the state information system must be ensured and the information must be confined to what is necessary in order to verify the authenticity of the new-generation identity papers.

Biometric data are a particularly sensitive category of personal data, the unlawful use of which creates a threat and is liable to cause substantial harm to the rights and lawful interests of the data subjects. In Article 6, item 2, of the Law, therefore, the legislator has stipulated that biometric data are to be protected by the Kyrgyz laws "On personal data", "On computerisation" and "On the protection of state secrets of the Kyrgyz Republic". Accordingly, the authorised state body responsible for the collection, storage, use and dissemination of biometric data must ensure that the said laws are rigorously enforced so as to prevent any unauthorised access to the database.

Thus, the constitutional chamber held that the requirement for mandatory biometric registration of citizens aimed at satisfying the interests of the citizens and the public interest of society and the rights of such a restriction is proportional and proportionate.



The second decision of the Constitutional Chamber was made on 22 April 2015 concerning the constitutionality of the provisions of the Law "On Electric and Postal Communication" and the Law "On operative-investigative activities" on the application of a citizen of the Kyrgyz Republic and the Company "Winline", which provides telecommunications and mobile services.

Disputed laws regulated using of special technical means intended for the private information which order determined by the Government of the Kyrgyz Republic, and the operators duty to provide the authorized state bodies, who engaged operational-search activities in communication networks, information about the users of communication services and other necessary information.

Constitutional chamber noted in decision that according to the part 2 Article 29 of the Constitution of the Kyrgyz Republic the right for secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications is not absolute right and can be limited allowed by the law that provide limits, the grounds, conditions and procedure for its implementation; the intervention of the executive authorities to the right for secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications shall be allowed accordance with a law and solely on the basis of a court order. The limitation of these rights allowed in constitutional aims.

It was also noted that its aims, tasks, methods for their solutions operatively-search activity is objectively linked to the need to limit the constitutional rights of the individual.

Law "On operation - investigation activities" detailed Article 2 of the Constitution of the Kyrgyz Republic, implementation of operation-investigation activities affecting legally protected secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications, and right to security of residence allowed only to gather information about persons, who prepare or committed grave crime on reasoned decision by head of the state body implementing operate-



investigation activities solely on the basis of law with further notification prosecutor during 24 hours.

Special using of special technical equipment intended to receive information provide opportunity to invade sphere of private life of person without his consent and leads to violation of individual rights guaranteed with constitution of the Kyrgyz Republic. In this regard, Government should regulate activity to development, production and realization special technical equipment, their registration order, identify their specification aimed to elimination from illegal using and thereby – damage to the security of state and humans rights and freedoms.

In addition, Constitutional Chamber indicated that under the Article 29 relates not all information which is important for goals and tasks of operation-investigation activities. Thus, according with Law “electricity and postal services” database contains following: surname, name, full name (company name) of a subscriber - legal entity, surname, name of the head and employees of the entity, and the address of the subscriber or the address for a terminal of a subscriber unit (terminal), subscriber numbers and other data, possible to identify the subscriber or terminal, information databases settlement systems for providing services that are of personal data and confidential. They are regulated by the rules defining access restrictions, transmission, delivery and storage of personal data conditions.

Thus, the constitutional chamber held that provisions of Law ““On operation - investigation activities” and Law “On Electric and Postal Communication” do not conflict to the provisions of the Constitution of the Kyrgyz Republic.

Another decision of the Constitutional Chamber was made on the protection of honour and dignity, which is closely linked to the right to life, to privacy.

Thus, the court has considered case on the constitutionality of Article 128 of the Criminal Code of the Kyrgyz Republic, which provides for criminal liability for the offense is deliberate humiliation of honour and dignity of another person.



The Chamber, in decision indicated that everyone should have effective mechanisms to protect their honour and dignity. The main way to protect the honour and dignity of the person is entitled to legal protection. That's right, as a procedural guarantee protection of all human rights and freedoms, as well as an effective means to protect human honour and dignity, recognized in the Constitution of the Kyrgyz Republic. Ways to protect the honour and dignity of the person provided in the Civil Code and in the contested article of the Criminal Code.

However, in accordance with Constitution of the Kyrgyz Republic no one shall be subject to criminal prosecution for the dissemination of information which abases or humiliates honour and dignity of a person. Actions abases or humiliates honour and dignity of a person, through the dissemination of information cannot be considered a crime, as are less public danger.

In such circumstances the Constitutional Chamber held that article 128 of the Criminal Code does not conflict to the provisions of the Constitution of the Kyrgyz Republic.

"At the same time, the Constitutional Chamber has noted that it is necessary to consider an effective mechanism to protect the honour and dignity of an individual by amending to the Civil Code of the Kyrgyz Republic, including the protective measures in the actions aimed at the insult.

In conclusion, I would like to note that, despite on short time, the Constitutional Chamber has considered important issues of political and social life, and the institution of constitutional control in Kyrgyzstan is gradually developing in line with global trends. And the experience of formation and development of the constitutional justice in Kyrgyzstan may be the subject of in-depth study and application.

Let me once again express my gratitude to the Constitutional court of the Republic of Turkey for the invitation and opportunity to participate in this event. We wish great success to all the participants of the Summer School.

Thank you for attention!

***THE ROLE AND POSITION OF THE
CONSTITUTIONAL COURT OF THE
REPUBLIC OF KOSOVO***

Srdjan STALETOVIC
KOSOVO



THE ROLE AND POSITION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

*Srdjan STALETOVIC**

The Constitutional Court of the Republic of Kosovo is the youngest Constitutional court established in Europe. Even though the Constitution was promulgated in 2008, The Court itself begun its work from 2009. The position and role of The Constitutional Court within the constitutional system of the Republic of Kosovo was set also with the Comprehensive Proposal for the Kosovo Status Settlement (CSP), a document drafted/proposed by Marti Ahtisari, which preceded the founding of the Republic in Kosovo, and foresaw also its political system and the Constitutional Bodies.

The Constitutional Court shall be composed of nine (9) judges, which shall be appointed by the President of the Republic of Kosovo to serve for a nine (9) years mandate. The Constitution of Kosovo, which is considered as a modern constitution and is a result of an international process of constitution making, was influenced by the neo-liberal Constitutional doctrine. Therefore it guaranties the multi-ethnic and gender representation.

The election, appointment, organization, function and further jurisdiction of the Constitutional Court are foreseen with Chapter VII of the Constitution and the Law on Constitutional Court.

Prior to the further elaboration of the position and role of The Constitutional Court within the constitutional system, please allow us to stress that The Court had for a short time since its foundation, a rich and diverse case practice. In its infancy Kosovo's Constitutional court served not only as the highest authority for interpretation of the Constitutional provisions, whose decision are final and enforceable but also as an advisory body for parties in question

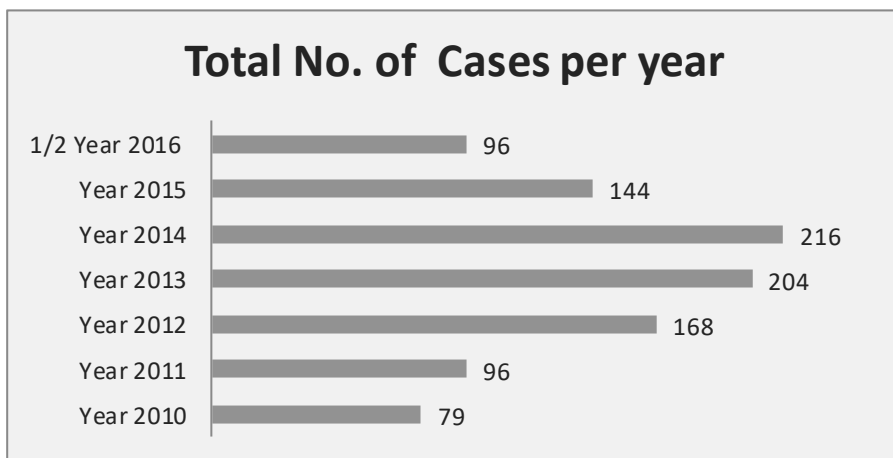
* Legal Adviser, Constitutional Court of Kosovo.



with single purpose to enhance and promote the constitutional order and protection of human rights.

Cases before the Constitutional Court during the period 2009/2016

Total Cases-1022



Total number of finished cases is - 1003

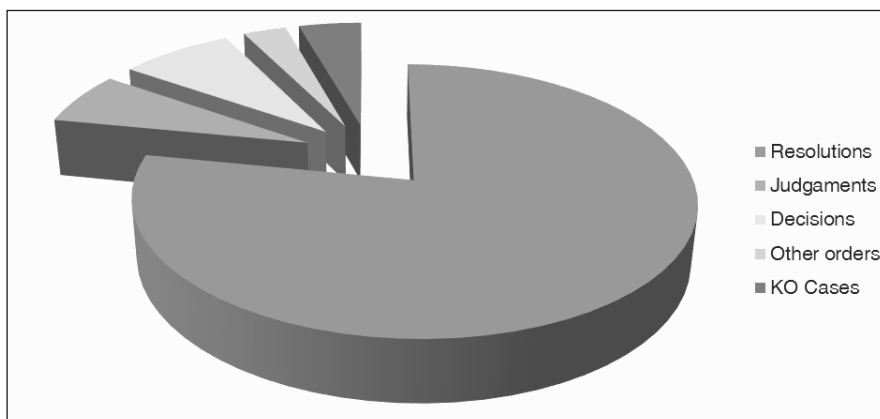
Judgments -67

Resolution on Inadmissibility - 798

Decision- 81

KO cases-45

Other orders-31



The Constitutional Court of the Republic of Kosovo has original jurisdiction in relation to constitutional questions raised by authorized parties in accordance with Article 113 of the Constitution.

Article 113 [Jurisdiction and Authorized Parties]

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) The question of the compatibility with the Constitution of laws, of decrees of the

President or Prime Minister, and of regulations of the Government;

(2) The compatibility with the Constitution of municipal statutes.

3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:

(1) Conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;

(2) Compatibility with the Constitution of a proposed referendum;

(3) Compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;

(4) Compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;

(5) Questions whether violations of the Constitution occurred during the election of the Assembly.

4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.

5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality



of any law or decision adopted by the Assembly as regards its substance and the procedure followed.

Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.

9. The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

10. Additional jurisdiction may be determined by law."

The Constitutional Court of Kosovo has subsidiary jurisdiction in relation to individual acts issued by the regular courts and other public authorities within the territory of the Republic of Kosovo which can be raised by the individuals in accordance with paragraph 7 of Article 113 of the Constitution.

Article 113. Paragraph 7 of the Constitution:

"7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

The Constitutional Court of the Republic of Kosovo reviews the constitutionality of general acts or sub-constitutional legislation whether they are in conformity with the Constitution and may render decisions on the constitutionality respectively unconstitutionality of the sub-constitutional legislation under review. When reviewing



individual acts rendered by the regular courts or other public authorities, the Constitutional Court concerns itself whether the act under review satisfies the procedural criteria as provided for in the Constitution, and does not by definition and subsidiary jurisdictions concern itself with questions of fact and law insofar their assessment and application leads to a serious breach of fundamental human rights and freedoms or creates an unconstitutional situation.

One peculiarity of the Constitutional Court of the Republic of Kosovo is its competency to review constitutional amendments *ex ante* to make sure that they do not diminish fundamental rights and freedoms set forth in Chapter II of the Constitution of the Republic of Kosovo.

Article 144 [Amendments] of the Constitution

Article 144. Paragraph 3

“3. Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.”

The Constitutional Court of the Republic of Kosovo is the final interpreter and guarantor of human rights and fundamental freedoms and has jurisdiction to resolve conflicts between different branches of the government within the meaning of Article 113 of the Constitution. The Constitutional Court of the Republic of Kosovo is put into action by authorized parties and can act *ex officio* only to impose interim measures and even then, only in cases where it deems that irreparable damage could be incurred or public interest comes into play.

Finally, the Constitutional Court of the Republic of Kosovo can act only as a negative legislator *vis-à-vis* other branches of government in full compliance with the doctrine of separation of powers and checks and balances between different branches of the government as enshrined in the Constitution of the Republic of Kosovo (see Article 4 of the Constitution).



Article 22 [Direct Applicability of International Agreements and Instruments]

From theoretical aspect which describes the relation between international and domestic law, Kosovo's Constitution adopted the monism theory which means that Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution. Therefore they are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

- (1) *Universal Declaration of Human Rights;*
- (2) *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*
- (3) *International Covenant on Civil and Political Rights and its Protocols;*
- (4) *Council of Europe Framework Convention for the Protection of National Minorities;*
- (5) *Convention on the Elimination of All Forms of Racial Discrimination;*
- (6) *Convention on the Elimination of All Forms of Discrimination against Women;*
- (7) *Convention on the Rights of the Child;*
- (8) *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.*

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is listed amongst the 8 international HR instruments, which, pursuant to Article 22 of the Kosovo Constitution (KC) entitled "[Direct Applicability of International Agreements and Instruments]", are directly applicable in the Republic of Kosovo and which, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

Apart from the human rights and freedoms which are similarly foreseen in modern constitutions, some of these international instruments add additional rights to the list of rights and freedoms which are specifically provided in the Kosovo Constitution.

According to Article 22, the human rights and fundamental freedoms laid down in these international instruments are guaranteed by the Constitution. However, they do not stem from a normal ratification process. In fact, Kosovo has voluntarily embraced them, when inserting them into Article 22 of the Kosovo Constitution.

So, when the Kosovo Constitution was adopted, all human rights laid down in these international human rights instruments became constitutional rights within the Kosovo constitutional and legal order.

But, in fact, the unilateral application by Kosovo of these human rights has, as such, no consequences for Kosovo from any international institution. This means that, once any public act violates these rights, it cannot be subject to any international legal mechanism which would be applicable to the State Signatories to such international instruments.

So, in case, Kosovo violates the ECHR, the victim cannot submit a complaint to the European Court of Human Rights in Strasbourg.

In absence of such international legal mechanisms, Kosovo is, nevertheless, under the constitutional obligation to put into place legal procedures which would provide the people with the necessary access to all of the rights covered by the ECHR and the other international instruments mentioned by Article 22.

So, the victim should, at least, be able to submit a complaint about an alleged violation of such rights to the Kosovo judiciary and the Kosovo Constitutional Court.

Under Article 22 of the Kosovo Constitution, the Republic of Kosovo has not only accepted that the European Convention is directly applicable within its internal legal order, it has also recognized that, in case of conflict, the ECHR, as much as the other 7 international instruments mentioned in Article 22, is superior to the provisions of laws and other acts of the Kosovo public institutions.

Apart from Article 22, no other Article in the Kosovo Constitution makes direct reference to the Strasbourg Convention per se. Even in its Article 53 entitled "Interpretation of Human Rights Provisions",



which obliges the Kosovo Constitutional Court to interpret human rights and freedoms guaranteed by this Constitution consistent with the court decisions of the European Court of Human Rights," the ECHR is not explicitly mentioned.

Article 53 [Interpretation of Human Rights Provisions]

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

Article 53 simply means that, when the Constitutional Court and the regular courts of Kosovo interpret human rights and freedoms guaranteed by the Constitution, the human rights standards, elaborated by the European Court in its case-law, need to be applied to these rights and freedoms, when applicable. In case of conflict between the two, the ECHR standards will prevail.

The ECHR and the Kosovo Constitutional Court

As we have just seen, the Kosovo Constitutional Court has to interpret human rights and freedoms guaranteed by the Kosovo Constitution consistent with the Strasbourg case-law. The case-law of the Strasbourg Court has served as our source of interpretation and has guided us in solving many difficult constitutional questions. It still does so in every case we deliberate and decide upon.

Admissibility Requirements

Apart from following the Strasbourg Court in its interpretation of the rights and freedoms laid down in the European Convention, our Court also interprets the admissibility requirements in our Constitution in accordance with the standards developed by the Strasbourg Court regarding such requirements.

Non-exhaustion of Remedies

Regarding this criteria of admissibility, please allow to refer to Article 113.7 of the Kosovo Constitution which contains the requirement that the Applicant must exhaust all legal remedies provided.

If the Applicant does not meet this requirement, the Court cannot adjudicate the alleged violation of his or her right under the Constitution.

The Article provides that *“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*

The Constitutional Court has interpreted this Article in such a way that the claimant is not only required to exhaust all legal remedies under Kosovo law, but, in the relevant proceedings, he/she should also have invoked the human rights and freedoms allegedly violated, or at least in substance.

For the first time, this interpretation was established by the Court in Case 41/09, AAB-Rinvest University versus the Government of the Republic of Kosovo.

The Applicant filed a referral alleging that the decision of the Government, by which it was given the name “College” instead of “University”, was in violation of the Constitution and applicable law.

The Court rejected the referral as inadmissible, reasoning that the Applicant could not be considered to have met the requirements of Article 113.7 of the Constitution, since the Applicant had failed to submit any evidence to show that it had appealed against the Government decision or had used other legal remedies available by law.

In this respect, the Court referred to the Strasbourg case-law, citing, *inter alia*, the case of *Azianan v. Cyprus*.

There the Strasbourg Court held that: *“If the complaint presented before the Court [...] had not been put, either explicitly or in substance, to the national courts, when it could have been put in the exercise of a remedy available to the applicant, the national legal order had been denied the opportunity to address the Convention issues which the rule on exhaustion of domestic remedies was intended to provide.”*

Other example where the Constitutional Court concluded that the Applicant was exempted from fulfilling all applicable



admissibility requirements, basing itself upon the jurisprudence of the Strasbourg Court is the case of Fadil Selmanaj.

In that case, the Constitutional Court referred to a judgment of the European Court in the Case Colozza versus Italy, where it was held that, although the right to take part in a hearing was not expressly mentioned in Article 6 (1), *“the object and purpose of the Article taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing.”*

The Constitutional Court considered that the Referral was admissible, since legal remedies had been unavailable to the Applicant in view of the failure of the Supreme Court to serve him with a copy of the judgment as an interested party.

The Constitutional Court further held that there was no evidence that the Applicant had either been informed of the possibility of reopening the procedure before the Supreme Court or that the Applicant would have had the opportunity to appear at a new hearing in order to present his arguments.

Applying the abovementioned jurisprudence of the Strasbourg Court to the case, the Constitutional Court concluded that the Applicant was not required to exhaust extraordinary legal remedies that appear not to be effective.

4-months Rule

Article 49 [Deadlines] of the Law on the Constitutional Court provides that an Applicant is required to submit the Referral within a period of 4 months after the rendering of the final court decision in the case.

This requirement is always strictly applied by the Court.

However, an exception to this rule may be made in case of a “continuing situation” as in the case of the Independent Trade Union of Employees of the Steel Factory IMK in Ferizaj and in the case of Agush Lollun, the Constitutional Court determined that the situation of the non-execution of decisions of public authorities, which are final and binding, constitutes a continuing situation.

The Constitutional Court made reference to a judgment of the European Court in the case of Romashov versus Ukraine, stressing that *“the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6 of the European Convention in conjunction with Article 13 of the European Convention, would be illusory, if the Kosovo legal system allowed a final and binding judicial decision to remain inoperative to the detriment of one party.”*

It further held that *“To construe the above Articles as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect.”*

A similar situation of the non-execution of both the decisions of the Court and the Independent Oversight Board of Kosovo has arisen in a number of other cases, where the Constitutional Court confirmed the existence of a continuing situation and, thereby, the non-applicability of the time limit rule.

Another case in which the European Court considered that the time limit requirement did not apply is the Case of Iatridis versus Greece, where the Court considered the required deadline not applicable, for the reason that the executive had refused to comply with a specific decision.

The case-law of the Constitutional Court contains numerous other examples, where reference is made to Strasbourg jurisprudence regarding the interpretation by the European Court of admissibility requirements.

ECHR catalogue of human rights used in the case-law of the KCC

Based on the fact that the Constitutional Court of Kosovo did not deal with any case regarding the “Right to Respect for Private and Family Life”, please allow us to present some cases similar to the topic and which are connected to the direct applicability of the European Convention on Human Rights



Article 2 [Right to life] of the European Convention

The Constitution of Kosovo adopted this Article of ECHR through the Art. 25 of the Kosovo Constitution [Right to Life]. Related to this article, The Court reviewed the referral of Gëzim and Makfire Kastrati.

The claimants were the parents of the deceased D. K. who was deprived of her life in May 2011. As a consequence of continuous threats by her ex-husband, she had submitted a request to the Municipal Court in Prishtina requesting the issuance of an emergency protection order against the threat of domestic violence.

After about three weeks, D.K. passed away after having received wounds to her neck from a gunshot fired by her ex-husband.

Prior to the merits, The Court first had to examine whether the Applicants would meet all requirements for being an authorized party in the proceedings before it.

In this connection, the Court referred to the case law of the European Court, which in similar cases had received requests from individuals who were considered as indirect victims, since there was a personal and specific connection between the victim and the claimant.

In the case of *McCann and Others versus United Kingdom*, the European Court recognized as an authorized party the parents of the victims who were killed by members of the UK Special Air Service, while in the case of *Yasa versus Turkey*, the nephew of the deceased was recognized as authorized party.

The Kosovo Constitutional Court concluded that, given that the claimants were the parents of the deceased, they may be considered as an authorized party.

On the merits of the case, the Constitutional Court made reference to the judgment of the European Court in the case of *L.e.B. versus The United Kingdom*.

In the judgment the European Court stressed that it is the duty of state authorities not only to refrain from the intentional

and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction).

It further held that this involves a primary duty of the State to secure the right to life by putting in place effective criminal-law provisions in order to deter the commission of offences against a person and backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.

It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see the case of *Osman versus The United Kingdom*, cited also in the case of *Kontrova versus Slovakia* and *Opus versus Turkey*).

In this context, the Kosovo Constitutional Court noted that from the documentation submitted to it, it can be concluded that the responsible authority, in this case the Municipal Court in Prishtina, ought to have known about the real risk that existed when the request for issuance of an emergency protection order was submitted, since the victim had explained, in chronological order, the deterioration of the relations between them, by specifying also the death threats by her former partner and by offering evidence for previous reports to the police authorities about these threats received by her.

The Court concluded that, in such circumstances, the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction presented violations of Article 25 of the Kosovo Constitution and Article 2 of the ECHR.

Article 6 [Right to a fair trial] of the European Convention

Article 6 ECHR was adopted through Article 31, [Right to Fair and Impartial Trial] of the Constitution of Kosovo. The Constitutional Court referred relevant Strasbourg jurisprudence in its judgment in the Case of *Adije Iliri*.

In this case, the Applicant alleged that the decision of the District Court of Prizren and the subsequent decision of the Supreme Court



were taken in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] of the ECHR.

According to the Applicant, neither she nor the Public Prosecutor had been summoned to participate in the proceedings for the return of her three minor children.

This had led to the rejection of the request of the Ministry of Justice of Kosovo, to return them to their habitual place of residence in Austria.

The Constitutional Court emphasized that, according to the case law of the Strasbourg Court, one of the aspects of the right to fair trial is the principle of equality of arms.

This implies that a party must be afforded a reasonable opportunity to present his/her case under conditions which do not place him/her at a substantial disadvantage vis-a-vis the opponent.

The Constitutional Court was further of the view that the presence of her husband and his lawyer at the proceedings before the District Court in Prizren placed the Applicant in a substantial disadvantage vis-à-vis her husband, since she was unable to present arguments and evidence and challenge the submissions of her husband during the course of the proceedings.

The Court found that, in these circumstances, the Applicant's rights to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 (1) of the European Convention had been violated.

In its judgment, the Court referred to the judgment of the European Court in the case of *Dombo versus The Netherlands*.

Article 1 [Protection of property] of Protocol No. 1 to the European Convention

As an example of the use of Strasbourg jurisprudence in a judgment of our Court, serves the case of *Imer Ibrahim* and 48 Other Employees of the Kosovo Energy Corporation.

The subject matter of this Referral is the assessment of the constitutionality of the individual judgments adopted by the



Supreme Court of the Republic of Kosovo in 49 cases brought by the Applicants against the Kosovo Energy Corporation (KEK).

In 2001 and 2002, each Applicant signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer, KEK.

However, in 2006, KEK unilaterally terminated the payment stipulated by the Compensation Agreements without any notification. The Supreme Court annulled the decisions of the Municipal and District Courts in Pristina on allowing the payment of monetary compensation to the Applicants by KEK.

Thereupon the Applicants submitted a referral to the Constitutional Court, claiming that they would have been entitled to a monthly indemnity until the Pension and Invalidity Insurance Fund was established, while it was well known that this Fund had not been established yet.

Thus, in substance, the Applicants complained that there had been a violation of their property rights.

In its judgment the Constitutional Court recalled the jurisprudence of the European Court of Human Rights according to which the concept of “possessions”, referred to in the first part of Article 1 of Protocol No. 1 to the ECHR, has an autonomous meaning which is not limited to ownership of physical goods and which is independent from the formal classification in domestic law.

The European Court also held that certain other rights and interests constituting assets can equally be regarded as “property rights” and thus as “possessions” for the purposes of Article 1 of Protocol No.1.

According to the case law of the European Court of Human Rights, an Applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision.

Furthermore, according to the European Court, “possessions” can be either “existing possessions” or assets, including claims, in respect of which the Applicant can argue that he or she has, at least,



a “legitimate expectation” of obtaining the effective enjoyment of a property right.

The European Court further held that, by way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a “possession” within the meaning of Article 1 of Protocol No.1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition be considered a “possession” (see the judgments of the European Court in the cases of Prince Hans Adam II of Liechtenstein versus Germany and Gratzinger and Gratzingerova versus the Czech Republic).

The Constitutional Court, in its judgment, considered that the Applicants, when signing the Agreements with KEK, had a legitimate expectation that they would be entitled to the monthly indemnity until the Pension and Invalidity Insurance Fund had been established.

The Court further held that such legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete and not a mere hope, and is based on a legal provision or a legal act, i.e. Agreement with KEK.

Consequently, the Constitutional Court concluded that there is a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR.

Article 2 [Freedom of Movement] of Protocol 4 [securing certain rights and freedoms other than those already included in the Convention and in the First Protocol hereto]

As an example of the use by the Kosovo Constitutional Court of jurisprudence of the European Court relating to Article 2 of Protocol No. 4 to the Convention which is the equivalent of Article 35 [Freedom of Movement] of the Kosovo Constitution, serves the judgment of the Kosovo Constitutional Court in the case of Valon Bislimi.

The subject matter of this case is the assessment of the constitutionality of the alleged violation of the Applicant’s freedom



of movement as guaranteed by Article 35, paragraph 2, of the Constitution.

According to the Applicant, the right to leave his country had been violated by refusing to issue a passport to him which is required to be able to travel abroad.

The Applicant further argued that in the Kosovo legal system there is no effective legal remedy to pursue his right to leave the country.

He argued that the Municipal Court of Pristina unfairly and erroneously interpreted the applicable legal provisions and failed to provide him with the certificate which is needed for the Ministry of Internal Affairs in order to issue any passport of the Republic of Kosovo.

The Applicant also argued that the Ministry of Internal Affairs did not have any legal basis to deprive him of his constitutional right based on the absence of the certificate issued by the Court that a person is not under investigation.

In substance, according to the Applicant, the restriction imposed on his right to freedom of movement is not based on law, but is a matter of erroneous interpretation of the laws and practice, including the misinterpretation of the Memorandum of Understanding entered into between the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice.

Also in this case, the Constitutional Court referred to the jurisprudence of the European Court of Human Rights, according to which the applicable test with regard to the alleged violation of the right to leave any country could be summarized in the following

In order to comply with Article 2 of Protocol No. 4, any restriction must be “in accordance with the law” and pursue one or more of the legitimate aims contemplated in paragraph 3 of the same Article and be “necessary in a democratic society” (See the judgment of the European Court in the Case of Raimondo versus Italy of 22 February 1994).

The Court analysed the above-mentioned tests one by one and concluded that in the case at hand it was not disputed that, by virtue



of the non-issuance of the passport, there had been an interference with the right of the Applicant as guaranteed by Article 35 of the Constitution and Article 2 of Protocol No. 4 to the ECHR.

Conclusion

Even that the Constitutional Court of Kosovo is a young court, as we can see, it was challenged by numerous founded referrals, which set a new standard regarding human rights and freedoms. As a young democracy, The Court was also challenged by other cases, which were referred by Institutions (the Institutional part of Constitutional Law) and which was not included in this presentation.

Despite the fact that the material does not meet the topic of the Summer School, we tried to offer an attractive way of presenting the work of one of the youngest Constitutional Courts.

As we saw, the Constitutional Court of Kosovo had important impact in protecting citizens from violation of their human rights and freedoms, and started to set a new standard of acting of the state institutions within all branches of government. The Court tries to interpret the human rights and freedoms consistent with the court decisions of the European Court of Human Rights.

Being aware that this presentation offered just general information's regarding the organization, function, jurisdiction of The Constitutional Court of Kosovo we tried also to include some references related to the applicability of international instruments, in concrete the European Convention on Human Rights.

***RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE***

***Sabariah BINTI OTHMAN
Shah Wira BIN ABDUL HALIM
MALAYSIA***



THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

*Sabariah BINTI OTHMAN**

*Shah Wira BIN ABDUL HALIM***

1. INTRODUCTION

[1] The phrase “right to respect for private and family life” is not available in Malaysian written statutes rather it appears in Article 8 of European Convention on Human Right. It provides that:

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

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 wellbeing 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.

[2] Obviously, Malaysia is not a party to that convention. However, Malaysia has never compromised with discrimination against private and family life as a basic component of a society. Therefore, in this paper, general reference will be made to the theory of private and family life according to Article 8 of European Convention on Human Right but the application will be within the scope of laws available in Malaysia particularly to the Federal Constitutions.

2. THE BACKGROUND OF MALAYSIAN LEGAL SYSTEM

[3] Before going further to know about the right of private and family life in Malaysia, it is a matter of prudent to know the

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background of Malaysian legal system. Malaysia is a complex country which comprises of 31.7 million multiracial subjects such as Malays, Chinese, Indian, and natives. Besides, most of Malaysians profess a religion of their own choice including Islam, Hindu, Buddha, and Christian with 61.3% are Muslims. Every citizen's right to practise their own religion is guaranteed by the Federal Constitution.¹ To ensure the unity in diversity, the Supreme law of the land, i.e. the Federal Constitution provides the concept of distribution of power to meet the needs of Malaysia multicolour citizen.

[4] There is a federal judiciary administering federal and state laws in all parts of the federation. Part IX of the Federal Constitution provides that there shall be two High Court of co-ordinate jurisdiction and status, namely: -

- a) High Court of Malaya; and
- b) High Court in Sabah and Sarawak.²

[5] However, there are also states' court which are only exist in the form of Syariah Courts and Native Court to deal with the Muslim and natives' affairs respectively. The Federal Constitution also recognised the jurisdiction of Syariah Court as having independent jurisdiction without interference of civil courts by virtue of Article 121(1 A) which was introduced in Act A704 and came into force from 10 June 1988.

[6] The Federal Constitution vide Article 74 uphold the concept of separation of power by legislative to make laws as enumerated in the Ninth Schedule of the Federal Constitution. The Ninth Schedule comprises of two lists namely 'Federal List' which provides the power of the Federal legislative to deal with the matters stated therein such as on external affairs, internal security, citizenship, finance, federal works, trade, newspaper, and shipping. While the 'State List', it provides that matters such as under Islamic Law, including inheritance, marriage, divorce, maintenance, zakat, land matters, forestry and state holidays which falls within the jurisdiction of the respective States.

1 Article 3(1) of Federal Constitution.

2 Article 121(1) of Federal Constitution.



[7] On 21 March 2005, List IIA was incorporated in the Federal Constitution to give power for the Sabah and Sarawak Legislatures to govern their own native law and customs, including personal law relating to marriage, divorce, determination of matters of native law or custom, and Cadastral land surveys.³ There is also concurrent list between the Federal and States' Legislative which is provided under List III and IIIA of the Ninth Schedule. It includes social welfare, protection of women, children, and wild animal, town and country planning, preservation of heritage etc.

[8] From the above-mentioned background of Malaysian legal system, we can see how the law had been moulded to harmonize the needs of multicolour Malaysian citizen according to Malaysia's template. Derived from this template, we will illustrate how Malaysian legal system recognises the private and family life based on Malaysian framework, taking into consideration of fundamental liberties blended together with religion, culture and norm.

3. RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE - IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS CONTEXT

[9] Respect is one of the important qualities in a relationship, be it a relationship between individuals or a relationship between humankind and other creatures or a relationship between people and the nationwide. According to Oxford Dictionary, respect means "a feeling of deep admiration for someone or something elicited by their abilities, qualities or achievement."

[10] Private life, is a broad concept and is incapable of exhaustive definition.⁴ However the court said that:-

"...it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."⁵

3 Section 4 of the Constitution (Amendment) Act 2005 (Act A1239).

4 Costello- Robert v. the United Kingdom, ECHR 25 March 1993, para 36.

5 Niemietz v. Germany, ECHR 16 December 1992.



[11] Thus, private life, by virtue of European Convention on Human Right means a relationship which fall outside the scope of family life. It necessarily includes the right to develop relationships with other persons and the outside world such as relationships between foster parents and children they have looked after, relationships between parties who are not yet married, and relationships between homosexuals and their partners with or without children.⁶ From various case law, it includes moral and physical integrity, personal identity, personal information, personal sexuality, and personal or private space.⁷ It also means the right to live the life with privacy and without interference by the state. It covers things like sexuality, body, personal identity and how one look and dress, forming and maintaining relationships with other people, how a person's personal information is held and protected.⁸ Personal relationships in business contexts might also fall within the scope of private life.⁹

[12] Family life on the other hand generally means a relationship based on a marriage including the extended family. However, by virtue of European Convention on Human Right, unmarried couple who live together with their children, will normally be said to enjoy a family.¹⁰ This shows that the closeness of the relationship plays an important role rather than the legal status. In our Malaysian perspective, there are circumstances that can be considered as fall within the private life which is common to the gist of the European Convention on Human Right. However, it is not identical in every way as there are limitations set out by our law as the phrase "save in accordance with law" had been repeated few times in the Federal Constitution.

6 Ursula Kirkelly, *The Right to Respect Private and Family Life- A Guide to the Implementation of Article 8 of the European Conventions of Human Right*, (Germany: Human Rights Handbooks No 1,2003), 11.

7 Richard Clayton, Hugh Tomlinson, *The Human Rights*, (Oxford University Press, 2000), Vol. 1,812.

8 "Your Right to Respect for Private and Family Life," Citizen Advice, <<https://www.citizensadvice.org.uk/law-and-rights/civil-rights/human-rights/what-rights-are-protected-under-the-human-rights-act/your-right-to-respect-for-private-and-family-life/>> (assessed 15 September, 2016).

9 Ursula Kirkelly, 12.

10 *Marckx v. Belgium*, ECHR, 13 June 1979.



[13] Similarly, in respect of family life, we can see that many interpretations derived from the European Convention of Human Right which are not in line with Malaysia's atmosphere especially in relation to the religion of Islam.

4. MALAYSIAN POSITION IN PRIVATE AND FAMILY LIFE

[14] Human rights are universally recognised around the globe. They have been incorporated into the constitution of various states, including Malaysia. The Rt. Hon. Arifin Zakaria, Chief Justice is of the opinion that "human rights are the rights that every one of us as human being is endowed with from the day we were born into this world of ours until we leave this world. These rights cannot be taken away, nor derogated or denied based on colour, religion, age or other personal factors. Human right is meaningless without freedom."¹¹

[15] In Malaysia, the fundamental of human rights have been incorporated in Part II of the Federal Constitution comprising of Articles 5 to 13. It guarantees certain fundamental liberties such as right to personal liberty, freedom of speech, freedom of religion, rights in respect of education, and property. These rights are guaranteed to all citizen but subject to restrictions by the specific and explicit law provides for it, in the interest of security, public order, and religion. Since there is no hard and fast rule of classification of private and family life, illustrations based on issues as the following might help.

4.1 PRIVATE RIGHT

4.1.1 Right of life and personal liberty

4.1.1.1 Right to privacy

[16] Article 5(1) of the Federal Constitution provides that no person should be deprived of his personal life or personal liberty save in accordance with the law. While freedom of movement is

¹¹ Arifin Zakaria, *The Malaysian Perspective on Human Rights and Freedom in 21st Century and The Role of Court*, Paper presented in 50th Turkish Constitutional Court and International Symposium, Turkey, 2012.



a kind of the liberty provided by this Article, however the right to travel overseas or the right to a passport does not include in this clause. This can be supported in the case of **Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan**¹² where the court observed that ‘personal liberty’ in Article 5 covers all rights relating to the person or body of the individual, but does not include the right to travel overseas and to have a passport. The words ‘personal liberty’ should be given a meaning in the context of Article 5 as a whole and the constitutional guarantee under Article 5(1) was not absolute. It could be taken away by law duly passed by Parliament.¹³

[17] The issuance of passport is only a privilege under the discretion of the executive.¹⁴ However as a matter of check and balance, Suffian Lord President added that “if it is established that Government has acted mala fide or has in other way abused this discretionary power, the court may... review Government’s action and make the appropriate order...”

[18] In the absence of a written constitution provided for the right of privacy in Malaysia, the Federal Court in the case of **Sivarasa Rasiah v. Badan Peguam Malaysia & Anor** [2010] 3 CLJ 507, Gopal Sri Ram Federal Court Judge has brought up some light to the protection for privacy based on the provided right to life and personal liberty in the Federal Constitution. The court states as follows:

“It is patently clear from a review of the authorities that ‘personal liberty’ in art 5(1) includes within its compass other rights such as the right to privacy. ”

[19] This observation offers the prospect of developing a constitutional right to privacy through the interpretation of express rights under the Constitution. The statement in *Sivarasa* offers a remarkable opportunity for protections for privacy intrusions additional to those in the common law.¹⁵ In the case of **Sivarasa**

12 [2002] 4 CLJ 105.

13 Zuryati Mohamed Yusoff “Constitutional Protection of Privacy in Malaysia: A Case Study” [2010] 3 CLJ 507, [2010] 2 MLJ 333 at page 16.

14 *Government of Malaysia v. Loh Wai Kong* [1979] 2 MLJ 33.

15 Zuryati Mohamed Yusoff “Constitutional Protection of Privacy in Malaysia: A Case Study” [2011] 1 LNS(A) lxxix at page 1.

Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507, the applicant is an advocate and solicitor, who was disqualified from being a member of the Bar Council by virtue of Section 46A of the Legal Profession Act 1976 ('LPA') due to his appointment as Vice-President of a political party. Dissatisfied with this statutory disqualification, he applied for leave for judicial review under Order 53 Rules 1 of the Rules of the High Court 1980. The learned High Court judge dismissed the application.¹⁶

[20] Sivarasa then appeal to the Court of Appeal. The main issue in this appeal was whether Section 46A(1)(c)(ii) ("the impugned statutory provision") of the Legal Profession Act 1976 ("the Act") was inconsistent with Article 10(1)(c) and 5 of the Federal Constitution. The Court of Appeal then, dismissed the appeal with costs on the grounds:

[a] With regard to Article 10(1)(c), the question of freedom of association does not arise at all and therefore the inconsistency between the impugned statutory provision and Article 10(1)(c) of the Federal Constitution does not exist.

[b] The right to form an association under Article 10(1)(c) does not arise because the right guaranteed therein is the ordinary right which is enjoyed by all citizens including the Appellant to form associations. It bears no reference to a right which is conferred by a particular statute ie, the Act, to serve as a member of the Bar Council, a body which is the creation of the Act itself. The Bar Council is a creature of the Act. Applying the above principle, the right to form the BC arises from the Act and therefore any rights, benefits or privileges conferred by the Act can also be restricted by the Act without in any way contravening Article 10(1)(c).

[c] "Association" within the meaning of the word association in Article 10 to which the members of the legal profession belong, including the Appellant, is the Malaysian Bar. All lawyers admitted to practise as advocates and solicitors have a right to become members of the Malaysian Bar. However, not all members have a right to be a member of the Bar Council. To assume a post in the

¹⁶ Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697.



Bar Council, a member will have to be elected under procedures laid down in the Act. The Act does not confer on the Appellant a right to be a member of the Bar Council. It only confers a right to stand for election to the Bar Council. The right for election or to be elected to the Office of the Bar Council and a political party is not a fundamental right. The Appellant does not have the fundamental right to be a member of the Bar Council which is an elected post. Therefore, when he was disqualified from being a member of the Bar Council upon assuming the post of Vice President of Parti Rakyat Malaysia, there was no question of his constitutional right being affected. Even assuming that there appears to be a restriction on the Appellant's right, the restriction is clearly permitted by the provisions of clause 2(c) of Article 10.

[d] The effect of the impugned statutory provision which outlines the disqualification of the members of the Bar Council, does not in any way constitute a violation of the protected fundamental right since the right of being a member of the Bar Council is in itself not a protected right under Article 10(1)(c).¹⁷

[21] After hearing both submissions of the parties, The Court of Appeal is of the view that Section 46A(1)(c) was not only constitutional but consistent with the Federal Constitution. Being dissatisfied with the decision of High Court and Court of Appeal, Sivarasa then appealed to the Federal Court on the 3 broad grounds:

- i) that the section violates his rights of equality and equal protection guaranteed by Article 8(1) of the Constitution.
- ii) that it violates his right of association guaranteed by Article 10(1)(c).
- iii) that it violates his right to personal liberty guaranteed by Article 5(1).

[22] He argues that in the event that any one of these rights is found to be violated, the section must be declared void as being inconsistent with the supreme law. The arguments advanced in support of the appeal require the case to be taken through several stages.¹⁸ The Federal Court dismissed the appeal and affirmed the

¹⁷ Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2006] 1 CLJ 139.

¹⁸ Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507.

High Court and Court of Appeal decision that Section 46A(1)(c) of the Legal Profession Act is a valid law and does not violate Article 5(1), Article 8(1) or Article 10(1)(c) of the Federal Constitution. In the judgment delivered by Gopal Sri Ram Federal Court Judge, it States clearly that the right to privacy falls under the umbrella of “personal liberties” that has been stipulated under Article 5 (1) of the Constitution.

[23] By parity of reasoning, the right to be a member of a statutorily created and regulated professional body in this case the Malaysian Bar - comes within “personal liberty” and is protected by Article 5(1). The issue is whether there has been a deprivation of that right “in accordance with law”. The answer must straightaway be in the negative. Because s. 46A does not infringe the Appellant’s right to be a member of the Malaysian Bar. What it does is to prevent him from serving on a distinctly separate body, namely the Bar Council.¹⁹

4.1.2 Right to be treated equally

[24] Article 8 of Federal Constitution provides:

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[25] To illustrate this, reference can be made to the case of **Beatrice a/p AT Fernandez v. Sistem Penerbangan Malaysia & Ors.** [2005] 3 MLJ 681. In this case, the applicant is a flight stewardess of the Respondent. Clause 2 paragraph (3) of the First Schedule to the collective agreement which govern the terms and conditions of service of the applicant required an air stewardess to resign if she became pregnant. After the company learnt that she was pregnant,

¹⁹ Ibid., page 520.



and as a result of her refusal to resign, the company dismiss the applicant. The High Court dismissed the Applicant's application for inter alia, a declaration that clause 2 of the collective agreement contravene Article 8 of Federal Constitution. The Applicant's appeal to the Court of Appeal and leave application to appeal to the Federal Court were dismissed by both courts. In dismissing the leave application, the court, apart from the other reasons stated in the judgment decided that the job requirements and occupational benefits of the applicant against the special conditions applicable peculiarly to this occupation, which the first Respondent as the employer could impose. In particular, the court agreed with the employer that an airline could not have pregnant stewardess working on board a flying aircraft as it was not a conducive place to be working in.

[26] Another example is the case of **Guppy Plastic Industries Sdn Bhd v. Gan Soh Eng and Others [2010] MLJU 977**. The Respondents ("the women") are eight women, who were all 50 years of age or over, worked as production operators, cleaners and general workers at Guppy Plastic Industries Sdn Bhd ("the company"). At the time of the Women were recruited, the company had no retirement policy and all letters of offer of employment issued prior to 1 January 2000 did not contain any term on retirement age. In December 1999, the company held an orientation for its employee on the terms and conditions in the Employment Handbook which sets out the terms and conditions of the service as well as the regulation of the company. It includes clause 13 which provides for the compulsory retirement age for male workers is 55 years old and for female workers at 50. However, the company could exercise its discretion to re-employ the retirees on a fixed term contract basis if they were capable of continuing to work and if the company requires their service. As a result of the introduction of the Employment Handbook, the women were who had attained the age of retirement, accordingly be retired. The women made representation that they had been dismissed without just cause and excuse.

[27] The Industrial Court decided in the favour of the women. However in the Judicial Review application to the High Court by

the company, the High Court held among other, the Industrial Court had failed to consider the norm in the plastic industry on employees' retirement age. Thus allowed the judicial review application. Dissatisfied with the decision, the women appealed against it to the Court of Appeal.

In dismissing the appeal, the Court of Appeal in the agreement with the High Court's finding and added that the Industrial Court failed to consider whether it was fair and reasonable for the Guppy Plastic to adapt to industry norms for the retirement ages of male and female employees as implemented by other company. The leave application to appeal to the Federal Court was also dismissed. In the course of the proceeding, the solicitor for the women sought for determination of the court on the issue that the retirement policy is a gender discrimination contravene to Article 8(2) of Federal Constitution and Convention on the Elimination of Discretion against Woman (CEDAW). In response to that, the Federal Court agreed with the company's solicitor that since the new Act, namely Minimum Retired Age 2012 (which provides that the retirement age is 60 years for all private sector employee) was passed by Parliament in June 2012, this argument has become academic.

[28] Based on the finding of this case, it can be noted that the Federal Court agreed that by having this Act, the government has taken steps to address the issue of gender equality. The minimum retirement age of 60 years covered all employees in the private sector, regardless of gender.²⁰

4.1.3 Right for Women

4.1.3.1 Right to Gender Equality

[29] CEDAW, or the woman's convention, Malaysia has ratified the Convention in 1995 which was adopted in 18 December 1979 by the United Nations General Assembly. It was passed with the objective of seeking for the elimination of all forms of discrimination

²⁰ Latifah Binti Mohd Tahar, Izralizam Sanusi, Khainur Aleeza Binti Ismail, *Principle of Equality and Prohibition of Discrimination: Gender Equality in Malaysia*, (Paper presented at Association of Asian Constitutional Courts and Equivalent Institution. Turkey, 2013).



against women at international level and it serves as the main global legal force in protecting women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The Convention defines discrimination against women as **“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”**.²¹

[30] By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women, to establish tribunals and other public institutions to ensure the effective protection of women against discrimination and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

[31] In showing Malaysia commitment, the word “gender” has been added to Article 8(2) by the Constitution (Amendment) (No. 2) Act 2001 (Act A1130) which came into force on 28 September 2001. However, Malaysia has a complex society which include different religious and cultural background, thus few reservations had been made to the CEDAW provisions. At present, Malaysia maintain to reserve five articles namely:

1. Articles 9(2) on states parties shall grant women equal rights with men with respect to the nationality of their children.
2. Article 16(1)(a) where states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women for the same right to enter into marriage;

²¹ Muzaffar Syah Mallow, “CEDAW in Malaysia”, 2011, Paper presented at CEDAW workshop and an overview over the current reservation on the implementation of the “Convention on the Elimination of All Forms of Discrimination against Women” (CEDAW) in Malaysia.



3. Article 16(1)(c) on the same rights and responsibilities during marriage and at its dissolution,

4. Article 16(1)(f) on the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount consideration;

5. Article 16(1)(g) on the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

[32] CEDAW is recognised in a landmark case of **Noorfadilla binti Ahmad Saikin v. Chayed bin Basirun & Ors.** [2012]1 CLJ 769 as having the force of law and it is binding in Malaysia. In this case, the Plaintiff was offered and accepted as a teacher. Like in Beatrice case, after learning of her pregnancy, the Ministry of Education Officer withdrew her placement memo. The reason was that she would be absent for about two months after giving birth thereby requiring a replacement teacher. The Plaintiff filed an application from the court to declare that the revocation of her placement due to her pregnancy was unlawful, discriminatory and unconstitutional, contravene to Article 8(2) of Federal Constitution.

[33]The court held that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. Further, the court held that:

“CEDAW is without doubt a treaty in force and Malaysia’s commitment to CEDAW is strengthen when Article 8(2) of the Federal Constitution was amended to incorporate the provision of CEDAW which is not part of the reservation, i.e. to include non- discrimination based on gender. As such, I am of the opinion that there is no impediment for the court to refer to CEDAW in interpreting Article 8(2) of the Federal Constitution. Hence applying article 1 and 11 of CEDAW, I hold that pregnancy in this case was a form of gender discrimination. The Plaintiff should have been entitled to be employed as a



Guru Sandaran Tidak Terlatih (GSTT) even if she was pregnant. Further, the Plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination because basic biological fact that only woman has the capacity to become pregnant.”

4.1.3.2 Right of modesty, decency and dignity

[34] In the case of **Maslinda Ishak v. Mohd Tahir Osman & Ors. [2009] 6 CLJ 653**, the Appellant was arrested at a nightclub in a joint operation by officers of Angkatan Relawan Rakyat Malaysia (‘RELA’) and Jabatan Agama Islam Wilayah Persekutuan, Kuala Lumpur (‘JAWI’). The 1st Defendant in this case, who is an officer of RELA was charged under Section 509 of Penal Code (Act 574) for capturing photographs of the Appellant urinating in the truck.

[35] It is to be highlighted that, Section 509 of Penal Code (Act 574) came into picture when it covers a situation of protecting a person from his privacy including the right of modesty. **Section 509 of Penal Code (Act 574)** states that:

“Whoever, **intending to insult the modesty of any person**, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or **intrudes upon the privacy of such person**, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.”

[36] In this case the 1st Defendant pleaded guilty and convicted accordingly. The issue brought up in this case is whether the 2nd Respondent, the Director General of RELA, the 3rd Respondent, the Director of JAWI and the 4th Respondent, the Government of Malaysia are jointly and severally liable with him. The appeal was allowed and Justice Suriyadi Halim Omar delivering his judgment stated that the action of the 1st Defendant taking unauthorized photographs in the course of the work he was instructed to carry out was intended to insult the Appellant and such action per se shall be seen as intruding upon the privacy of the Appellant and the rest of the Respondents are jointly and severally liable with him.

[37] This case has been referred to **Lee Ewe Poh v. Dr. Lim Teik Man & Anor [2010] 1 LNS 1162**. The Plaintiff in this case, was a freelance writer who suffered from hemorrhoids or piles and receiving continuous consultation from the 1st Defendant who was a General and Colorectal Surgeon practising in Loh Guan Lye Specialist Centre. She underwent a procedure known as Stapler Haemorrhoidectomy and the operation was successfully done. On 27 December 2006, she was surprised and shocked to know that the 1st Defendant had taken photographs of her private part during the procedure without her permission. The issues of right to privacy brought up in this case are:

(i) Whether Plaintiffs cause of action for violation or invasion of privacy rights was actionable under the law of tort. The 1st Defendant contended that invasion of privacy rights is not a recognized breach in tort under the English common law and hence it is also not an actionable tort in Malaysia pursuant to Section 3 of the Civil Law Act 1956;

(ii) Whether it is an acceptable medical practice for photographs to be taken in the course of surgical procedure and whether the 1st Defendant was entitled to take the two photographs showing the anus of the Plaintiff without her prior knowledge and consent;²²

[38] The Court held that the Plaintiff's claim was allowed and the Appellant was granted RM25, 000. 00 with costs RM10 ,000. 00. The Court also ordered the photographs taken to be destroyed by the Deputy Registrar. The Learned Judicial Commissioner held that (at page 6 of judgement):

"The learned trial judge found for Maslinda Ishak against the 1st Defendant but not against the other Respondents for whom she appealed. The Court of Appeal allowed her appeal and held the Respondents to be jointly and severally liable for the wrongful act of their agent as well as vicariously liable. Although Maslinda Ishak's case is not directly on point, the fact remains that the High Court in so finding has departed from

22 Lee Ewe Poh v. Dr. Lim Teik Man & Anor [2010] 1 LNS 1162.



the old English law that invasion of privacy is not an actionable tort and our Court of Appeal indirectly, though this issue was not canvassed, seems to endorse such cause of action when the pleadings were specifically referred to and C.A. did not overrule invasion of privacy as a cause of action on ground that it is not one in line with the English law."

*Since such a cause of action has been accepted as a cause of action under our common law, it is thus permissible for a Plaintiff to found his/her action on it. Drawing an analogy of this Court of Appeal case, I am inclined to hold the view that since our courts especially the Court of Appeal have accepted such an act to be a cause of action, it is thus actionable. **The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched.** Hence, it is just right that our law should be sensitive to such rights. In the circumstances, Plaintiff in the instant case ought to be allowed to maintain such claim. "*

[39] In relation to the cause of action for breach of confidence, the photographs were information having the necessary quality of confidence as they involved the modesty, decency and dignity of a woman. Secondly, the 1st Defendant was under an obligation to maintain confidence of that information on the general duty of the doctor arising from the doctor-patient relationship. Thirdly, there was unauthorized use or disclosure of that information since the Hospital's nurse knew of the confidential information ie, the photographs. Thus, the Plaintiff came within the cause of action of breach of trust or confidence for having satisfied the three requirements for liability under this cause of action.²³

4.1.4 Right in Respect of Religion

[40] Liberty is not foreign in our Constitutional framework nor is it a mala fide invention of the West. When Tunku Abdul Rahman

²³ Lee Ewe Poh v. Dr. Lim Teik Man & Anor [2010] 1 LNS 1162.



Putra Al-Haj²⁴ proclaimed independence, he declared Malaya 'forever a sovereign democratic and independent State founded upon the principles of liberty and justice'. Though it is agreed that such declaration notwithstanding, Islam still secures its position as a religion of the Federation. This is evidenced in Article 3 of the Federal Constitution. However, this does not mean that Tunku's aspirations hold no water. In fact, it is in the spirit of Islam that such aspirations can herald a powerful crescendo that is music to every citizen's ears.²⁵

[41] While Article 3 provides that Islam is the religion of Federation, Article 11 provides the provision on freedom of religion. Reading the language of Article 11 of the Federal Constitution clearly shows that the Article is intended to protect absolutely the religious belief of the people, in term of professing any religion, practising it, to establish religious institution, etc. However in exercising religious practices, certain boundaries have been drawn by the laws of Malaysia to safeguard the protection of freedom of religion, this directly has built a reflection that it conclusively not absolute. The said laws are as follows:

1. As Islam is the religion of Federation, there should no propagation of any religious doctrine or belief among persons professing the religion of Islam as stated in Article 11 (4) of the Federal Constitution.

2. Article 11 (5) also clearly forbids any act which may lead to public disorder, affect public health or public morality. In **Halimatussadiah v. Public Service Commission, Malaysia & Anor [1992] 1 MLJ 513 at 526**, per Justice Eusoff Chin held that "a disciplinary order by the Public Service Commission prohibiting female employees from wearing purdah (i.e., by which a woman is covered completely except for the eyes) while on duty as an employee of the Government of Malaysia was held to be constitutionally valid because government secrets and

²⁴ Malaysian's First Prime Minister.

²⁵ Azlan Abdul Razak. "What is in the name?". TheMalayMailOnline, <http://www.themalaymailonline.com/print/what-vou-think/whats-in-a-name-azlan-abdul-razak> (assessed on 16th September 2016).



governmental interests must be safeguarded and protected at all costs.” It is transpired in this case that, while Muslim woman in Malaysia is not prohibited to practice her Muslim religion including wearing purdah, but as a matter of preserving public order, public health, or morality she has to adhere to the Service Circular No. 2 of 1985 which prohibits the wearing of an attire covering the face during work. However, she may continue to wear it outside office hours.

Similarly in the case of **Meor Atiqulrahman Ishak & Ors. v. Fatimah Sihi & Ors. [2006] 4 CLJ 1**, the Appellants were dismissed from school for breaching Regulation 3(i)(i) of the School Regulation 1997 which provides that all pupils are prohibited from wearing “jubah, turban (serban), topi, ketayap dan purdah”. They challenged their dismissal in court on the basis that the Regulation violates the provisions of Article 11(1) of the Federal Constitution. The Court held that:

“We are not dealing with a total prohibition of wearing of the turban. The students, primary school students of the school, are not allowed to wear the turban as part of the school uniform i.e., during the school hours. They are not prevented from wearing the turban at other times. Even in school, certainly, they would not be prevented from wearing the turban when they perform, say, their “Zohor” prayer in the school “surau” (prayer room)... there is nothing to prevent them from changing school, eg, to a “pondok” school that would allow them to wear the turban...The School Regulations 1997 in so far as it prohibits the students from wearing turban as part of the school uniform during school hours thus not contravenes the provision of Article 11(1) of the Federal Constitution and therefore is not unconstitutional”.

Like all freedoms, the right to follow one’s conscience cannot be absolute.²⁶ It is undoubtedly positive that every person has the right to profess and practise his religion,

26 Prof. Dr. Shad Saleem Faruqi. (2008) “Document of Destiny” at page 332.



but it is all subject to certain boundaries that have been stipulated under Article 11 (5) of the Federal Constitution. As mentioned above, under this article it states that all religious freedom is subject to public order, public health and also morality.

In Islamic context, the right to wear *purdah* and *serban*, are both the non-mandatory and optional religious practises. In light of the case of *Halimatussaadiah*²⁷ and *Meor Atiquilrahman*²⁸, it can be safely concluded that, Article 11 of the Federal Constitution do recognised the basic right of the Muslims as they can freely exercise the obligatory practice of Islam such as wearing *hijab* (covering one's head). Wearing *purdah* for example, is not an integral part of the religion of Islam. This can be supported in the book of *al-Majmu'* written by Al-Imam Al- Nawawi, it stated; "*Verily, the aurah of Muslim women is the whole of her body except face and the palms (hands).*"

By putting both of the cases into a frame of discussion, it speaks louder than words that those non-mandatory practices does not fall into the ambit of the freedom of religion in Malaysia under Article 11 of the Federal Constitution. Thus in Malaysia, our Federal Constitution does not prohibit anyone to profess his or her own religion and freely to practise one's own faith.

3. A Muslim is very much attached to the teaching of Islam, our court being the civil court and Shariah court takes very much careful consideration in deciding apostasy or renunciation matter. In the case of **Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor [2004] 6 CLJ 242**, the Plaintiff seek various declaratory reliefs to enable her to convert out of Islam. The High Court, in dismissing her application was of the opinion that this matter should be dealt by the *Shariah* Court. By virtue of clause 1A of Article 121 of the Constitution, the civil courts have no jurisdiction in respect of matters within the jurisdiction of the *Shariah* Court. If the High

²⁷ [1992] 1 MLJ 513.

²⁸ [2006] 4 CLJ 1.



Court granted the Plaintiff's application, it would not only create confusion but would also be declaring something that was contrary to Article 121(1 A) of the Constitution. Further, Justice Faiza Thamby Chik in this case opined that without such regulation, they would be chaos and confusion impairing the harmony of Muslim and non-Muslim communities, contrary to Article 11(4) and (5) which authorises anti propagation laws to protect Muslim and restriction on the basis of public health, order and morality respectively. This construes public order very expansively. Under this paternalistic regime requiring third party confirmation, Article 11 is not a right but a state granted privilege.

In **Mat Yaacob bin İsmail v. Kerajaan Negeri Kelantan & Ors.** [2001] 6 MLJ 179, Justice Suryadi held that under the relevant state enactment, a person is deemed a Müslim despite his assertion otherwise in the absence of a confirmation of apostasy by a *Shariah* Court. He rejected the argument that the *Shariah* Court lack authority to deal with the applicant the moment they apostatised.

In recent case **Azmi Mohamad Azam v. Director of Jabatan Agama İslam Sarawak & Ors.** [2016] 6 CLJ 562, the High Court allowed the Applicant's application to among other, an order of *mandamus* to compel the first and/or second respondents to issue the letter of release from the religion of Islam ("surat murtad") to the applicant effecting the applicant's intention to be released from the religion of Islam. The court held that "by reason that the applicant's conversion in the first place was not based on his professing Islam but by virtue of his mother's conversion and by his mother's choice for him, now that the applicant is a major, he is at liberty not only to exercise his constitutional religious right to choose his religion, he can come to this court to enforce his choice to be reflected in his identity card i.e., his name and religion."

4.1.5 Right to Property

[42] Right to property have been considered to be part of man's natural's right and were important enough to be enshrined in the earliest constitutional documents like the Magna Carta.²⁹ In Malaysia, the right to property, while important to every individual,

²⁹ https://en.wikipedia.org/wiki/Magna_Carta.



the state may acquire an individual's property provided that it is for the overall goods of the community, to serve a public purpose.³⁰ Article 13 of the Federal Constitution provides:

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[43] Right of property under Article 13 is not an absolute right, while ensuring in some ways the sanctity of private property. Parliament may make law providing for compulsory acquisition, provided that adequate compensation is given for such acquisition.

[44] In **Adong Kuwau & Ors. v. Kerajaan Negeri Johor [1998] 2 MLJ 154 (CA)** case, statutory requirement of compensation does not limited to compulsory acquisition or use of property only but also in the case of the deprivation of livelihood. In this case, the claimants were the occupants of a reserve. The reserve was later alienated to a State Corporation to build a dam for water supply. In consequence, these aboriginal claimants could not cultivate, forage and take the produce of the land. The High Court held that the government is liable to pay compensation under Article 13 of the Constitution as the aborigines were entitled to rights both under the common law and the Aboriginal Peoples Protection Act 1954 ("Act 1954"). The Court of Appeal, in dismissing the appeal by the state, held that the Plaintiff's claim was founded on the denial of their right to derive livelihood from 'an aboriginal inhabited place' under Act 1954.³¹

4.1.6 Right of Personal Identity

[45] Right for lesbian, gay, bisexual, and transgender (LGBT) in Malaysia currently is not recognised in Malaysia though it invites strong opposition by the LGBT activists under the name of human right. The Prime Minister, Datuk Seri Najib bin Tun Abdul Razak said "although universal human rights have been defined, we still define human rights in the country in the context of Islam and

³⁰ Chong Chung Moi v the Government of the State of Sabah [2007] 5 MLJ 441.

³¹ Appeal by the State to the Federal Court was dismissed but there is no written reason available.



the shariah. And even if we cannot defend human rights at an international level, we must defend it in the Islamic context.”³²

[46] The legal proposition on this issue can be seen in the case of **Muhamad Juzaili Bin Mohd Khamis & Ors. v. State Government of Negeri Sembilan & Ors.** [2015] 1 CLJ 954. In this case, the Plaintiff filed an application for judicial review seeking for a declaration that Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) (“the Enactment”) is void by reason of being inconsistent with Article 5(1), 8(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

[47] Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan)³³ states that:

“Any male person who, in any public place wears a woman attire and poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.”

[48] In this case the three Plaintiffs are Muslim men. Medically, however, they are not normal males because they have a medical condition called ‘Gender Identity Disorder’ (‘GID’) which was confirmed by medical experts in their respective affidavits. Because of this medical condition, the Plaintiffs have been expressing themselves as women and showing the mannerisms of the feminine gender such as wearing women’s clothes and using makeups since their young age. Indeed, they feel natural being such.

[49] Section 66 of the Enactment makes it an offence for any Muslim male person to do among others; to wear a woman’s attire, or to pose as a woman in public place. Those convicted can be liable to a fine not exceeding RM1,000.00 or to imprisonment for a term not exceeding six months or to both. This section makes no exception for sufferers of GID like the Plaintiffs. Hence, as a consequence, the

32 Syed Jaymal Zahiid, “Najib: Putrajaya will defend human rights, but only in the context of Islam”. The Malaymailonline. <http://www.themalaymailonline.com/malaysia/article/najib-putrajaya-will-defend-human-rights-but-only-in-the-context-of-islam#sthash.XWGVSTjR.dpuf> (assessed 15 September, 2016).

33 Enactment No.4 of 1992.



Plaintiffs have been repeatedly detained, arrested, and prosecuted by the religious authority of Negeri Sembilan acting pursuant to Section 66 for cross-dressing.

Enactment No.4 of 1992.

[50] The High Court dismissed the application on the grounds, *inter alia*, allowing the application will lead to greater harm to the society especially the social problems and sexual activities.

[51] Dissatisfied with the decision, the Plaintiffs appeal to the Court of Appeal. In allowing the appeal, the Court of Appeal declared that Section 66 of the Enactment is:

i. inconsistent with Article 5(1) of the Federal Constitution in that the section deprives the Appellants of their right to live with dignity;

ii. inconsistent with Article 8(1) of the Federal Constitution as it is discriminatory and oppressive, and denies the Appellants the equal protection of the law;

iii. inconsistent with Article 9(2) of the Federal Constitution for denying the Appellants and sufferers of GID of the right to move freely in public places;

iv. inconsistent with Article 10(1)(a) as it violates their right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice; and

v. inconsistent with Article 10(2)(a) as only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable. The State Legislative Assemblies in Malaysia (and this includes the State Legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression.

[52] Justice Mohd Hishamudin Mohd Yunus further elaborated that a person's dress, attire or articles of clothing are a form of expression which is guaranteed under Article 10(1)(a) of the



Constitution.³⁴ He is of the opinion that freedom of speech and expression should not be restricted by Section 66 of the Enactment. He further added that Section 66, criminalises all the male Muslims expressing their rights to dress up in the women's attire and to pose freely in public.

[53] However, the Federal Court³⁵, took different position in allowing the appeal by the State. It held that the application for the declarations sought by the Plaintiffs was incompetent by reason of substantive procedural non-compliance with clauses (3) and (4) of Article 4 of the Federal Constitution. Therefore, the decision of the Court of Appeal and High Court was set aside. As a consequence, the status quo of Section 66 of the Enactment stands.

4.2 FAMILY LIFE

4.2.1 Rights of Children

[54] The right of children in Malaysia is protected by the Child Act 2001 where it regulates the matter relating to care, protection and rehabilitation of children. Malaysia is very serious in the handling the issue of abandonment of child or violation against their right. For example in a case of a 15 years old cerebral palsy-stricken boy, Muhammad Firdaus Dullah who was found in deplorable conditions, covered in his own faeces and urine during a raid conducted by the Negeri Sembilan State Immigration Department at a low-cost flat at Taman Semarak, Phase 2, Nilai, at 2.30 am on 21 June 2014. His mother was charged and pleaded guilty for two charges framed against her under the Child Act 2001. Under Section 33(1)(a) for neglecting him, she was sentenced to four months imprisonment and fine of RM 6, 000. 00 in default she will be liable to two months imprisonment. As for the second charge under Section 33(1)(c), she was sentenced to three months imprisonment and fine of RM 4, 000. 00 in default of one month imprisonment for leaving her son unattended.

[55] The government also show its serious effort in combating the problem of neglecting the welfare of the child by adding the

³⁴ 1 [2015] SHR 6 at page 9.

³⁵ Refer to State Government of Negeri Sembilan & Ors. v. Muhammad Juzaili Mohd Khamis & Ors. [2015] 8 CLJ 975.



provision of mandatory community service order (“CSO”) vide Child Act (Amendment) 2016 (Act A1511) which has been gazetted on 25 July 2016.³⁶ The CSO will become a mandatory order once the parents or guardian of the child has been convicted under section 31, 32 and 33 of Child Act 2001 after serving the original sentence provided therein.

[56] On the international level, Malaysia also shows its commitment towards the protection of children’s right by acceding to Convention on the Right of the Child on 17 February 1995. Like CEDAW, Malaysia also put some reservation to the convention particularly on Articles 2, 7, 14, 28(1)(a) and 37 of the Convention on the Right of the Child due to the inconsistency factor with Federal Constitution, laws and national policies.³⁷

[57] Article 2 provides right of the children to be respected irrespective of the child’s parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Article 14.1 provides that States Parties shall respect the right of the child to freedom of thought, conscience and religion. Malaysia cannot conform to these article as the religion of an infant below the age of 18 years’ old will be determined by his or her parent.

[58] In this respect, reference can be made to the case of *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300. In this case the High Court dismissed the Plaintiff’s application among other, a declaration that he, as the lawful father and guardian, has the right to decide the religion, education and upbringing of his infant daughter, who was converted to Islam when she is 17 years and 8 months old. Justice Abd Malek, seems to suggest that the right to freedom of religion under Article 11 includes the right to choose religion for he said that “right to profess and practices religion of her chosen religion and the father would only have the right to decide on her general upbringing in so far as it does not conflict with her choice of religion and the same infant had chosen

³⁶ As to date, the Act is not yet come into force.

³⁷ Regional Workshop on the Implementation of the Convention on the Rights of the Child 24-27 September 2012, The Sukosol Hotel, Bangkok, Thailand The Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups (OPP), Ministry of Human Security and Social Development, Thailand.



on her own free will to become a Christian or Hindu...". However the Supreme Court had overturned the case by allowing the appeal of the Plaintiff. By virtue of Guardianship of Infants Act 1961, the Supreme Court held that, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes major. Even though Appellant would have been entitled to the declaration he had asked for, but the court had refused to do so as at the time the decision was made, she is no longer an infant.

[59] The Child Act 2001 guarantees the right for children for special safeguards, care and assistance. Apart from the Child Act 2001 and CRC, there are other mechanism to protect the right of children in Malaysia such as Evidence of Child Witness Act 2007, and Adoption Act 1952 which need to be respected by every person in Malaysia.

4.2.2 Rights Against Criminality

[60] In Criminal aspect, protection is always being given by the law to show that the family institution stands a special place in the eyes of the law. If a person had voluntarily causing hurt which may be charged under Section 323 of the Penal Code, it will constitute a non-seizable offence which the police shall not arrest the wrongdoer without warrant. However, in a case involving domestic violent, Domestic Violence Act 1994 ("the DVA"), by virtue of Section 18A³⁸ gives an exception to the general rule. Section 18A of the DVA provides:

"Offences involving domestic violence shall be deemed to be seizable offences."

[61] This means that if a violence happens within a family member, the law provides more protection by way of allowing the perpetrator to be arrested even though in cases which warrant is needed if it involves the outsider. To strengthen the protection against violence between spouses, on 31 December 2014, the Parliament of Malaysia has passed the proposed amendment of the Penal Code by inserting Section 326A which states as follows:

³⁸ Section 18A was inserted to the Domestic Violence Act 1994 vide Domestic Violence (Amendment) Act 2012 which came into force on 20 February 2012.



"Whoever, during the subsistence of a valid marriage, causes hurt to his spouse and commits an offence under section 323, 324, 325, 326, 334 or 335 shall be punished with imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section."

[62] The other special circumstances given in respect of criminality within family members can be seen in sexual intercourse case. For example in an ordinary rape case under Section 376 of Penal Code, the punishment provided by the law is imprisonment for a term which may extend to twenty years, and shall also be liable to whipping. That means the court has the discretion to impose the sentence of imprisonment for any terms as long as it is not more than twenty years and whatever number of whipping which the court thinks fit. However, if the rape is committed against the family members or on a woman whose relationship to him is such that he is not permitted under the law, religion, custom or usage, to marry her, the punishment will be heavier where Section 376(3) provides a minimum sentence of imprisonment of eight years and not more than thirty years, and he shall also be punished with whipping of not less than ten strokes.

[63] Similarly, in the case of incest. The offence of incest was introduced in Malaysia Penal Code in 2001. By virtue of Penal Code Amendment Act 2001 which came into force on 1 August 2002, Section 376A was inserted in our Penal Code to define the word incest as a person (man or a woman) who has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person. The punishment awaiting for the offender is also much greater than a normal rape as Section 376B provides the imprisonment term of not less than six years and not more than twenty years, and shall also be liable to whipping.

4.2.3 Right in the Distribution of Property

[64] The distribution of property in Malaysia is distinguished between the Muslim and Non-Muslim law. As for non-Muslim law,



if a person dies without a will, or a will which was prepared prior to the death does not cover all properties, the law applicable in such a situation is the Distribution Act 1958. The Act is not applicable to Muslim as the Muslim will be governed by the Islamic Law.

[65] Section 6 of the Distribution Act 1958 provides the manner on how the deceased's estate will be distributed. It will only go to spouse, parent or parents, and issue³⁹(children and the descendant of the children) of the deceased. The child who is entitle for the deceased's property must be a legitimate child. An adopted child who is adopted under the Adoption Act 1952 or the Adoption Ordinance of the State of Sarawak is also recognised as a child under this Act.

[66] In case **Shamugam v. Pappah** [1994] 1 MLJ 144, the rival to the deceased property is between the Plaintiff who claimed to be the sole heir of the deceased, and the Defendant who claimed to be the deceased's wife having been lawfully married to the deceased according to Hindu rites. The court held that neither the Plaintiff nor the Defendant were entitled to the estate of the deceased. This is because the Plaintiff had failed to prove that he is a legitimate son of the deceased. The Defendant, on the other hand was declared by the court as not the lawful widow of the deceased as the Defendant's marriage to another man on 16 November 1966 was solemnized before the Defendant's purported marriage to the deceased on 6 September 1967. Consequently, even if her children were the children of the deceased, they were not his legitimate children.

[67] The law on the distribution of estates of Muslim or commonly referred to as *Faraid* or *Mirath* is based on the Holy Quran and the Sunnah. *Faraid* or *Mirath* concerns the way in which inheritance is distributed according to Islamic law and persons entitled to the estate concerned.⁴⁰ In *Faraidh* system, it provides specific portion for specific class of beneficiaries. For example the Holy Quran stipulated:

³⁹ Section 3 of Distribution Act 1958.

⁴⁰ Mimi Kamariah Majid, *Family Law in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 1999), p. 381.



*"In what your wives leave, your share is a half, if they leave no child; but if they leave a child you get a fourth; after payment of legacies and debts. In what you leave, their share is a fourth if you leave no child, but if you leave a child they get an eighth; after payment of legacies and debts."*⁴¹

[68] The distribution of estate, apart from the spouse, will be based on the kinship or those who are related to the deceased by blood. It is divided into three categories namely, *Ashab al- Furudh*, *Asabah Nasabiah*, and *Zawil Arham*.⁴²

i. *Ashab al- Furudh* (whose shares in the inheritance have been fixed to one- half, one- third, two third, or one-sixth). They are father, mother, grandfather, grandmother, daughter, granddaughter, female sibling (same father and mother), female siblings (same father), male siblings (same mother), and female sibling (same mother).

ii. *Asabah Nasabiah*- (whose shares to the deceased's estate are not fixed but they will receive the remaining estate and property after it has been distributed amongst *Ashab al- Furudh*). They include son, or a male sibling of the same father and same mother, and a male sibling of the same father.

iii. *Zawil Arham* (relatives who are connected by blood ties with the deceased but do not come within the category of *Ashab- al Furudh* or *Asabah Nasabiah*). Example of this group of beneficiaries are father of the mother or the child of a daughter who are related to the deceased on the female side.

[69] The apportionment are fixed and cannot be argued unless all the beneficiaries consented to it. Similarly, for a same class of beneficiaries which involves male and female, the male will enjoy double than female as had been prescribed in the Holy Quran, particularly in Surah An- Nisa verse 176.

41 Al- Quran, Surah An- Nisa verse 12.

42 Mimi Kamariah, page 383-385.



5. CONCLUSION

[70] In conclusion, although there is no specific provision in the Constitution laid down regarding the right for private and family life in Malaysia, its absence does not constitute as if it does not play an important role in the human rights chapter. The court's interpretation through various case laws and multiple provisions from the statutes had granted recognition of "other rights" in Article 5 of the Constitution. The courts have said that the right to life includes a right to livelihood and quality of life.⁴³

[71] The expressions "life" and "personal liberty" have been construed widely to cover all aspects of life including the right to privacy. The Court of Appeal in **Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor** [1996] 2 CLJ 771 remarked that the expression "life" is not confined to mere existence. The expansion of the scope of life and personal liberty in Article 5 of the Constitution was among other reasons due to the foresight and judicial wisdom of the Federal Court Judges particularly Gopal Sri Ram Federal Court Judge in developing the express right in order to include other possible rights which form part of the personal liberty clause.⁴⁴

[72] While, right to respect for private and family life is not limited to the European Convention of Human Right and the State Party to it only, but the spirit within it is a global issue which forms the basic necessities in human life. Throughout the abovementioned discussion, though Malaysia promote the rights and liberty to practice any way of life, but we do have religious and morality restriction which all citizen must adhere to.

[73] Even though there are still rooms of improvement in many issues, it has to be noted that it's not easy to satisfy everyone's need especially in a multi-racial country like Malaysia. Finally, the element of check and balance, give and take, plays an important role to ensure every people in Malaysia can live peacefully, the sovereignty of law is respected, and the independence achieved will be maintained for the benefit of the present and future generation.

⁴³ Judgment of Gopal Sri Ram FCJ in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 at 643.

⁴⁴ Zuryati Mohamed Yusoff "Constitutional Protection of Privacy in Malaysia: A Case Study" [2011] 1 LNS(A) lxxix.



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*RESPECT OF THE RIGHT TO PRIVACY
AND FAMILY LIFE IN THE CASE-LAW
OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF MOLDOVA*

Eugenia MÎTA

MOLDOVA



RESPECT OF THE RIGHT TO PRIVACY AND FAMILY LIFE IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MOLDOVA

*Eugenia MÎTA**

Free development of human personality and human dignity, values enshrined in Article 1 of the Constitution, cannot be conceived of without observance and protection of intimate, private and family life. The right to respect and protection of intimate, private and family life is part of the catalogue of rights and fundamentally freedoms, which have a complex substance.

The rights on private and family life, as were outlined in Article 28 of our Constitution, are inextricably linked to the very existence of human beings and encompass the general idea of “personality rights”.

Under Article 28 of the Constitution, the State is bound to observe and protect intimate, private and family life, that provision being consistent with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 17 of the International Covenant on Civil and Political Rights and Article 12 of the Universal Declaration of Human Rights.

Although, in general terms, the Constitution guarantees the intimate, private and family life, the extent of these rights shall be deducted from and in line with the judgements and interpretations delivered by the Constitutional Court in its case-law.

1. Protection of personal data and data related to personal health records

The Court has assessed in its jurisprudence the right to privacy and family life under several aspects, one of which being the protection of personal data.

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One of the complaints challenging the infringement of the right to privacy and family life has been examined by the Court in 2012 and mainly referred to the disclosure of personal data related to health condition of the person. According to the challenged provisions of the Regulation on recruitment of citizens in military service with full or reduced term, the young males unfit for military service, upon their exclusion from military records, are handed the standard certificate, indicating the relevant item of the Medical Scale for medical diagnosis according to the Order of the Minister of Defence, which serves as ground for exclusion. The author of the complaint (the applicant) claimed that the template of this certificate provided by the Regulation on recruitment of citizens in military service with full or reduced term, in the heading where the skills for military service had to be stated, it was compulsory to indicate, *inter alia* the name of diseases and physical defects hindering the performance of military service.

The applicant alleged that the requirement to indicate the item of the medical scale, which contains the name of diseases and of physical defects in the certificate issued to the young male as grounds for its exclusion from military records constitutes an unjustified restriction of his right to privacy guaranteed by Article 28 of the Constitution. According to the applicant, the practical use of the challenged provisions revealed information on the diseases or physical defects of a person, which is particular information related to his private life and could have been regarded as a disproportionate interference with the exercise of the right protected by Article 28 of the Constitution in conjunction with Article 54 the Constitution.

The Court found to be unconstitutional the provisions regulating the template of the certificate indicated in the Regulation on recruitment of citizens in military service with full or reduced term, approved by the Government Decision no.864 of 17 August 2005 in the part relating to the direct specification of the item of the medical scales that contains the name of diseases and of the physical defects, and noted that **the data on the person's health condition fall into the category of personal data** and are protected by constitutional norms. The item in the medical certificate is an encryption of the diagnosis set by the competent medical committee that is bound to

ensure the confidentiality thereof. Given the fact that the data on the health condition of a person are a special category of personal data, the information provided in the certificate cannot be disclosed to third parties, and has to be presented to the candidate that was subjected to medical examination.

The Court concluded that the specific indication in the sample of the certificate of the item of the medical scale with reference to the order of the Minister of Defence, specifying the number and date of its delivery, ground for removal from military records is an ungrounded limitation of the right to privacy by its accessibility to third parties, thus violating Article 28 of the Constitution. The Court considered this to be a disproportionate interference in the right to private life guaranteed by Article 28 of the Constitution in conjunction with Article 54 of the Constitution.

In this respect the Court recalled the position of the European Court that, despite taking into account the margin of appreciation provided by the European Convention on Human Rights, the states should however establish a fair balance between public interest and the right to privacy and family life of the person. Taking these remarks of the European Court into consideration, the Constitutional Court found that although the right to respect and protection of privacy and family life is not absolute, any interference must be prescribed by the law that has to comply with generally accepted principles of international law, has to be proportional to the situation that have caused it and should not hinder the very existence of this right.

2. Collection by state officials of information related to an individual and inclusion thereof within an identification system used in administrative and civil scopes (health, social services, taxation, etc.)

Another Judgment delivered by the Court in 2014 referred to the inviolability of privacy and family life and to the guarantees of exercising this right, including protection of personal data and free circulation of such data.

The Court was asked to carry out the control of constitutionality of the legal provisions modifying the Tax Code according to which the



persons exercising the liberal professions (lawyers, public notaries, persons carrying out the activity of private detectives and security agents, bailiffs, mediators) were not individualized as separate legal entities and their tax obligations were held based on their personal tax codes listed in the State Register of the Population.

The complainant considered that, in the context of these amendments to the Tax Code, the State assimilated the personal code of a citizen with the tax code of the person carrying out a liberal profession and the aforementioned amendments represented interference in the private life which is contrary to Article 28 of the Constitution and Article 8 of the European Convention. Given the fact that the State Identification Number of a person (IDNP) falls into the category of personal data and is protected by the state, in light of these amendments it became public information. In other words, the personal code of the individual, which is a component of his/her private life, is associated with the tax code assigned to the lawyer, bailiff, notary etc. and acquired the status of public data not only for the state but also for a large group of people who benefitted from their services.

In its appreciation of the circumstances of this case the Court started by noting that the protection of personal data and privacy life means ensuring an acceptable level of security, which represent the two pillars of identity within any society. The Court held that the right to informational self-determination guarantees everyone the freedom to decide on disclosure and use of personal data, to the extent to which, by general rule, the consent of the person is required during the registration and use of such data. The Court emphasized that due to the fact that the legislator has expanded the scope and possibilities of using confidential codes, could seriously affect the right to informational self-determination and human dignity. The Court also stated that such potential risks impose the obligation to secure personal data. To support the arguments provided in this Judgment the Court noted art. 7 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which provides that “appropriate security measures shall be taken for the protection of personal data stored in automated data files against [...] unauthorized access, alteration or dissemination”.

The Court has not found any objective and reasonable justification for the adoption of such regulations, which, as a consequence, allow disclosure of the State Identification Number (IDNP) of the persons practicing the liberal professions of lawyer, public notary, bailiff, mediator etc. and stated that their corresponding legal provisions were unconstitutional. Moreover, the Court noted that in the legal regulation the state has both, a negative obligation to avoid undue interference with the private life, home and correspondence of a person and a positive obligation to ensure true respect for the values it is meant to protect. Considering the “sensitive” nature of the right to privacy and in order to prevent any restraints in exercising this right, the legislator should provide effective opportunities and remedies.

3. Excessive restriction of information held by the Government Agent

A relatively recent Judgement of the Court concerned *inter alia* the right for privacy and family life and examined the limitation of access to certain categories of information held by the Government Agent before the European Court provided for by Law on the Government Agent.

The case originated in the exception of unconstitutionality of Article 10.4 of Law on the Government Agent, raised by a representative of the public association “Lawyers for Human Rights”.

The author of the exception of unconstitutionality claimed that the provisions of Article 10.4 of the Law on the Government Agent, which limits the access to certain categories of information held by the Government Agent in the context of the Government’s representation before the European Court, are contrary to Articles 1, 4, 34 and 54 of the Constitution.

Article 34 of the Constitution guarantees the right of a person to have of access to any kind information of public interest. According to their competence, public authorities shall be bound to provide correct information on public affairs and matters of personal interest to the citizens.



The Court emphasized that the right to information can be ensured only by an appropriate level of transparency of public authorities.

In its case-law, the Court noted that the right to information may be subject to restrictions in order to protect citizens and national security if the restriction pursues a legitimate aim, is necessary in a democratic society, is proportional to the situation that caused it and does not affect the right or the freedom itself.

In this case, the Court held that under Article 10.4 of the Law on Government Agent, the provisions of the Law on access to information are not applicable to the information held by the Government Agent in exercising his/her duties, namely to: 1) the correspondence of the Government Agent with the European Court and other authorities; 2) the case files of the proceedings before Government Agent.

The Court noted that under Article 6 of the Law, Government Agent is compelled to: 1) to observe the confidentiality of proceedings and information regarding friendly settlements, and in other cases provided by the Rules of the European Court; 2) to ensure the non-disclosure of the identity of the applicant in cases before the European Court, as well as to ensure the protection of personal data from case files that are at his/ her disposal.

The Court held that different categories of data are already protected by the Law on access to Information, Law on Protection of Personal Data and the Law on State Secret.

In this context, the Court held that the challenged provision is a blanket rule that imposes excessive restrictions on the information that is at the disposal of the Government Agent and does not allow the individualization of the categories of information that are restricted.

The Court stated that the challenged rule is a rule that establishes excessive restrictions to information in possession of Government Agent and does not allow the individualization of categories of information to be restricted before the public. The provisions of Article 8 of the Law on Access to Information establish that personal

data are part of official information with limited accessibility and represent data relating to an identified or identifiable individual, the disclosure of which would constitute a violation of privacy, intimate and family life and access to such information shall be in accordance with the laws on the protection of personal data. In this context, the Court held that due to the special importance of the information that concerns personal data, the disclosure of which could affect the rights of persons, benefit from increased legal protection and prevails over the free access to information in the cases provided by law.

For the stated reasons, the Court concluded that the challenged provision does not ensure a fair balance between the right of access to information and the protection of the rights of other individuals.

4. Professional integrity testing

In another case the Court was requested to examine the legal provisions on professional integrity testing of the judges from ordinary courts and the constitutional court by the employees of the National Anti-corruption Centre.

On December 23rd, 2013 the Parliament adopted Law no. 325 on professional integrity testing, Article 4 of which provided that the professional integrity test consists of the creation and application by the tester of certain virtual, simulated situations, similar to those in the work activity, materialized through dissimulated operations, conditioned by the activity and behaviour of the tested public agent, in order to monitor in a passive way and establish the reaction and conduct of the tested public agent.

In this context, it is worth mentioning that the fight against corruption was declared national objective by a multitude of international agreements and national documents, and the Court has consistently stated in its case law that **corruption undermines the democracy and the rule of law**, leads to the violation of human rights, undermines economy and erodes the quality of life. Therefore, **fight against corruption is an integrated aspect of ensuring the respect for the rule of law.**



Nevertheless, the rule of law enshrines certain guarantees, including jurisdictional ones, that ensure respect for the rights of a man and a citizen through the autonomy of the state, and subsequently, enclosing public authorities within the framework of the law.

Therefore it is extremely necessary to ensure a certain degree of compliance and efficient legal means that would be compatible with the ongoing process of modernization and technological development, so that criminality is effectively controlled and successfully diminished. Due to this particular aspect protection of human rights cannot be absolute, these rights cannot be exercised *in absurdum* and they may be subject to certain limitations that can be justified depending on the goal pursued.

The applicants alleged that professional integrity testing of the employees of the Courts of all levels and of the Constitutional Court, including judges, done by the employees of an institution which is under the control of the Executive (the National Anti-corruption Centre) breaches the principles of the rule of law, separation of state powers and independence of the judiciary, as well as the right to a fair trial and the right to respect for private life. The applicants consider that both dissimulated and unconcealed investigation of public agents by NAC employees regarding professional testing of their functional integrity constitutes violent intrusion in their private life.

It should be mentioned that in order to objectively assess the results of the professional integrity test, the latter shall be recorded on a mandatory basis by audio/video means and the communication means in the tester's possession or used by the tester. The audio/video recording means, the communication equipment and other technical means for undercover acquiring of information are the equipment of the National Anti-corruption Centre and of the Intelligence and Security Service. Also, the Law on professional integrity testing sets out in a general manner the right of testers to use *any technical means for undercover acquiring of information* within the public agents' professional integrity testing and the term "dissimulated means" is not very explicit and it is not clear how the



means for undercover acquiring of information differ as compared to the means used by the testers within special investigation activities. Article 9 para. (3) of the Law no. 325 of 23 December 2013 allows application of undercover means and, therefore, interference in the private life of the public agents without judicial control.

The Court noted that the notion of technical means for undercover acquiring of information as used in the Law submitted for the constitutional review overlaps with the notion audio/video recording means, the communication equipment and other technical means provided in Article 132/2 of the Criminal Procedure Code, means that can be ordered only by the instruction judge (para (1)) or by the prosecutor (para. (2)) for a 30 days term, with a possibility to be prolonged on reasonable grounds up to 6 months. These measures, despite the fact that are provided for criminal cases, may be employed only in cases when there is a reasonable doubt referring to the preparation and commitment of serious, extremely serious or exceptionally serious crimes.

The Court considered that the challenged Law does not provide guarantees allowing effective protection against the risks of abuse, as well as against any illegal access and use of personal data. While special investigation means are defined by the Criminal Procedure Code, the concept of technical means for undercover acquiring of information may also represent similar special means, given the regulatory framework of the law and the definitions it contains, so that carrying out of such supervising activities cannot be permitted unless authorized by a judge.

Another aspect revealed by the Court concerns the person that coordinated the professional integrity testing of public agents - a person holding management position within the National Anti-corruption Centre or the Intelligence and Security Service. The coordinator of professional integrity testing activity, on confidential basis designates for each professional integrity testing activity a professional integrity tester which ensures carrying out of all professional integrity testing activities and is in charge with drafting the professional integrity testing plan and submission of the reports accompanied by the results obtained following testing activities.



Consequently, the decision regarding professional integrity testing which further implies the use of means and methods for testing and recording that may constitute serious interferences with the public agents' private life - **is not authorized by a judge or an authority that offer the largest guarantees of independence and impartiality, as it should be under the rule of law** (see *Klass and Others v. Germany*, para. 55).

The Court mentioned that in criminal matters referring to the facts with a higher social risk such means can be used only upon the authorization of the instruction judge, it is more impetuous that such intrusions are not justified without judicial authorization as referred to disciplinary offenses which constitute facts which social risk rate lower than that of the crimes.

The Court considered that **data that are covered by the provisions of the challenged law are likely to lead to quite definite conclusions regarding the private life** of individuals whose data were collected, conclusions that can target the habits of everyday life, places of permanent or temporary residence, daily trips or other traveling, activities performed, social relations of these people and their social environments.

Also, the fact that retention of data and their subsequent use under the circumstances when the registered public agent is not informed on this may imprint on the consciousness of persons concerned the feeling that their private life is subject to *continuous supervision*.

Concerning the appointment of an executive body performing activities in the field of information as national authority responsible for integrity testing, the Court held that there is a serious risk to frustrate the purpose of the Law on professional integrity testing the sense of employing the powers conferred by this Law by the information services with a view to obtain information and data, that might consequently violate constitutional rights to privacy, family and private life.

The lack of a precise legal rule which would exactly regulate the manner of storing and use of the data collected, offers possibility

for potential abuses by the competent authorities. Moreover, the legal framework regulating such a sensitive area should be clear, predictable and free of confusion, so that any possibility of arbitrariness or abuse of those called to apply the law is avoided to the largest extent possible.

In conclusion, the Court considered that the adopted measures are not of a specific and predictable nature, the interference of the state in the exercise of constitutional rights to intimate, family and private life, although provided by the law, is not expressed in clear, exact and comprehensive wording in order to provide confidence of citizens, the character providing for the extreme necessity in a democratic society is not fully justified and the proportionality of this measure is not ensured by regulating adequate guarantees.

In conclusion we would like to say that the protection of the right to privacy has raised concerns in jurisprudence and doctrine because of its hybrid nature, full of variables specific to each individual and covering the vast area of protection of personal data, secrecy, privacy, individual freedom of choice in sexual orientation or other issues. According to Article 4 par. (1) of the Constitution of the Republic of Moldova, Constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party. This provision entails legal consequences and provides that law enforcement authorities, including the Constitutional Court and the courts of common jurisdiction, within the limit of their competence, are entitled to apply the provisions of international law, in situations provided by the law, in the process of examination of concrete cases.

In light of the above, it is noted that the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms as well as the jurisprudence of the European Court of Human Rights are not only relevant in determining a particular solution adopted by the Constitutional Court, in some circumstances they have a leading role and guide the examination of a constitutional litigation when the dispute refers to the core issue of guaranteeing and respecting a constitutional right safeguarded by the Constitution and the European Convention on Human Rights and namely the right for privacy and family life.



Thus, the European Convention and the judgments of the European Court of Human Rights are recognized as having the status of source of law and are directly applicable in the national law of our country. The fact that the Constitutional Court in its case-law relates to the European Court's jurisprudence is not so much due a supranational control of the latter, but more to the fact that it possesses a superior experience in settling human rights disputes.

***RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE UNDER THE
EUROPEAN CONVENTION ON
HUMAN RIGHTS***

Ali BAHADIR

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RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Ali BAHADIR**

First of all, I would like to thank those who have contributed to the organization of this conference. I greet all you with respect both on my behalf and on behalf of the European Court of Human Rights (“the ECHR” or “the Court”).

Today, the topic I will discuss is the protection of private life within the scope of the European Convention on Human Rights (“Convention”). In my representation, will make an overview of the ECHR’s case-law and practice in this respect.

As you know, the right to respect for private life is enshrined in Article 8 of the Convention. This article is of the same structure with Articles 9, 10 and 11 of the Convention which respectively set out the freedom of thought, conscience and religion, the freedom of expression as well as the freedom of assembly and association.

As in the other above-mentioned articles, Article 8 is also formulated in the same way. In the first paragraph, scope of the right is explained, and in the second paragraph, the circumstances and conditions under which an interference with this right may be justified in accordance with the Convention are set out. In fact, this provision does not encompass merely the right to respect for private life. There are four different rights enshrined therein which are the right to respect for private life, for family life, for home and for correspondence.

Let me note that these rights are not in fact independent from one another and interrelated rights. In many of its judgments, the ECHR deals with at least one of these four rights concurrently and does not always clearly and explicitly indicate under which right

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it has made its examination. The first of these rights is the right to respect for private life. Before elaborating on this issue, I would like to mention of some other issues.

As you may see, the rights are worded in a very general manner in the relevant article where there is no definition and scope. Therefore, scope and framework of these rights are set by the ECHR's case-law by attributing an autonomous meaning to all terms used in the article. In other words, notions of correspondence, family, home or private life, which are mentioned in the Convention, are autonomous terms that are independent from their definitions in the domestic law. Of course, in doing so, the ECHR has considerably extended the interests falling into the scope of this article and embodied many issues in this article. We may also conclude that given the issues which it protects and covers, this is the article of the broadest scope within the Convention. It is not the provision which is mostly invoked in filing cases or lodging applications. However, its protection and coverage are the broadest one. Even when we examine the Court's judgments, we may get the impression that when the Court cannot decide on a certain Convention provision under which an issue, an application or a complaint would be examined, it must then examine the case under Article 8.

The first of these four rights is the right to respect for private life. What should we infer from the notion of private life? As I have mentioned, the provision includes no definition. In fact, nor has the Court made a definition because this article is not suitable for being defined thoroughly given the scope it protects and covers. We cannot even find an exact definition of this provision in the Court's case-law. On the contrary, the Court notes in some of its judgments that it is impossible and even unnecessary to make such a definition. However, the Court has outlined some tips on the issues which would fall into the scope of this article. The first one of them: this article is not limited to private life, that is to say, to activities performed at closed areas e.g. home, or to personal information. It is much broader than these concepts. In other words, it is a concept which is much more extensive than the concept of "privacy" in Anglo-Saxon law.



The Court outlined one of these tips in one of its previous judgment delivered in the case of Niemietz. In this judgment, the Court points out that notion of private life is not limited to inner circle but may, to a certain extent, cover the outside world. It is also noted that the right to respect for private life also encompasses the right to establish relationships with other human beings.

In that case, it would be easier to explain which issues are under this provision instead of making a comprehensive definition. One of the significant issues falling into the scope of this provision is personal and social identity of a person. What elements are included in the notion of personal and social identity? First of all, identity encompasses name of a person. Therefore, the Court examines complaints concerning names under this provision. There are many precedent judgment on this issue, e.g., the case of Kemal Taşkın where the applicant is a Turkish citizen of Kurdish origin. He was complaining of his inability to register his name in his own native language, Kurdish, on his identity card. He wanted to use certain letters like x or w which are not available in the Turkish alphabet. However, the relevant administration did not allow it. He then brought this matter before the Court which examined the applicant's case under Article 8 of the Convention.

The right to know one's ascendants or descendants is also considered to form a part of private life.

Sexual identity of a person is also a part of his identity and private life. In this respect, the Court assesses that legal recognition and legal record by the state and administration of transgender individuals' gender change are an issue falling under Article 8 of the Convention.

Sexual life is undoubtedly one of the most intimate aspects of private life. In this respect, the Court examined the punishment of homosexuality in its well-known judgment in the case of Dudgeon. It also dealt with the cases of military officers who were dismissed from the military for being homosexual within this context. Besides, the application lodged by a father who was not awarded the custody of his child for being a homosexual was also examined



under this article. This is because all of the steps taken in respect of the applicants in these cases are due to their sexual choices.

As you may foresee, personal information and data also form a part of private life. Taking, recording and saving any types of data including GPS data, fingerprints and DNA samples are issues falling into the scope of Article 8.

Discussed in the Court's recent judgment in the case of von Hannover, image of a person is also a part of his identity and is under protection.

Personal dignity also forms a part of a person's identity, hence his private life. Unjust attacks towards a person's dignity is also examined under the scope of private life.

Physical and mental integrity of persons is considered to fall into scope of private life. In this respect, medical negligence cases are also examined under this heading.

The ECHR has placed emphasis on the notion of personal autonomy in one of its recent judgments where it is underlined that one of the basic interests safeguarded by Article 8 of the Convention is personal autonomy. This notion may be also defined as the right of a person to make his own decisions on his life or future. One of the Court's best-known judgments in this sphere was delivered in the case of *Pretty*, which concerns euthanasia. The ECHR dealt with this case under Article 8, that is to say, the right to die is also considered to form a part of private life. Besides, forced treatments administered to persons as well as medical interventions against their will are also considered to constitute an interference with their personal autonomy, which is dealt with under Article 8 of the Convention.

As to the right to home, I should primarily note that it is not the right to purchase a home. It only encompasses the existing ones. As I have mentioned above, the notion of home has a very different meaning than its definition within the domestic law. The ECHR makes its own definition and decides which matters fall into the scope of this notion, interpreting the Convention. It has extended the scope of home and considered that places of work are also a



part of home. In the same vein, the Court has also introduced the right to environment –right to clean environment– deriving from the right to home and noted that the latter also encompasses a healthy environment for individuals. For instance, in a case where the applicant complained of his inability to make use of his own home due to noise coming from many bars and night clubs located near his home, the Court examined the application within the scope of the right to home under Article 8 of the Convention.

The abovementioned information is also applicable to the notion of family life. In other words, this notion is distinct from that of the domestic law. Family life is interpreted in a broader manner beyond official relationships and family life in wedlock and may also encompass social bonds beyond biological relations. In acknowledging existence of family life, the ECHR attaches importance to scope and veracity of relations. In this respect, issues with respect to *de facto* relationships and children born out of wedlock are examined within the scope of private life.

The right to correspondence is a right exercised by individuals to establish communication with others without being censured and precluded. Regardless of the means by which you exercise this right, all communications –whether by post, phone, facsimile, internet or similar means– fall into the scope of the right to correspondence. Correspondences at the places of work are also included therein.

Nevertheless, it should be stated that every cases safeguarded by, and to be examined under, Article 8 of the Convention would not necessarily mean that there has been a violation of this provision. For instance, in some of the judgments I have mentioned above, the Court dealt with the matter under Article 8, but found no Convention breach. In other words, these rights are not absolute. As also indicated in Article 8 § 2 of the Convention, there are certain circumstances under which an interference with these rights may be found justified.

A public authority may interfere with the exercise of this right only when it is prescribed by law and 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.

Let's take a look at the conditions of the interference. According to the Convention, what is prohibited is the interference of an official authority. The classical understanding of fundamental rights and freedoms requires that the State will not interfere with the exercise of rights.

At first glance, the Convention seems to have adopted this understanding. However, this classical understanding is not sufficient in ensuring the individuals to effectively exercise their fundamental rights. The ECHR has gone beyond this classical meaning by means of interpretation and has introduced positive obligations. This means that the Convention imposes obligations on the States not only to avoid interference with the rights but only to create an environment where these rights can be safeguarded and exercised properly.

Accordingly, the State may have an obligation on an issue between two private persons related to their private lives, e.g. medical negligence cases. For example, in a case where a person who underwent an operation at a private hospital has become permanently disabled, the relevant person alleges that the doctor could not perform the operation properly or that he is not qualified enough. Hence, there is an issue between two persons, which fall into the scope of Article 8, namely physical integrity. There is an interference with the relevant person's private life. However, it is not the State who made the interference, but a private person. Even in such cases, the State may be held responsible. That is because the State has a positive obligation in this respect. His obligation is not only to avoid interference, but also to safeguard the individual's right. According to this obligation, the State must provide that anyone cannot be a doctor, namely it must regulate the conditions in which this profession can be performed. The State must also establish the rules regarding all medical interventions.

The issues such as under which conditions the medical interventions or operations will be carried out and to which extend



the patient will be given information before the operation must be regulated by the State. However, this is not sufficient. When there is an allegation that a doctor caused a damage to the patient as a result of his medical negligence, the patient must have an access to an effective domestic remedy.

Accordingly, the State is not only expected to make regulations in this respect. It must also have an obligation to establish a proper functioning and effective domestic remedy capable of determining the doctor's responsibility, identifying those responsible and punishing them.

As you can see, despite the wording of the Constitution, the ECHR has not adopted the classical concept of human rights. It has adopted a more modern understanding and imposed on the State an obligation not to interfere, as well as, to protect the rights and even to launch investigation, if necessary.

In this respect, the ECHR relied on two points. The first one is the wording of Article 8. Article 8 contains the phrase of "the right to respect for private life", not "the right to private life". Here, the ECHR underlines that this is an important distinction and that the word "respect" imposes certain positive obligations. In addition, Article 1 of the Constitution provides that "The High Contracting Parties shall secure everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". This provision does not contain the phrase "they do not interfere with these rights", but the phrase "they provide them with the opportunity to enjoy these rights".

To summarize, the State's responsibility is at stake not only in cases where it makes an interference, but it may be at stake in the disputes between private persons.

For an intervention to be in compliance with the Constitution, it must be provided by law, must pursue a legitimate aim and must be necessary in a democratic society. Now, we will examine these concepts separately. The concept of "being provided by law" requires that the interference must have a legal basis. However, this legal basis may not be a written text. It may be a law, a regulation,



a statute or a circular. It may even be an unenacted law, e.g. an established case-law. The ECHR treats the case-law as law, within the meaning of the Convention. If the courts have consistent case-law that allow for interference, the ECHR may accept that the interference is provided by law.

However, the concept of being provided by law does not require solely a legal basis. This concept is not only related to the existence of a basis, but it is also related to the legal character of the basis. This means that the legal basis, namely the legal provision forming a basis for the interference, must have the characteristics of being a law. One of these characteristics is the accessible nature of the legal provision or the norm.

For example, all letters and correspondences of the prisoners held in prison are read by the prison officers. This is an interference. So, is this interference provided by law? There is a ministerial instruction allowing for this interference. Accordingly, the interference has a basis in the domestic law. However, this instruction is not accessible to everyone. Only the personnel of the Ministry and criminal enforcement officers are informed about the existence of such an instruction. That means, the legal provision or the norm forming a basis for the interference is not accessible. Therefore, it does not have the most basic characteristics of the law. Hence, the interference does not comply with the law.

Another issue examined under the legal characteristic is the explicitness and clarity. The legal basis of the interference must be explicit and clear enough. When any citizen reads the text of the legal provision, she/he must predict what will happen in which situation.

In a judgment concerning France, the ECHR went further. It stated that the phrase of “explicit and clear” required some other things. The relevant case was related to the phone wiretapping, which was provided in the French criminal procedure code. The code granted power to the police in this respect. The ECHR accepted the existence of a legal basis, however it stated that the legal basis in question does not have a legal character, as it is not explicit and clear enough.

This code did not include issues such as the methods to be used, the persons allowed to conduct phone wiretapping, the conditions under which wiretapping would be conducted, the persons who would keep the records pertaining to wiretapping and the period during which the records would be kept, and etc. Accordingly, this code might lead to arbitrary acts. In fact, the purpose of the laws is to protect individuals against arbitrary acts. In its certain judgments, the ECHR makes such examinations. However, in some other judgments, it examines the issue as to whether a law is explicit and clear enough under the review of proportionality.

Legitimate aims are listed in the Convention. In the case-law of the ECHR, it is hardly possible to see a judgment where it held that the interference pursued a legitimate aim. The ECHR generally makes a wide interpretation in this respect, and it accepts in almost all cases that the interference pursued a legitimate aim.

The third requirement is “necessity in a democratic society”. The ECHR states that the term of “necessity” is not as flexible as those such as “appropriate, possible or desirable”. In its judgments it stated that the interference must be against a social pressure. It is not possible to examine this issue in theory. In fact, the ECHR makes a review of proportionality under the concept of necessity in a democratic society.

The ECHR considers that there must be a reasonable proportionality between the aim sought and the means employed. In this respect, it leaves a certain margin of appreciation to the States in order to make a review of proportionality. As this margin of appreciation is not limitless, the last review is directly made the European Court of Human Rights.

In review of proportionality, the importance of the right under protection, the gravity and importance of the interest protected by way of interference and whether there is a consensus in the Europe in this respect are taken into consideration. The international laws and norms are also paid regard.

Another point is that while making this review of proportionality, the ECHR also has regard to the domestic proceedings. Where a



person complains about an alleged interference, she/he applies to the domestic courts in the first place. Then, upon the rejection of the domestic courts, an application is lodged with the ECHR. While making a review of proportionality, the ECHR also takes into account the domestic proceedings as a result of which the case was rejected.

In brief, in examination of an issue falling into the scope of Article 8, the ECHR in the first place determines whether the alleged issue must be examined from one of the aspects of Article 8 and whether it falls into the scope of Article 8; secondly, whether there is a positive obligation attributable to the State; and thirdly, whether there is an interference with this right, and if so, whether the interference is provided by law, pursues a legitimate aim and necessary in a democratic society.

*RIGHT TO RESPECT FOR PRIVATE AND
FAMILY LIFE BY THE CONSTITUTIONAL
COURT OF MONGOLIA*

Batsuuri YALGUUN
MONGOLIA



RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE BY THE CONSTITUTIONAL COURT OF MONGOLIA

*Batsuuri YALGUUN**

1. GREETING

Honourable Chairperson,

Honourable Representatives of the Constitutional Courts

Ladies and Gentleman,

I would like to begin by extending sincere gratitude on behalf of the Constitutional Court of Mongolia and myself to the Constitutional Court of Turkey for organizing the 4th Annual Summer School program here in Ankara and wishing great success to your future endeavours.

Many thanks to the delegates who have prepared presentations to share the rich and unique experiences of their similar issues in their home countries. I believe that this Summer School Program will be as successful as the previous programs.

2. ABSTRACT

The concept of human rights and freedom has been essentially articulated as “to accept, to confirm and to protect,” and these ideas are integral part of human rights. This concept shall become valuable and relevant only when it’s enforced by the law and the idea of human rights and freedom would not be possible without the protection and power that is upheld by the constitutional government.

Immunity of a person is the definite fundamental feature of human rights. In other words, immunity is the principal idea of

* Lawyer, Constitutional Court of Mongolia.



human rights. Society is an inseparable part of human life as people must interact with one another in order to live their lives properly. When people are involved in one another in a society their basic rights and freedom is often compromised. Thus, democratic society needs to establish foremost the relevant laws in order to ensure that the human rights, freedom and the immunity of privacy within the person's family are protected.

Reflecting on above, it seems apparent that accepting, confirming, and protecting human rights is of vital importance for every nation. Therefore, the topic of this year's summer program must have considered significant. I would like to present "Right to Respect for Private and Family Life by The Constitutional Court of Mongolia" for this program. The presentation includes the following:

- Greeting
- Summary
- Foreword
- Legal Regulation of Human Rights and Freedom
- Legal Regulation of Protection of the Privacy of Family Life
- Current Regulations to Protect Human Rights by Constitutional Court Of Mongolia
- Resolutions of the Constitutional Court of Mongolia related to the Right to Respect for the Family and Private Life

3. FOREWORD

The Constitution is a legal and political document of supreme importance that serves as a guarantee of the independence and sovereignty, human and citizens' rights and freedoms, separation and balance of the state power and exercising the constitutionalism of a country.

An issue that attracted special attention when adopting its new Constitution following the transition of Mongolia to democracy was ensuring human rights by the Constitution and their practical implementation as well as their protection. A special article "The Human Rights and Freedoms" was included in the Constitution of Mongolia in compliance with the treaties and conventions



relevant to the human rights and freedoms adopted by the United Nations based on the letter and the spirit of the Universal Declaration of Human Rights. In other words, Mongolia, in line with internationally-set practices, declared inalienable, political, social, cultural and economic rights and freedoms in a new Constitution adopted in 1992. It established that no person shall be discriminated on the basis of ethnic origin, language, race, age, gender, social origin and status, wealth and religious belief. The constitution clarified human rights related to marriage and privacy of family life.

Aside from that, the Constitution¹ of Mongolia has specifically reflected that the State must provide the grounds for social, economic and other factors required in upholding the constitutional human rights and enforcing the citizen's basic rights guaranteed under the constitution if it has been infringed. Mongolia certainly is one of the exemplary nations in its peaceful movement for human rights.

The constitution of Mongolia has established basic rights clause stating, "men and women shall possess equal rights under the law," as early as 1924 in its First Constitution. Since then this clause was clarified as "women are equal to men" and later in 1992, the clause was defined to its current wording as "in all affairs, men and women are equal in rights."

4. Legal Regulation of Human Rights and Freedom

Immunity is the indispensable part of personal liberty. The constitution of Mongolia's Article 16 stipulates the following in Clause 13² & 17³:

1 The Constitution of Mongolia: Article 19 Clause 1.

2 The Constitution of Mongolia: Article 16 Clause 13 - The right to personal liberty and safety. No one shall be searched, arrested, detained, persecuted or restricted of liberty except for the grounds and procedures prescribed by law. No one shall be subjected to torture, inhumane, cruel or degrading treatment. Whenever the person is arrested, his/her family and advocate (legal counsel) shall be notified within a period of time prescribed by law of the reasons for and grounds of such arrest. The privacy of citizens and their families, confidentiality of correspondence and communication shall be protected.

3 The Constitution of Mongolia: Article 16 Clause 17 – The right to seek and receive the information on any issues except which the State and its organs are legitimately bound to specifically protect as relevant secret. In order to protect the human rights, dignity and reputation of persons, and to ensure the national defence, security and the public order, the



- The right to personal liberty and safety, no one shall be searched, arrested, detained, persecuted or restricted of liberty except for the grounds and procedures prescribed by law.
- No one shall be subjected to torture, inhumane, cruel or degrading treatment
- The privacy of citizens and their families, confidentiality of correspondence and communication shall be protected
- The inviolability of home residence shall be protected.
- Demanding for or compelling to and using the force to testify against oneself shall be prohibited
- Every person shall be presumed innocent until proven guilty
- Human rights, dignity and reputation, private and confidential information is protected by the law

Immunity and personal liberty clauses in the constitution of Mongolia are further stipulated in the respective laws such as Criminal, Civil, Property, Administrative, Military, Judicial and Prosecutors, describing the protection of these rights from being infringed.

The Constitution of Mongolia has secured the guarantee for human rights stipulating the right to life, personal dignity, reputation and privacy of family life. There are cases when personal people's basic rights are infringed by the officials in public power, therefore relevant laws also contain clauses ensuring the immunity of people's private life.

Mongolian Criminal law of 2002, Civil law of 2002, Constitutional Court Law of 1992, General Administrative Law of 2015 and all other pertaining laws serve to the purpose of ensuring the personal immunity. Citizens may learn and be informed about the respective laws in order to protect himself from the abuse of his basic rights.

5. LEGAL REGULATION OF PROTECTION OF THE PRIVACY OF FAMILY LIFE

The Constitution of Mongolia ordered the equal rights' of men and women⁴ as following:

confidential state, corporate and individual information, that are not subject to disclosure, shall be classified and protected by law.

4 The Constitution of Mongolia: Article 16 Clause 11 - Men and women shall enjoy equal



- Men and women shall enjoy equal rights in political, economic, social and cultural fields and in marriage.
- The marriage shall be based on the equality and consensual relationship of the spouses who have attained the age determined by the law.
- The state shall protect the interests of the family, mother and the child.
- Privacy of family shall be protected by law
- Right not to testify against family member, parents and children
- The punishment and penalties imposed on the convicted shall not be applicable to his or her family members

Article 17, clause 2 of the Constitution also stipulates that it is duty of every citizen to bring up and raise their own family.

Family is the foundation of our society and the basis every human life which requires a lifetime of involvement. A person will be a born into a family to live and grow and in turn also bring up his or her own children and will raise the next generation. The role of family in our society is great and thus it is defined as the foundation of our society in the international agreements.

Main role of a family in society is to build a consensual relationship in which the individuals work together to earn a living in order to take care of their family members, bring up and raise their children. The Constitution of Mongolia stipulates marriage shall be based on the voluntary and equal relationship between men and women. Family law further defines marrying partners' requirements as follows:

- Must be at least 18 years old and be of legal capacity
- Be voluntarily involved in the relationship
- Not be married to anyone else
- Not be a carrier of infectious disease

rights in political, economic, social and cultural fields and in marriage. The marriage shall be based on the equality and consensual relationship of the spouses who have attained the age determined by the law. The state shall protect the interests of the family, mother and the child.



An adult man and woman who voluntarily agreed to become family is called marriage and once married, parties will be referred to as husband and wife. Their consensual relationship will become the basis of their family. Husband and wife are called each other's spouse. They may bring up and raise their own children which will extend their family. They may also adopt a child or adopt anyone willing to become part of his or her family and take care of the adoptee. Children will become part of the family and will be called family members.

Possession of mutual wealth is the special characteristic of family. Any possession owned by the family will be a shared property. Aside from the personal clothing and jewellery, real estate and any other properties will be mutually owned by all of the family members. If any of the family members start their own family separately he or she may acquire some percentage from the family's shared property. But no one in the family may trade or sell the mutual possession without the other member's consent. If the family member causes any damage to others' property, he or she may pay for it from his or her own share of the mutual possession. After the reimbursement, remaining payment may not be transferred to the other family members. The Constitution of Mongolia Article 16, Clause 14 is concerned with above issue in stating that it is prohibited that the punishment and penalties imposed on the convicted shall not be applicable to his or her family members.

Spouses may sign a prenuptial contract as defined in Civil Law Article 125 Clause 2 and Article 132 prior to marriage by the people intending to marry. The content of a prenuptial agreement includes provisions for division of property and spousal support in the event of divorce. The contract must be notarized by public notary in order to be valid. In marriage, there must be equal rights and responsibilities between husband and the wife.

Equal rights and responsibilities include earning and managing their wealth through any type of enterprise, raising their children, nursing for the sick, cooperating and protecting each other in times of need. Marriage and the family members' equal rights will be



protected by the state. The Constitution of Mongolia Article 16, Clause 11 states that the “State shall protect the interests of the family, mother and the child.”

The latest Constitution ratified in 1992 Article 10 Clause 1 states “Mongolia shall adhere to the universally recognized norms and principles of international law, and shall pursue a peaceful foreign policy,” Clause 2 states “Mongolia shall enforce and fulfil in good faith its obligations under the international treaties to which it is a State Party,” Clause 3 states “The international treaties to which Mongolia is a State Party, shall become effective as the domestic legislation upon the entry into force of the law on their ratification or accession.” Currently, Mongolia is agreed to abide by 40 conventions related to family and women’s equal rights as listed below:

- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage
- C100 - Equal Remuneration Convention, 1951 (No.100)
- C103 - Maternity Protection Convention, 1952 (No.103)
- C111 – Discrimination (Employment and Occupation) Convention, 1958 (No.111)

Based on the conventions listed above and the Constitution of Mongolia (Article 16 Clause 11), it can be concluded that the State ensures that equality of women by providing financial support for the pregnant and stay at home mothers and also ensures right to education, health and political involvement by voting for the representative. Some ratification regarding family matters were made to the Constitution of Mongolia in 1999 which focused on issues of marriage such as the legal arrangement for division of assets, dependents’ custody and adoption in case of divorce. The Law on Family clauses were further defined by in Civil Law (1994, 2002), Children’s Rights Law (1996) and Domestic Violence Law (2004).



Based on internationally agreed pacts on women's rights such as, Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), Declaration on the Elimination of Violence against Women, Beijing Declaration, and Platform for Action, State Khural has passed Law on Domestic Violence in 2004. This law enabled state to raise awareness on domestic violence and against the offenders of women rights and helped more women to domestic violence and which enabled children to grow up in a peaceful homes and undisturbed environment.

Women's right to own affirmed by the Declaration on the Elimination of Violence against Women was reflected in the Constitution of Mongolia and also stipulated in the special article of Civil Law. The article affirms all property acquired by either spouse during the marriage is marital property and is subject to equitable division upon dissolution of marriage. It makes no difference how title to the property is held. If it is marital property, it will belong to everyone in the family regardless of who earned the asset. Legal arrangement for prenuptial agreement detailing the division of asset in case of divorce has also been clarified in the Civil Law.

With the various legal regulations outlined above, I believe Mongolian laws and regulations on family matters have been greatly improving in recent decades. But if these laws are not conformed, it will merely be declaration on paper. In the next chapter, I will discuss the details on the current regulations protecting human rights by Constitutional Court of Mongolia.

6. CURRENT REGULATIONS TO PROTECT HUMAN RIGHTS BY CONSTITUTIONAL COURT OF MONGOLIA

There must be a mechanism to protect human rights and freedoms enshrined in the Constitution and other laws in case as those rights and freedoms will not become a reality just on their own. There is always a possibility that they could be violated. The highest form to provide for such protection in domestic legislation is the Constitutional Court.



The Constitutional Court of Mongolia called “TSETS” has a discretion to initiate constitutional proceedings on the basis of petitions and information received from citizens. The Constitutional Court also examines and settles constitutional disputes at the request of the Parliament, President, Prime Minister, Supreme Court and the Prosecutor General.

Apart from citizens of Mongolia, foreign citizens and stateless persons residing lawfully in the territory of Mongolia enjoy the right to submit petitions and notifications to the Constitutional Court of Mongolia. Citizens could submit petitions, information and complaints to the Constitutional Court regarding any issue which falls under its jurisdiction and it does not require the rights and freedoms of the citizen to be violated or the case to be previously settled by the court. Apart from the issues regarding violation of individual rights of citizen, he/she may submit petitions, information and complaints regarding violation of the rights and interests of the public. The right of the citizens to apply for a constitutional review on all issues which fall under the Constitutional Court’s jurisdiction gives broader opportunities in comparison with other states’ courts. Thus the Constitutional Court of Mongolia protects the rights and freedoms of the citizens through an abstract form of supervision over implementation of the Constitution.

The Constitutional Court of Mongolia has taken numerous decisions aimed at stopping violations of human rights following Court proceedings on petitions and information received from citizens. It should be mentioned that these decisions will set a standard which will be essential in preventing these kinds of violations in the future, have practical influence on promoting and protecting human rights and freedoms and formation of the Constitutionalism.

Since its establishment, the Constitutional Court of Mongolia adopted approximately 240 decisions and 60 percent of them determined that the Constitution had been breached. The cases that have breached the Constitution have violated about 37 provisions and 73 clauses for 202 times. Article 2 of the Constitution “Human



Rights and Freedoms” has been breached 65 times. Article 16 Clause 14⁵ has been violated 19 times. The Constitutional Court also intervened⁶ and solved about 20 cases regarding inequality.

The Constitutional Court of Mongolia has examined and settled numerous disputes regarding human rights and freedoms. Upon a closer examination, private and family life lawful rights violation cases have taken about 3% of the total cases ruled by the Constitutional Court of Mongolia.

Ultimately, the Constitutional Court of Mongolia has received gratitude from citizens by successfully resolving cases that protected the human rights and freedom from abuse of public power. The following are brief examples of some cases:

As regards to the personal inviolable rights and freedoms, arresting an intoxicated (alcohol or drugs) person according to the relevant law was regulated by the rules adopted by a public official. The Constitutional Court of Mongolia repealed it after having established that this provision breached the concept of the Constitution regarding infringement of the citizens’ rights which could only be regulated according to the grounds and procedures prescribed by law. On another case, the Constitutional Court settled a dispute regarding removal of the category of confidential information about AIDS patient after an amendment made to the law on protection of confidential individual information. The Constitutional Court repealed abovementioned provision after having concluded that this was a regulation that could result in slander by infringing on the confidential individual information of the patient.

5 Article 16 Clause 14- The right to appeal to the court to protect such rights if he/she considers that the rights or freedoms as prescribed by the laws of Mongolia or by the international treaties have been violated; and shall have the right to be compensated for the damage illegally caused by other; right not to testify against oneself, his/her family, or parents and children; right to defence; right to receive legal aid; to have documents of evidence examined; right to fair trial; right to be tried in his/her own presence; right to appeal against court decisions, and right to request a pardon. Demanding for or compelling to, and using the force to testify against oneself shall be prohibited. Every person shall be presumed innocent until proved guilty by the court through the due process of law. The punishment and penalties imposed on the convicted shall not be applicable to his/her own family members or relatives.

6 Speech given by Doctor Jantsan N. who is an acting chairman of the Constitutional Court of Mongolia.



Mongolia faces many issues securing and improving protection of an individual rights as well as family rights through refined mechanism of legal system. There have been local and regional forums and a numerous researchers and scholars spoken on improving these issues as well. As a result of these forum and discussions, Law on Investigation Execution has been passed in 2015. This law adjudicates the limits to individual rights, family rights when performing any type of investigative activities. Laws relevant to human rights such as the Law on Family, Law on Domestic Violence, Criminal Law and Administrative Law has been listed as the laws which requires amendment to be made by the State Khural.

In conclusion, the protection of the human rights and freedom is the ultimate goal of democratic society and I believe every nation prioritizes the matter of refined mechanism of legal system in order to prevent the violation of people's basic rights.

The constitutional adjudication system is the most important means of realizing the legitimacy of the Constitution. Moving on to the next part of the speech, I present to you the four cases resolved by the Constitutional Court of Mongolia regarding the human rights and freedom.

7. RESOLUTIONS OF THE CONSTITUTIONAL COURT OF MONGOLIA RELATED TO THE RIGHT TO RESPECT FOR THE FAMILY AND PRIVATE LIFE

PART 1

Adjudication of constitutional dispute on constitutionality of provisions of Article 4, Clause 4.4 of the Law of Mongolia on Privacy

Constitutional Court Hall, 11:50 p.m.

Brief content of the dispute:

Dispute on inconsistency of Article 4, Clause 4 of the Law of Mongolia on Privacy stipulating "Diseases other than certain specific, dangerous to the public diseases" specified in Clause



2.2 of this Article, does not include Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)” with the provisions of Article 16, Clause 13 of the Constitution of Mongolia stipulating: “Privacy of citizens shall be protected by the law,” Clause 17 of this Article stipulating: “In order to protect human rights, dignity and reputation of person which are not subject to disclosure, shall be determined and protected by law”; Article 19, Clause 1 stipulating “The State shall be responsible to the citizens for the creation of legal guarantees ensuring human rights and freedoms”.

Content of a petition of citizen Mergen B. to the Constitutional Court

Article 4, Clause 2 of the Law of Mongolia on Privacy provides: “In this Law, privacy of correspondence, health, property and family shall mean the following”, and Article 4, Clause 2.2 provides that health privacy includes physical defects and information on diseases other than certain specific, dangerous to the public diseases. However, this Law has been amended, in particular Article 4, Clause provides that “diseases other than certain specific, dangerous to the public diseases” shall not include infection with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). So the Law excludes information of a person about infections of HIV and AIDS from the individual’s privacy. Thus, Article 4, Clause 4 of the Law on Privacy is in breach of the following provisions of the Constitution of Mongolia:

- Article 14, Clause 1: “All persons lawfully residing within Mongolia are equal before the law and the Court”;
- Article 14, Clause 2: “No person shall be discriminated ...”;
- Article 16, Clause 13: “Privacy of citizens, their families, correspondence ... shall be protected by law”;
- Article 16, Clause 17: “In order to protect human rights, dignity and reputation of persons ... which are not subject to disclosure shall be determined and protected by law”;
- Article 19, Clause 1: “The State shall be responsible to the citizens for the creation of legal ... guarantees ensuring human rights and freedoms ...”.



Content of the explanation submitted by a Member of Parliament

Regarding the provision of Article 14, Clauses 1 and 2 of the Constitution:

The provision of the Constitution stipulating “All persons are equal before the law and court” covers legislative, executive and judicial organs and officials, and the regulation that restricts discrimination against any person in any forms, implies that individuals are equal before the law and court, or the regulation has common characteristics. Thus, it is deemed that information on a person infected with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) has not been specially excluded from the privacy and his right has not been violated.

Regarding the provisions of Articles 16, Clauses 13 and 17 of the Constitution:

As provided in Article 12 of the Universal Human Rights and Article 17 of the International Covenant on Civil and Political Rights, “No one shall be subjected to arbitrary interference with his privacy. Everyone has the right to protection by the law against such interference or attacks.” Thus, privacy of a person is an immune right, and in this case, if it is considered that due to the disclosure of information pertaining to the privacy specified in provision 24.1 of the Civil Code without permission, if damage was caused, the citizen has the right to require remedy. Also, according to the relevant laws, an administrative and criminal penalty is imposed for disclosure of the person’s private affairs. The World Health Organization sets a list of certain infectious diseases dangerous to the public, and the list does not include Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). Unfortunately, there is no such regulation in the laws of Mongolia. But, certain precise regulations on protection of the rights of persons who are infected with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) are included in the Law on Prevention from infection with HIV and AIDS.



Regarding the provision of Article 19, Clause 1 of the Constitution:

Human rights and freedoms are equally natural rights of all human beings. Protection of human rights is a primary duty of legislative, executive and judicial bodies. The State organization designated to protect human rights, or the National Human Rights Commission of Mongolia, was established as a mechanism for supervision of the implementation of human rights. Besides, an independent and impartial administrative court was developed with the purpose of fighting against violation of human rights and freedoms, and rehabilitating the infringed rights. This court has a big effect on implementation of human rights. Therefore, provision of Article 4, Clause 4 of the Law on Privacy has not breached the relevant provisions of the Constitution.

Content of the explanation of the Minister of Health of Mongolia

Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) are not “infectious diseases dangerous to the public”. Thus, I propose re-editing the content of the Article 4, part 4 of the Law on Privacy. According to the International Health Regulations (2005), “A member state should evaluate and make a conclusion on any serious situation that has emerged on its territory, and inform of the following unusual, unforeseen diseases, having severe effect to human health”:

- Smallpox, Polio caused by a wild-type poliovirus, Human influenza caused by a new subtype, SARS, Cholera, Plague, Yellow fever, Bloody Virus fever (Ebola Hemorrhagic fever, Lassa fever; Marburg Hemorrhagic fever; Western Nile virus), Other diseases of national or regional concern (Dengue fever; Rift Valley fever; Meningitis infections, etc.)

FINDINGS:

The Constitutional Court discussed this petition at the Medium Bench Session on 10 September 2014, and rendered conclusion number 05 that provision of Article 4, Clause 4 of the Law on Privacy stipulating: “Diseases other than certain specific dangerous



to public diseases” specified in Clause 2.2 of this Article, do not include infection with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)”, has breached the provisions of Article 16, Clause 13 of the Constitution of Mongolia, stipulating: “Privacy of citizen shall be protected by law”; Clause 17 of this Article stipulating: “In order to protect human rights, dignity and reputation of persons which are not subject to disclosure, shall be determined and protected by law”; Article 19, Clause 1 stipulating: “The State shall be responsible to the citizens for the creation of legal guarantees ensuring human rights and freedoms,” and has not breached the relevant provisions of Article 14, Clauses 1 and 2 of the Constitution of Mongolia.

The Parliament of Mongolia (State Great Khural) discussed the above conclusion of the Constitutional Court (Tsents) on the plenary session of 9 October 2014, and rendered resolution number 56 on rejection to accept the first clause of conclusion number 05, dated 10 September 2014.

GROUND:

1. An amendment of 13 December 2012, made to Article 4, Clause 4 of the Law on Privacy stipulating that information on disease, of a person infected with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), was excluded from the health privacy of the person, is considered to be a regulation that might cause such consequences as: violation of dignity and reputation of the persons with infection of HIV and AIDS; deprivation of them from the community and avoidance of the infected persons from enrolment in medical tests and treatment, without concealment of disease.

2. Conclusion number 05 of the Constitutional Court (Tsents) of 2014 that the provision of Article 4, Clause 4 of the Law on Privacy stipulating: “Diseases other than certain specific, dangerous to the public diseases” specified in Clause 2.2 of this Article do not include infection with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)” breached the provisions of Article 16, Clause 13 of the Constitution of Mongolia stipulating: “Privacy of citizens shall be protected by law”; Clause



17 of this Article stipulating: “In order to protect human rights, dignity and the reputation of persons which are not subject to disclosure, shall be determined and protected by law”; Article 19, Clause 1 stipulating “The State shall be responsible to the citizens for the creation of legal guarantees ensuring human rights and freedoms” is considered well-grounded.

Guided by the provisions of Article 64, Article 66, Clause 3 of the Constitution of Mongolia and Article 8, Clauses 2 and 4 of the Law on Constitutional Court, Article 31, Clause 2 and Article 36 Clause 3 of the Law on Constitutional Court Procedure:

IT IS RESOLVED:

IN THE NAME OF THE CONSTITUTION OF MONGOLIA

1. Invalidate the provision of Article 4, Clause 4 of the Law on Privacy stipulating that information on disease of a person infected with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), as it is in breach of the provisions of Article 16, Clause 13 of the Constitution of Mongolia stipulating: “Privacy of citizens shall be protected by law,” Clause 17 of this Article stipulating: “In order to protect human rights, dignity and reputation of persons, which are not subject to disclosure, shall be determined and protected by law,” Article 19, Clause 1 stipulating “The State shall be responsible to the citizens for the creation of legal guarantees ensuring human rights and freedoms.”

2. Invalidate resolution number 56 of the Parliament of Mongolia (State Great Khural) on “Conclusion number 05 of the Constitutional Court (Tsents)” dated 9 October 2014.

3. This decision shall be final and is effective upon its issuance.

PART 2

Adjudication of constitutional dispute on constitutionality of provisions 55.1 of Article 55 of the Law on Enforcement of Court Decisions

Brief content of the dispute:

The medium bench session of Constitutional Court has reviewed and resolved the dispute on whether a provision 55.1 of Article



55 of the Law on Enforcement of Court Decisions has breached provision 14 of Article 16 of the Constitution.

Content of a petition of Citizen ChuluuntogtokhTs. to the Constitutional Court

The provision in section 55.1 of Article 55 of the Law on Enforcement of Court Decisions states that “the following essential property of the debtor cannot be seized as payment.” The provision in section 55.1.2 of Article 55 of the Law on Enforcement of Court Decisions states “a set of clothing for each season from debtor and their family members”, conflicts with section 14 of Article 16 of the Constitution of Mongolia which states “the penalties imposed on the convicted may not be applicable to his or her family members and relatives”. Being held responsible for others’ action would be the root of a non-democratic society. Maybe such things allowed in slavery, feudalization, communist society. Therefore, please review and examine this issue.

Content of the explanation of the Court Decision Enforcement Agency

Since the revision and adaptation on the Law on Enforcement of Court Decisions in 2002, there have been 279,847 cases executed and resolved.

There has not been any seizure of seasonal clothing from the debtor and their family members as payment during confiscation proceeding until today ever since the law has been validated and put into effect.

Content of the explanation submitted by a Member of Parliament

In Article 53 Clause 1 of Law on Enforcement of Court Decisions states that “payments are seized from all ownership such as real property, tangible property, bonds, monetary assets, current and saving accounts in banks and non-bank financial institutions and other assets by the debtor,” Article 53 Clause 3, “payments are seized from debtor first by cash or, monetary assets, current and



saving accounts in banks and non-bank financial institutions, and other valuables". Article 53 Clause 6 states "the other property debtor owns shall be seized if there is not enough asset specified in Article 53.1 or payment is insufficient. Article 53 Clause 7 states "payments will be seized from debtor's partial or jointly owned property if the property specified in section 53.3 and 53.6 is insufficient for payments. In case of payments to be seized from debtor partial or jointly owned property, the legal arrangement will be made according to the Civil Law.

There are no other arrangements for family member to make a payment as specified in the law except Article 53 in the Law on Enforcement of Court Decisions mentioned above. Thus, the provision in Article 55 Clause 1 of the Law on Enforcement of Court Decisions is not breaching a constitution stating "a set of clothing for each season from debtor and their family members."

The Universal Declaration of Human Rights Article 25 states "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services". It is consistent with the provisions of the Universal Declaration of Human Rights is that essential property cannot be taken away as payment as in Article 55 Clause 1 of the Law on Enforcement of Court Decisions states that "the following essential property of the debtor cannot be seized as payment."

The Constitution of Mongolia Article 16 Clause 14 does not conflict with the provision mentioned above in Article 55 Clause 1 of the Law on Enforcement of Court Decisions provision which states "a set of clothing for each season from debtor and their family members".

FINDINGS:

Provision Article 55 Clause 1 of the Law on Enforcement of Court Decisions stating "the following essential property of the debtor cannot be seized as payment" and provision in Article 55 Clause 1 Part 2 of the Law on Enforcement of Court Decisions that stating "a set of clothing for each season from debtor and their



family members” violates the Constitution of Mongolia Article 16 Clause 14 which states “the penalties imposed on the convicted may not be applicable to his or her family members and relatives”.

Under the provisions section 1 of Article 64, section 2.1 of Article 66 of the Constitution of Mongolia, Article 31 and 32 of the Law on Proceeding for Reviewing and Resolving Disputes in the Constitutional Court, the Constitutional Court makes the following conclusion.

IT IS RESOLVED:

IN THE NAME OF THE CONSTITUTION OF MONGOLIA

1) In Article 55 Clause 1 of the Law on Enforcement of Court Decisions that stating “a set of clothing for each season from debtor and their family members” conflicts with the Article 16 Clause 14 of the Constitution of Mongolia which states “the penalties imposed on the convicted may not be applicable to his or her family members and relatives”.

2) According to Article 32 Clause 4 of the Law on Proceeding for Reviewing and Resolving Disputes in the Constitutional Court, the provision in Article 55 Clause 1 Part 2 of the Law on Enforcement of Court Decisions stating “their family member” to be invalidated from January 28, 2015.

PART 3

Adjudication of constitutional dispute on constitutionality of provisions Article 57 Clause 2 of Law on Family

Brief content of the dispute:

This session has reviewed and resolved the issue on adjudication of constitutional dispute on constitutionality of provisions Article 57 Clause 2 of Law on Family.

Citizen Togtokhjargal’s. petition to the Constitutional Court states:

The provision in Article 57 Clause 2 of Law on Family of Mongolia adopted June 11, 1999, has breached Article 14 Clause



2 of the Constitution of Mongolia stating “No person may be discriminated on the basis of ethnic origin, language, race, age, sex, social origin or status, property, occupation or post, religion, opinion, or education. Everyone is a person before the law”. A citizen of Mongolia is deprived of their right to procreate, despite having proper health and livelihood; their wishes are limited by the law, and are deprived of their basic rights as citizen when they reach the age 60.

Thus, this is a violation of the Constitution of Mongolia which states “everyone is a person before the law” and prohibiting discrimination based on “age” with serious consequences. Another violation of the Constitution stating “everyone is a person before the law,” as in this petition 60-year-old citizen is not regarded a citizen.

It is duty of a citizen to raise children as a next generation for their State. Some people may wish to or to be required to leave behind a legacy by continuing one’s generation by adoption. The current Law on Family deprives an orphans right to be adopted, suppress people’s wish to adopt even though they are financially and physically capable, deprives the right to continue a one’s lineage because the law provides a specific age limit for citizen who want to adopt. Also this law restrains the basic right of the citizen whom out of pure generosity wishes to raise or adopt a child who was orphaned due to unfortunate events in their life.

I want to mention that putting eligibility criteria for adoption is not wrong. But it is a breach of the right of a citizen as proclaimed in the Constitution, to prevent a senior citizen of exercising their basic right. Therefore, I hereby submit my petition requesting the court to restore the right of a citizen to adopt a child by removing words “above the age of 60 years” from Article 57 Clause 2 of Law on Family of Mongolia.

Citizen Kh. Khuandag’s petition to the Constitutional Court states:

The provision in Article 57 Clause 2 of Law on Family of Mongolia which states that “it is prohibited to adopt a child to



a person over the age of 60 years” is disrespectful restriction of human rights and freedoms. Depriving the rights of person who is above the age 60 years is similar to degrading them to people who have had their rights taken away, are convicted, or are mentally disable people. This provision has unreasonably deprived the right of persons above the age of 60 years by abusing their age and violates the Constitution of Mongolian as stated below:

- Article 14 Clause 2 of the Constitution.
- The provision “above the age of 60 years” is considered to unlawfully restrict one’s right which is in violation of Article 16 Clause of the Constitution
- Aside from noting that people are not likely to become diseased after turning 60 and there are no major issues when a person over the age of 60 year to adopt a child. Instead, the benefit would be that an orphan may be able to inherit some asset from the adopted parents for better future.

Therefore, I petition to the Constitutional Court of Mongolia that provision in Article 57 Clause 2 of Law on Family of Mongolia stating “above the age of 60 years” violates the provision of Constitution of Mongolian.

Content of the explanation submitted by a Member of Parliament

The provision in Article 57 Clause 2 of the Law on Family of Mongolia which stating “it is prohibited to give a child for adoption to a person who is above the age of 60 years” does not violate the provisions in the Constitution. Law on Family of Mongolia was adopted in 1999 from the Parliament (State of Great Khural), to establish a number of methods and forms of protection of children’s rights with respect to parents’ custody including adoption, child custody, child support and custody within family.

Mongolia has ratified the Convention on the Rights of the Child adopted by the United Nations in 1990. Thus, the State Parties responsible for the adoption will bear in mind to put best interest of the child first in compliance with the terms and regulations of the Convention that allows the adoption system.



According to Article 4 of the International Covenant on Economic, Social and Cultural Rights which Mongolia has adopted it states that “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

In Article 19 Clause 2 of the Constitution of Mongolia it states “as defined by the Constitution and other laws are subject to limitation only by a law.” The Law on Family eligibility criteria for adoption regulation requirements was enforced according to Convention on the Rights of the Child and the Constitution of Mongolia above.

These eligibility criteria for adoption including wealth, health and the age difference between appropriate adoptee and adopter were put together according to World standards.

Considering Mongolian tradition and customs, legislators believe that it is the best practice to adopt orphans or children whose parents are missing or disappeared, mentally ill or lost legal capacity, to their close or distant relative. Therefore, an orphan without any legal guardian will give all custody to be adopted by his/her relative. This was stipulated in the Law on Family Article 57 Clause 3.

FINDINGS:

Depriving a citizen of Mongolia of the right to adopt a child, if that citizen meets the criteria for adopting a child as provided by the law and while has full capacity based on the grounds that “the citizen is 60 years old or older” has the nature of breaching the Constitution.

Under the provision of Article 66 Clause 2 Part 1 of the Constitution of Mongolia, Article 31 and 32 of the Law on Proceeding for Reviewing and Resolving Disputes in the Constitutional Court, the Constitutional Court makes the following conclusion.



IT IS RESOLVED:

IN THE NAME OF THE CONSTITUTION OF MONGOLIA

1. The provisions Article 57 Clause 2 of Mongolian Law on Family that stating “over the age of 60” breaches section2, Article 14 of the Constitution of Mongolia which states “No person may be discriminated on the basis of age,” and Article 19 Clause 1 which states “The State shall be responsible to the citizens for the creation of economic, social, legal and other guarantees”

2. Article 57 Clause 2 of Mongolian Law on Family that states “over the age 60” does not breach the provision of Article 14 Clause 2 of the Constitution which states “Everyone shall have the right to act as a legal person” and Article 16 Clause 13 of the Constitution that guarantees the “Right to personal liberty and safety. No person shall be search, arrested, detained, persecuted or deprived of liberty”.

3. According to Article 32 Clause 4 of Law on Proceeding for Reviewing and Resolving Disputes in the Constitutional Court, the provision in Article 57 Clause 2 of Mongolian Law on Family that states “over the age 60” to be invalidated from March 24, 2010.

PART 4

12 December 2014

No 02

Ulaanbaatar

Adjudication of constitutional dispute on constitutionality of provisions of Article 4, Clause 4.4 of the Law of Mongolia on Privacy

Constitutional Court Hall, 11:50 p.m.

Brief content of the dispute:

Constitutional dispute on inconsistency of constitutionality of provisions of Article 10, Clause 40.1.1 and 40.1.2 of the Law on Family of Mongolia with the Constitutional Law of Mongolia Article 16 Clause 11, Article 17 Clause 2.



Content of a petition of citizen Bekhbat B. to the Constitutional Court

Law on Family of Mongolia (passed on 1999 June 11, ratified on 2002 July 4) Article 40 Clause 1 has stipulated "Child support will be given out monthly and the amount is to be determined by the age group," Clause 1.1 "age from 0 to 11 will paid 50 percent of the subsistence level of the residing region," Clause 1.2 "age from 11 to 16 (if attending a secondary school to 18 years of age) and handicapped children will be paid 100% percent of the subsistence level."

Government mandated subsistence level cannot measure the true welfare of the families. International Covenant on Economic, Social and Cultural Rights⁷ Part I Article 1 states The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The Constitution of Mongolia and several international covenants have been breached firstly determination of amount to be paid for child support being based on the subsistence level of the residing region and secondly the lack of regulation in the Article 40 on alimony payment for the period before the divorce is being settled. Below listed are the details listed on these infringements:

a. Determination of amount to be paid for child support being based on the subsistence level of the residing region without any regard to the children's different living standard. This may cause the current living standard to be lowered and it is not fair that any legal arrangement causing the deterioration of any existing living condition

b. Lack of regulation in the Article 40 on alimony payment for the period before the divorce is being settled is causing the deterioration of any existing living condition.

⁷ **International Covenant on Economic, Social and Cultural Rights**

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>



As what can be conferred from above issues is that there are inconsistency of constitutionality of provisions of Article 10, Clauses 40.1.1 and 40.1.2 of the Law on Family of Mongolia with the Constitutional Law of Mongolia Article 16 Clause 11 stipulating "The state shall protect the interests of the family, mother and the child," Article 19 Clause 2 stipulating "The State shall be accountable to the citizens for the creation of economic, social, legal and other guarantees for ensuring human rights and freedoms, and shall fight against the violations of human rights and freedoms and shall restore such infringed rights for their exercise." Moreover, Convention on the Rights of the Child's PART I, Article 3, Clause 1 states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration," and PART I, Article 6, Clause 2 states "States Parties shall ensure to the maximum extent possible the survival and development of the child." This petitioned infringement is breaching the Convention on the Rights of the Child and furthermore the infringement of the Convention on the Rights of the Child itself is also breaching the Constitution of Mongolia Article 10 Clause 2 stipulating "Mongolia shall adhere to the universally recognized norms and principles of international law."

c. Justification for the determination of amount to be paid for child support being based on children's age is not sufficient and this clause is not protecting the best interest of the children. Children's living standard defined on a basis of their age seems to be creating discrimination. Thus, the petitioned infringement is breaching the Constitution of Mongolia Article 14 Clause 2 stipulating "No person shall be discriminated on the basis of age. Every human being shall be a legal person."

d. The determination of amount to be paid for child support being based on the subsistence level of the residing region has created the responsible parents to avoid supporting their own children which breaches the basic duty of parents to provide for their own family. Thus, the petitioned infringement is breaching the Constitution of Mongolia Article 17 Clause 2 stipulating "It is the sacred duty for every citizen to raise and educate his/her children."



e. Additionally, the petitioned infringement is breaching the Convention on the Rights of the Child's PART I, Article 27, Clause 2 states that "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development," Convention on the Elimination of All Forms of Discrimination against Women PART IV, Article 16, Clause D states that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount."

As can be concluded, the petitioned infringement is breaching the international conventions Mongolia has joined and the Constitution of Mongolia Article 10 Clause 2.

Therefore, this petition is being filed to the Constitutional Court of Mongolia to dispute on inconsistency of constitutionality of provisions of Article 40.1.1 and 40.1.2 of the Law on Family of Mongolia about the determination of amount to be paid for child support being based on the subsistence level of the residing region and secondly the lack of regulation in the Article 40 on alimony payment for the period before the divorce is being settled with the Constitutional Law of Mongolia Article 1 Clause 2, Article 10 Clause 2, Article 14 Clause 2, Article 16 Clause 11, Article 17 Clause 2 and Article 19 Clause 1.

Content of the explanation submitted by a member of Parliament

Law on Family of Mongolia Article 38 Clause 2 stipulates that parents can negotiate and sign a contract on child support payment. If not, then the court will decide the amount of child support payment as regulated by Article 40.1.1 and 40.1.2 of the Law on Family of Mongolia. In other words, Law on Family of Mongolia Article 40 Clause 1 set the amount of child support to be paid by the obligor who is unemployed with no fixed income and



Clause 2 stipulates in case of an obligor whose only income is fixed salary then the child support payment may not exceed 50% of the obligor's total salary.

Law on Determination of Population Subsistence Level Article 3, Clause 1, Part 1, states that the subsistence level means "monetary amount that can provide a standard of living where only the bare necessities of life for the citizens of Mongolia." Article 6 Clause 1 of the same law stipulates "subsistence level determined by the state will become a basis from define of monetary amount for social welfare programs and government assistance." Therefore, Article 40.1.1 and 40.1.2 of the Law on Family of Mongolia determining the amount of child support payment based on the subsistence level of the parent's residing region is not breaching the Constitution of Mongolia Article 16 Clause 11, Article 19 Clause 1 and Convention on the Rights of the Child Article 3 Clauses 1 and Article 6 Clause 2.

The Constitution of Mongolia Article 19 Clause 2 states "the human rights and freedoms as prescribed in the Constitution and by other laws may be subject to limitation exclusively by law." Based on this clause, child support payment based on the age of children has been determined using the standard living condition that fulfils bare necessities for the citizens.

Civil Law of Mongolia Article 16 through 18 clarifies the legal competency of for citizen's different age group. Based on this clauses, Article 40.1.1 and 40.1.2 of the Law on Family of Mongolia determining the amount of child support payment based on the age is not breaching the Constitution of Mongolia Article 14 Clause2

Child support obligations have been stipulated in the Law on Family of Mongolia in adherence to the Constitutional Law of Mongolia Article 16 Clause 11 stating that "State shall protect the interests of family, mother and child. There are many obligors who are unemployed with no fixed income avoiding their responsibility to pay child support. Following are the reasons for determining the amount of child support payment based on the age:

- Law on Family of Mongolia 1973 stating the child support shall be determined by the court and to be paid directly from the monthly salary has not been successfully realized in real life.



- Thus, the law amended in 1999 to be determined using the subsistence of level residence level of the children.

- There are people with higher income and standard of living while statistics show that one third of the whole population of Mongolia lives in or less than subsistence level only meeting their bare necessity. These people living in less fortunate conditions may not be able to provide more than the child support equal to the subsistence level and it should be noted that the human needs are unlimited and impossible to be fully fulfilled.

Considering above reasons, in order to at least provide the basic needs for children, it was determined in the law that it would be the best practice to demand the obligor to pay the minimum amount or the subsistence level.

Although the basis of age in child support may not be the best solution, the State is still looking for the better legal regulation regarding matters in family.

GROUND

There are no inconsistency of constitutionality of provisions of Article 10, Clause 40.1.1 and 40.1.2 of the Law on Family of Mongolia with the Constitutional Law of Mongolia Article 1 Clause 2, Article 10 Clause 2, Article 14 Clause 2, Article 16 Clause 11, Article 17 Clause 2 and Article 19 Clause 1.

Guided by the provisions of Article 66, Clause 2.1 of the Constitution of Mongolia and Article 31 and 32 of the Law on Constitutional Court Procedure:

IT IS RESOLVED:

IN THE NAME OF THE CONSTITUTION OF MONGOLIA

Law on Family of Mongolia **Article 40 Clauses 1 and 2** stipulating “Child support will be given out monthly and the amount is to be determined by the age group based on the subsistence level of the residing region is not breaching the Constitutional Law of Mongolia Article 1 Clause 2, Article 10 Clause 2, Article 14 Clause 2, Article 16 Clause 11, Article 17 Clause 2 and Article 19 Clause 1.

*RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE IN MYANMAR*

*Aung PAING
Thein TUN
MYANMAR*



RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE IN MYANMAR

*Aung PAING**

*Thein TUN***

Right to Respect for Private and Family Life in Myanmar

1. Brief History of Myanmar

On 4 January 1948, Myanmar became an Independent State, named the Union of Burma, with Sao Shwe Thaik as its first President and U Nu as its first Prime Minister. Myanmar was established under the Constitution of the Union of Burma (1947). It was adopted by the Constituent Assembly held on 24 September 1947. After attaining independence, Parliamentary Democracy System was practiced in the State consisting of a Chamber of Deputies and a Chamber of Nationalities, and multi-party elections were held in 1951-1952, 1956 and 1960.

Due to the political situation in Myanmar, the Army had taken over the state power on 2 March, 1962 and the Revolutionary Council of the Union of Burma headed by General Ne Win had been formed in order to prevent the Union from disintegration of the national solidarity and perpetuation of the sovereignty. The 1947 Constitution was suspended.

In 1973, the Constitution of the Socialist Republic of the Union of Myanmar was drafted. The 1974 Constitution was ratified through referendum which was held on 15 December 1973.

In 1988, a major movement against the government was occurred and the State Law and Order Restoration Council (SLORC)

* Officer, Constitutional Tribunal of Myanmar.

** Officer, Constitutional Tribunal of Myanmar.



Government came to power on 18 September 1989. The 1974 Constitution of the Socialist Republic of the Union of Burma came to an end due to the general situations and crisis occurred in 1988. SLORC forms the Union Solidarity Association (USDA). During the tenure of the State Law and Order Restoration Council, the National Convention was convened in 1993. SLORC was abolished and reconstituted the State Peace and Development Council (SPDC) on 18 November 1997. The National Convention adopted the Basic Principles through a nation-wide Referendum on 29 May, 2008 and it was adopted on 31 January, 2011 after general election.

Under the 2008 Constitution, the Union practiced multi-party democratic system and the Union is constituted by the Union System. Seven Divisions and Seven States are formed and they are in the equal status. The three branches of Sovereign power, namely Legislative, Executive and Judiciary sectors are separated to the extent possible and reciprocal control and constitutional review. The head of the State and the head of the Government is the President.

2. Myanmar Customary Law and Myanmar Family

2.1 Origin and Growth of Myanmar Customary Law

The present world began, in Myanmar myth and legend, after previous worlds had been destroyed. The first living beings on this earth were the Byamhas whose terms in the celestial state had ended. These first inhabitants were good and pure. Happiness was their food, and the glow from their bodies lit the earth. Gradually, however, desire took them, and they ate the flavoured flakes of earth which were pleasant and mild and nourished their bodies without forming excrements. Greed only grew and many changes took place in their daily live. They built houses in which they could hide and hoard and live their lives of shame. Greed and lust them to steal.

In order to prevent the declining situation, the community decided to elect a man from among them, a man of honesty, wisdom and worthiness, a man who would make the laws and instruct them, who would revile those who needed to be reviled,



banish those who must be banished from the community. They selected the King, namely the Maha Thamada, among those qualified men in their community, to rule and command and a tenth of their flavoured rice. The King ruled wisely and well. He honoured those who were learned and good and appointed a judge of a young cow-herd named Manu, whose fame for wisdom had spread. Manu acted both judge as well as the minister, settled many disputes and pronounced judgment. The wisdom of the judges and ministers were applauded by the whole community.

Manu, the judge, whom the King had made noble, wanted to relay the burden of his office and the responsibility of judiciary function to his fellow men.

Simultaneously Manu, the judge, after realizing the mistakes he had done while passing the judgment in some cases, sought the permission of the King to make a long quest for truth, and his own emancipation. Manu started to search and wander. Manu was able to gradually shake himself free from the shackles that bound him to the earth and lifting joy he ascended and on the "boundary wall of the solar system". Finally he found laws engraved in: letters as large as elephants, horses, buffaloes or oxen. He copied these laws and gave to the King Maha Thamada to serve as the legal guidance and instruction in contributing the decision they made. The Laws of Manu, were adopted, succeeded and accepted by the whole generations as guidance to Kings and men, and those that studied these law.

The original development of Family law had generated some living notions and beliefs. The notion of social contract that entrusted the powers and responsibilities of leadership had been brought to the best example of representatives at parliamentary and other state institutions. The life and force of law are the features, arose from the then notion of command. The main theme is nobody shall stay above the law. The discovery of the laws on the boundary wall of the solar system granted strength, dignity and the notion of law that guide a wise and good decision, harmonious and happy living, still endures even under the increasing stresses and strains of the modern state.



2.2 Myanmar Family

The freedom of the individual is the original important feature of Myanmar family. The Burmese commoner chose the wife to assist the husband and; they shared their daily life, its common toil and interest; their children grew up under the care of the parents. The Dhammathats (original source of Myanmar Customary Law) recognized the power of the father over the children whom he might even sell into slavery. The Dhammathats also gave the power to the husband allowing to treat his wife as the status of lord and master. This power was more truth in practical life of the wife. The descriptions of the power bore traces of Hindu law grafted on at random. The adaptation of Hindu law is considerable to some extent but in some incidents it was found to be more exaggerated. Thus, it was alerted in an early judicial decision that “the notions about *patria potestas* had changed for many years and the present concept conferring rights on individuals, parents, children, wives and husbands, the courts were advised to make cautions when enshrined and provided dealing with the rights and powers in the old Dhammathats.”

The new concept of Myanmar family is knit by love kind and respect, not welded by power. Although the Father is the head of the family, but in the absence of the father the mother takes care of the social needs of the children. Sons under puberty and unmarried daughters below the age of 20 come under the care of the parents whose consent they needed if they wish to conduct the marriage on the basic of love and family unity.

During the old days, Myanmar society had been isolated and sheltered from the stresses and distance from the modern world and well stood on its own traditions and beliefs. Since the abundance of natural resources, the ample land gave enough for all to eat and fulfil their simple basic social needs. The then Myanmar families can make the charity and perform the religious festivals after harvest or at the end of the harvest period. Most of Myanmar families are hard-working, industrious and energetic. Generally, Myanmar families work merely for their enjoyment and to fulfil their basic needs only.



3. Right to Respect for Private and Family Life in Myanmar

Traditionally and practically, the Myanmar families fully enjoy the right to respect for private and family life under the Myanmar Customary Law. The Myanmar Customary Law provides full respect of the family life, the obligations of the husband, wife, parents, teachers and children. The protection of their families rights are guaranteed by the administrative authorities and the Courts at all levels.

In addition to enjoy the social and family life under Customary Law, the fundamental rights of the citizens were promulgated in Chapter II of the 1947 Constitution. It is ratified in Section 16 of the Constitution that “no citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law.”

Under the regime of the socialist government from 1974 to 1988, the Constitution of the Socialist republic of the Union of Burma (1974) provided the fundamental rights and duties of citizens. In Chapter XI, Section 159(a) provided that “personal freedom and security of every citizen shall be guaranteed.” It is also provided in Section 160 that “the privacy and security of the home, property, correspondence and other communications of citizens shall be protected by law subject to the provisions of the Constitution.”

In 2008, the Constitution was drafted and ratified. Human rights are protected and guaranteed under the new Constitution. It is provided in Section 353 of the Constitution, that “nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.” In Section 357 of the Constitution, it is stipulated that “the Union shall protect the privacy and security of home, property, correspondence and other Communications of citizens under the law subject to the provisions of this Constitution.”

The Supreme Court of Myanmar also plays an important role in protecting and promoting of Citizens’ Constitutional Rights. A person whose rights or liberty as recognized by the constitution has been violated has the rights to submit the writs to the Supreme



Court for a ruling to grant remedy in order to obtain the justice and to protect their rights. The writs are;

- (1) Writ of Habeas Corpus;
- (2) Writ of Mandamus;
- (3) Writ of Prohibition;
- (4) Writ of Quo Warranto;
- (5) Writ of Certiorari.

4. Constitutional Rights in Myanmar

On 5 September 2011, the Myanmar National Human Rights Commission (MNHRC) was established to promote human rights protection in Myanmar. After the Myanmar National Human Rights Commission Law was ratified, the former Commission was replaced by a new Commission composed of 11 members on 24 September 2014. The Commission is independently functioned under its own mandate given by the Statute Law.

The formation of Commission was based on the Paris Principles, and authorized to investigate complaints of human rights violations.

Duties and powers of the Commission are as follows:

- (a) promoting public awareness of human rights and efforts to combat all forms of discrimination through the provision of information and education;
- (b) carrying out the following to monitor and promote compliance with international and domestic human rights laws:
 - (i) recommending to the Government the international human rights instruments to which Myanmar should become a party;
 - (ii) reviewing existing laws and proposed bills for consistency with the international human rights instruments to which the State is a party and recommending the legislation and additional measures to be adopted



for the promotion and protection of human rights to the Pyidaungsu Hluttaw through the Government;

(iii) assisting the Government in respect of its preparation of reports to be submitted under obligation in accordance with the international human rights instruments to which the State is a party and on the contents of those reports.

(c) verifying and conducting inquiries in respect of complaints and allegations of human rights violations;

(d) visiting the scene of human rights violations and conducting inquiries, on receipt of a complaint or allegation or information;

(e) inspecting the scene of human rights violations and, after notification, prisons, jails, detention centres and public or private places of confinement;

(f) consulting and engaging the relevant civil society organizations, business organizations, labour organizations, national races organizations, minorities and academic institutions, as appropriate;

(g) consulting, engaging and cooperating with other national, regional and international human rights mechanisms, including the Universal Periodic Review, as appropriate;

(h) responding to any matter referred to the Commission by the Pyidaungsu Hluttaw or the Pyithu Hluttaw or the Amyotha Hluttaw or the Government;

(i) responding to the specific matters referred by the President in connection with the promotion and protection of human rights;

(j) preparing reports in respect of the functions of the Commission and publishing them as appropriate;

(k) carrying out anything incidental or conducive to the implementation of any function of the Commission;

(l) submitting to the President and the Pyidaungsu



Hluttaw an annual report on the situation of human rights in Myanmar, the activities and functions of the Commission, with such recommendations as are appropriate;

(m) submitting special reports on human rights issues to the President as and when necessary.

If the Chairperson is, for any reason, not able to perform his/her responsibilities, the Vice-Chairperson shall assume the responsibilities of the Chairperson.

The Commission:

(a) have the right to act independently on matters that fall within its powers;

(b) have the right to act independently in respect of financial management and administrative matters in conformity with the provisions of this Law.

Where a member of the Commission becomes aware of his/her action in conflict with the interest of the Commission, the member shall promptly inform the Chairperson and members of the Commission, and take corrective action immediately.

The Commission has the power to engage thematic experts to be effective in undertaking its functions after informing the President.

The Commission shall, in respect of holding of the regular and special meetings, the fulfilment of quorum of the meetings, the presiding of meetings and making of decisions, act in accordance with the rules and procedures issued under this Law.

Myanmar National Human Rights Commission has also a mandate to receive and consider complaints, to submit amicus briefs or advice to bring cases before the Courts for the violation of the citizens' constitutional rights. To ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Previously many people including Civil Society Organizations does not rely much on the Myanmar National Human Rights Commission approach as they assume it will not be effected but



now this approach has been changed as public become trust on the Commission.

The Constitutional Tribunal also plays an important role for the protection of the constitutional rights of citizens. Since the mandate of the Tribunal to check the constitutionality of the Law, the protection and promotion of constitutional rights shall be enhanced through a progressive interpretation of domestic rights with reference to international law.

The right to respect for private and family life is protected and guaranteed by all constitutions that had been ratified in Myanmar history.

In Myanmar Customary Law and traditions, rights, ethics, duties, responsibilities and norms are regarded as social values. Those social values have been practised since the ancient days. Under the cardinal principles of the Myanmar Customary Law, all Myanmar people including the government, the president, the minister, the civil service personnel, the husband, the wife, the child, the teacher, have their own rights, ethics, duties and responsibilities. For instance, a King or a President must be beneficent, keep precepts, be not wrathful etc.

5. Conclusion

After 2010 general elections, a new democratic government was formed in Myanmar. The government has made strenuous efforts to promote and to protect the citizens' constitutional rights. One of the notable attempts of the government is establishing the Myanmar National Human Rights Commission. Furthermore, a lot of civil society organizations are established to check the human rights situation. Both the government and Civil Society Organizations have been making remarkable progress in protecting and promoting human rights in Myanmar. On 8 November 2015, historical democratic general elections were held and major opposition party, National League for Democracy (NLD) led by the noble laureate Daw Aung San Suu Kyi won a victory. A new government was formed after the general elections



The future direction for enhancing the protection and promotion of constitutional rights of citizens shall be guided with a purpose of increasing transparency and guaranteeing the independence of judiciary. The absence of wide discretionary powers in the judiciary also leads to weaken the effective protection on constitutional complaints. It is important to take measures that facilitate the protection and enforcement in practice with related to private and family life.

To sum up, Myanmar is a unique country for its customs and traditions. Throughout the history, Myanmar society had practiced its own Customary Law and traditions relating to the social and family affairs of Myanmar family. Although British common law system was introduced after the British annexation, the Customary Law is still practiced not only as a law but also as the guide for social norms and values. Traditionally, all Myanmar people enjoy their rights to respect for private and family life for centuries. They can freely set up a family with anyone they love, they can marry anyone without strict rules and they can have their private or family life without interference of any person or any authority.

***RIGHT TO RESPECT FOR PRIVATE
AND FAMILY LIFE IN THE RUSSIAN
FEDERATION: CONTRIBUTION OF
THE CONSTITUTIONAL COURT OF
THE RUSSIAN FEDERATION***

Andrey RYBALOV

Anna IVANOVA

THE RUSSIAN FEDERATION



RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE IN THE RUSSIAN FEDERATION: CONTRIBUTION OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

*Andrey RYBALOV**

*Anna IVANOVA***

PRIVATE AND FAMILY LIFE: CONSTITUTION OF THE RUSSIAN FEDERATION

Article 23

1. Everyone shall have the right to the inviolability of his (her) private life, personal and family privacy, and protection of his (her) honour and good name.

2. Everyone shall have the right to privacy of correspondence, of telephone conversations and of postal, telegraph and other communications. This right may be limited only on the basis of a court order.

Article 24

1. Collecting, keeping, using and disseminating information about the private life of a person shall not be permitted without his (her) consent.

<...>

Private and Family Life: Judgments of the Constitutional Court of the Russian Federation

A concept of “private life” includes individual-related sphere of life that is only a person’s concern and is not subject to control by society and state, provided that a person’s activity is not illegal.’

* Head of the Department of Council Foundation of Private Law, Constitutional Court of the Russian Federation.

** Senior Legal Officer, Department of Council Foundation of Private Law, Constitutional Court of the Russian Federation.

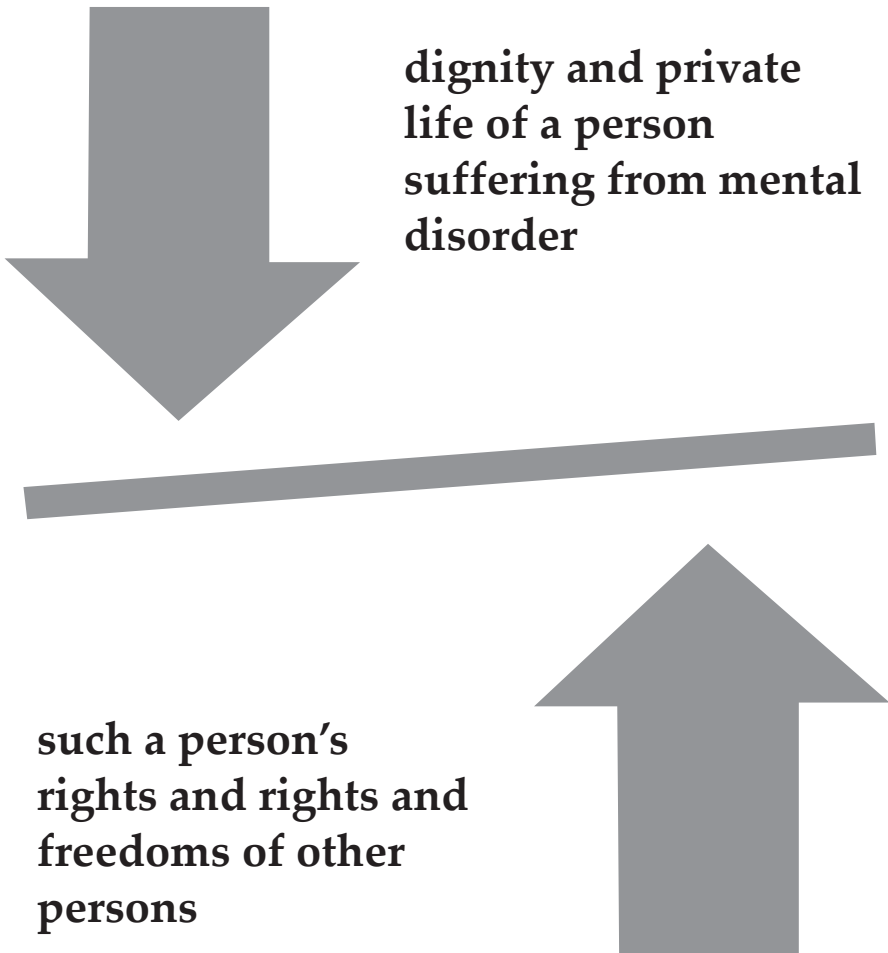


(rulings of 9 June 2005 No. 248-O, of 26 January 2010 No. 158-O-O, of 27 May 2010 No. 644-O-O, etc., Judgment of 16 June 2015 No. 15-II).

Judgment of the Constitutional Court of Russia No.15-II of 27 June 2012

(complaint of I.B. Delova)

- the legislation did not allow to limit the legal capacity of a person suffering from mental disorder in proportion to the degree of actual decrease of the ability to understand the significance of one's acts or direct them.

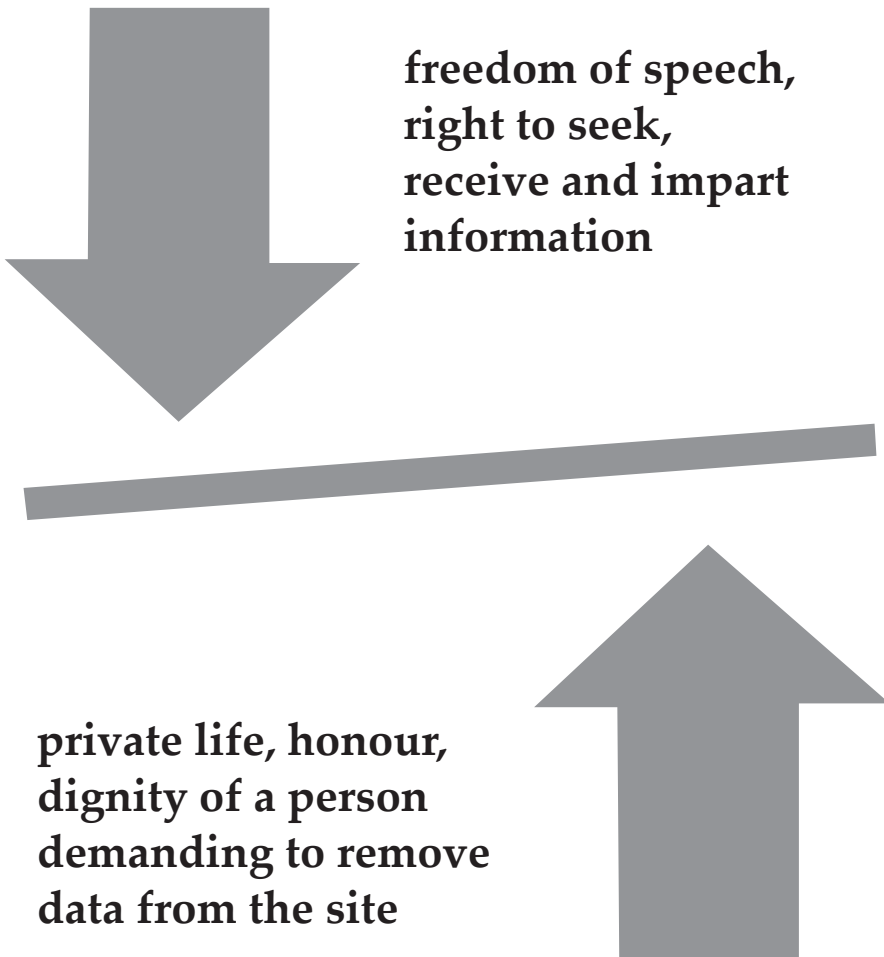




Judgment of the Constitutional Court of Russia No.15-II of 9 July 2013

(complaint of E.V. Krylov)

- the owner of an Internet site or a person responsible for placing information on this site were not obliged to remove, upon demand of the citizen, information containing data, defaming his honour, dignity or business reputation, which were recognized as not conforming to reality by a court decision.

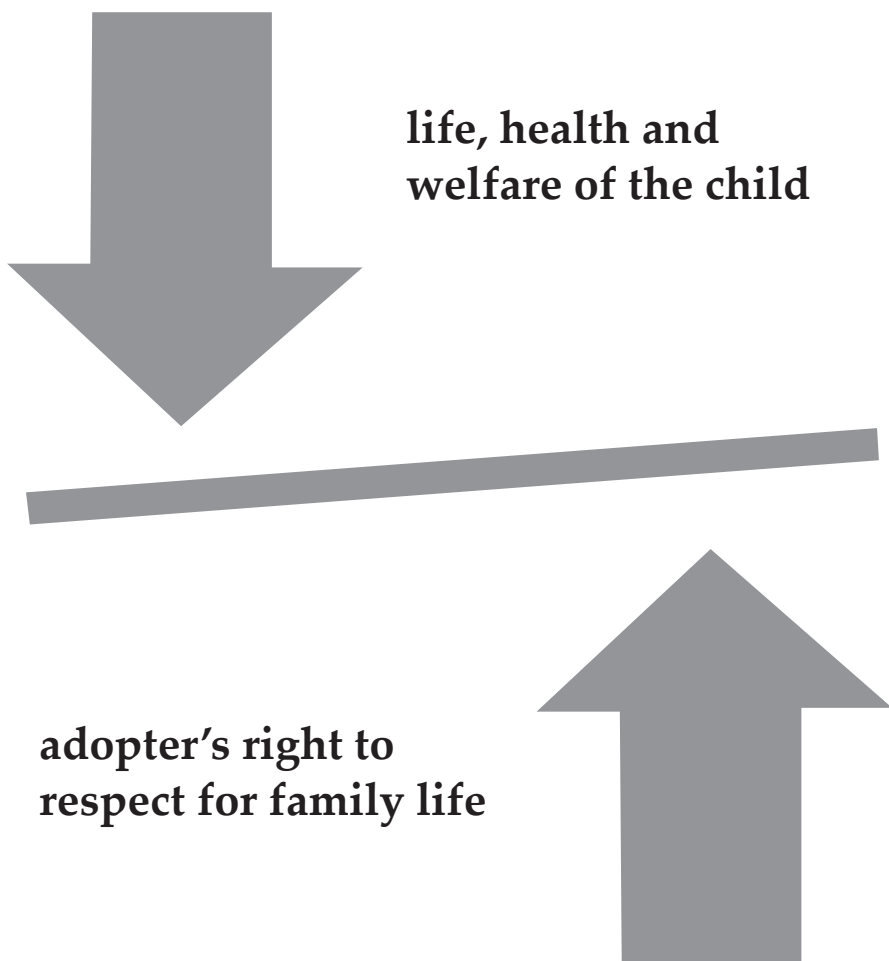




**Judgment of the Constitutional Court of Russia No.1-II of 31
January 2014**

(complaint of S.A. Anikiev)

- disqualification of a person with criminal background from
being an adoptive parent.

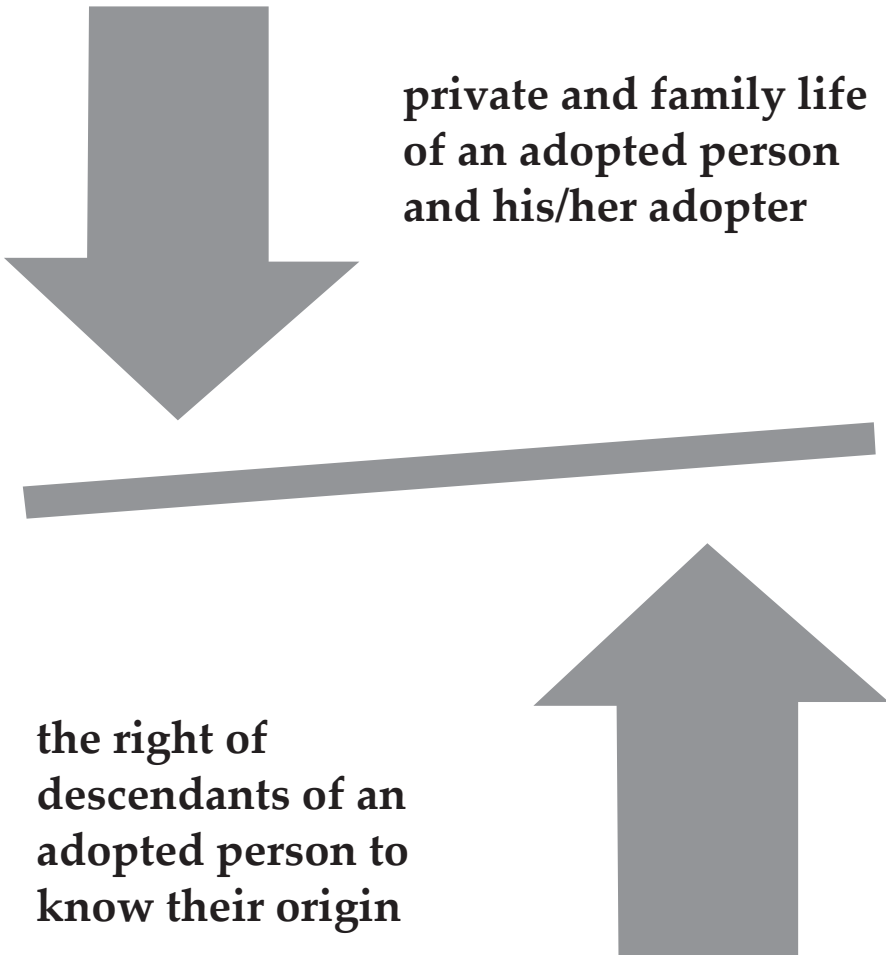




Judgment of the Constitutional Court of Russia No.15-II of 16 June 2015

(complaint of G.F. Grubich and T.G. Guschina)

- possibility for descendants of an adopted person to receive data about the adoption after the decease of such person and his/her adopter.

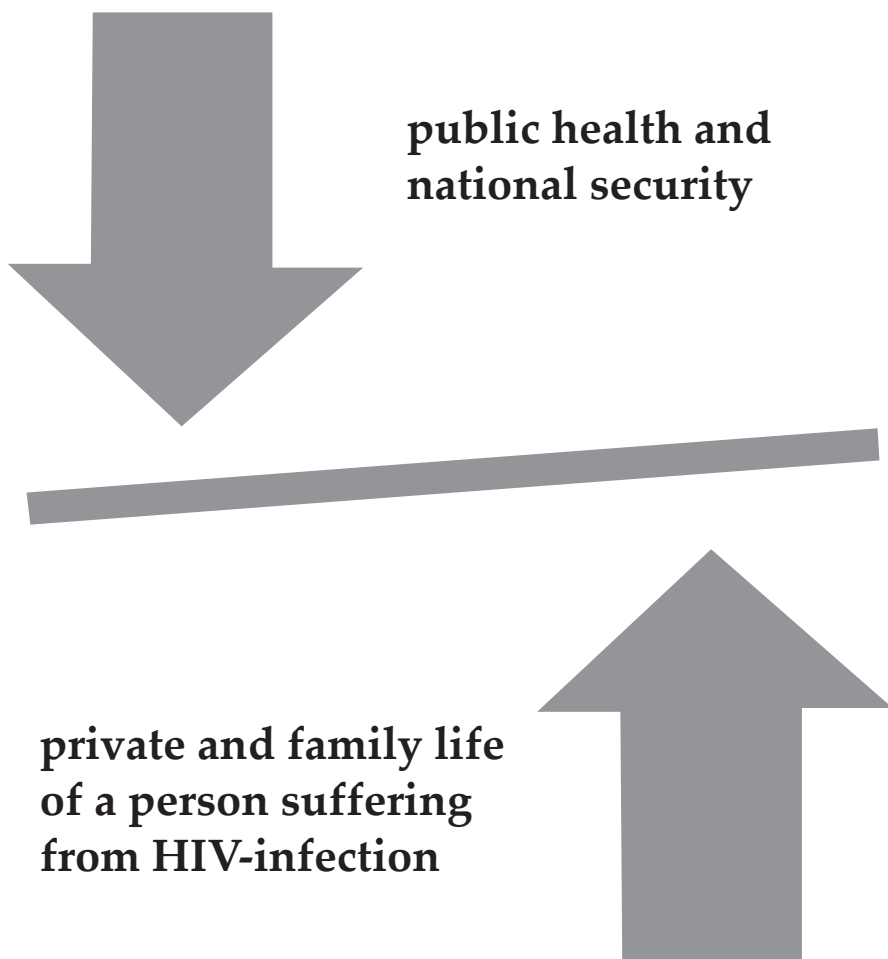




**Judgment of the Constitutional Court of Russia No.4-II of 12
March 2015**

(complaints of a number of citizens)

- the deportation and the undesirability of residence of foreign citizens and stateless persons suffering from HIV-infection, whose family permanently reside in Russia.



CLOSING SPEECH ON THE FOURTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Esteemed guests,

Today, the 4th Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions has ended. We are honoured to organize such an event and to be here with you.

With the summer schools that have become traditional, every year, the deficiencies are corrected and more ideal results are ensured, communications are improved between the countries and the legal systems of the countries are learned and understood by everyone.

Every year we are trying to see our deficiencies and develop our studies in this respect. I hope that we will again be together in the next years. In addition, I am sure that each of you will be representatives of Turkey in your countries and share your experiences in Turkey with your friends there.

I hope that we will meet again in the next summer schools.

I extend my respects and regards to you all. Thank you very much.

Burhan ÜSTÜN
Vice-President of the Constitutional
Court of the Republic of Turkey

CLOSING SPEECH ON THE FOURTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Dear guests,

I want to greet you all in the name of my country and in the name of my court.

In these days, we are here together for the 4th Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions. I see all of you as a student, and what is the purpose of being here? In short, if we look at the constitutional courts of Asia, then it is a broad area. The basic purpose of this program is to share information between the constitutional courts, to have close relations and to ensure the staff of these constitutional courts get closer as well.

One of the most benefits that the countries get to know each other is to ensure information flow and information exchange among them. As a member of the Constitutional Court, I can say that the countries have a lot of things to learn from each other while exchanging information. I and my institution believe in this. We are experiencing this in international events like anniversaries, seminars and symposiums. Accordingly, we hope that as workers of these courts, you also benefit from this information exchange.

As you know, constitutional law is now established in these countries in the last twenty years quicker than more. I can say exactly when an incident takes place anywhere in the world, nobody can say that it does not affect them. If an infringement of human rights occurs even in the most developed countries, nobody can say that it does not interest them. Also, if such an infringement occurs in our country, then the other countries do not have the change to say that it is not a matter of interest to them.

At the end of my speech, we have to see the truth that the world is so small that the countries and the people can be bound really close to each other. I want to say that as a summary.



While finishing my words, I am sure that you have benefitted from the 4th Summer School Program. And we will welcome you or your friends in the next years' summer schools. As to the memorandum, the summer school programs will continue. Ending my speech, I would like to say again that we are honoured to have you as guest in our country. We are waiting for you in the coming years.

I wish you all the best in your work in the future in your countries. Thank you very much.

Nuri NECİPOĞLU
President of the Court of
Jurisdictional Disputes
Judge of the Constitutional Court of the
Republic of Turkey



4TH SUMMER SCHOOL OF THE AACC
2 – 9 OCTOBER 2016
LIST OF PARTICIPANTS

Executive Committee:

Name-Surname	Title
Mr. Selim Erdem	Secretary General
Mr. Serhat Köksal	Former Deputy Secretary General
Mr. Yücel Arslan	Rapporteur Judge
Mr. Dr. Mücahit Aydın	Rapporteur Judge (Moderator)
Ms. M. Azra İlhan Durmuş	Translator-Interpreter

Lecturers:

Name-Surname	Institution
Burhan Üstün	Constitutional Court of the Republic of Turkey
Prof. Dr. Engin Yıldırım	Constitutional Court of the Republic of Turkey
Nuri Necipoğlu	Constitutional Court of the Republic of Turkey
Selim Erdem	Constitutional Court of the Republic of Turkey
Şermin Birtane	Constitutional Court of the Republic of Turkey
Ali Bahadır	European Court of Human Rights

Participants:

Name-Surname	Institution
1. Mr. Dr. Abubaker Muttaqi (Commissioner)	The Independent Commission for Overseeing the Implementation of Constitution of Afghanistan
2. Mr. Mohammad Arif Hafez (Commissioner)	



1. Ms. Meriem Benabdallah (Senior Officer)	Constitutional Council of the People's Democratic Republic of Algeria
1. Ms. Fransisca (Judicial Administrator) 2. Ms. Anna Triningsih (Researcher)	Constitutional Court of the Republic of Indonesia
1. Ms. Zaure Sharipova (Director of the Analysis Unit) 2. Mr. Kanat Akhanov (Senior Advisor of the Legal Unit)	Constitutional Council of the Republic of Kazakhstan
1. Ms. Jamilya Abdymomunova (Advisor of the International Relations Unit) 2. Ms. Nazgul Nurbekova (Senior Advisor of the Legal Unit Advisor)	Constitutional Chamber of the Supreme Court of the Kyrgyz Republic
1. Mr. Srdjan Staletovic (Legal Advisor) 2. Mr. Durim Berisha (Legal Advisor)	Constitutional Court of the Republic of Kosovo
1. Ms. Sabariah Binti Othman (Registrar) 2. Mr. Shah Wira Bin Abdul Halim (Deputy Registrar)	Federal Court of the Republic of Malaysia
1. Mr. Batsuuri Yalguun (Lawyer)	Constitutional Court of the Republic of Mongolia
1. Ms. Eugenia M●ța (Assistant) 2. Mr. Vasile Vasiliev (Advisor)	Constitutional Court of the Republic of Moldova
1. Mr. Aung Pai (Officer) 2. Mr. Thein Tun (Officer)	Constitutional Tribunal of the Republic of the Union of Myanmar
1. Mr. Andrey Rybalov (Head of the Private Legal Unit) 2. Ms. Anna Ivanova (Senior Legal Officer)	Constitutional Court of the Russian Federation



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|---|--|
| 1. Mr. Jovid Ganiyev (Assistant of Judge) | Constitutional Court of the Republic of Tajikistan |
| 2. Ms. Sharifamo Abdulloeva (Specialist) | |
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|--|--|
| 1. Mr. Burhan Üstün (Vice President) | Constitutional Court of the Republic of Turkey |
| 2. Mr. Prof. Dr. Engin Yıldırım (Vice President) | |
| 3. Mr. Selim Erdem (Secretary General) | |
| 4. Mr. Serhat Köksal (Former Deputy Secretary General) | |
| 5. Ms. Şermin Birtane (Rapporteur Judge) | |
| 6. Mr. Dr. Mücahit Aydın (Rapporteur Judge / Moderator) | |
| 7. Mr. Yücel Arslan (Rapporteur Judge) | |
| 8. Mr. İsmail Emrah Perdecioğlu (Assistant Rapporteur Judge) | |
| 9. Mr. Fatih Alkan (Assistant Rapporteur Judge) | |
| 10. Ms. Zehra Gayretli (Assistant Rapporteur Judge) | |
| 11. Ms. M. Azra İlhan Durmuş (Translator/Interpreter) | |

**PHOTOGRAPHS FROM
THE SUMMER SCHOOL**

































