Center for Training and Human Resources Development

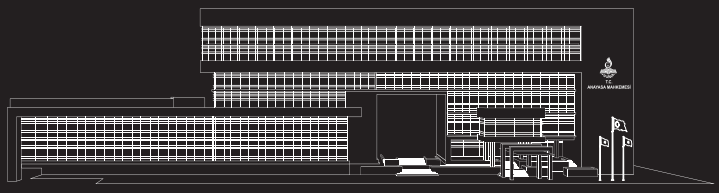
CTHRD

Constitutional Court of the Republic of Türkiye

Constitutional Justice in Asia

"Interpretation of Constitution in the Protection of Fundamental Rights and Freedoms"

60th year 1962-2022



10th Summer School of the Association of the Asian Constitutional Courts and Equivalent Institutions (AACC) (hybrid format)
21-23 September 2022, Ankara

Constitutional Justice in Asia

"Interpretation of Constitution in the Protection of Fundamental Rights and Freedoms"

10th Summer School of the Association of the Asian Constitutional Courts and Equivalent Institutions (AACC) (hybrid format)
21-23 September 2022, Ankara

Organised by
The Center for Training and Human Resources Development of AACC
Constitutional Court of the Republic of Türkiye

Constitutional Court Publications
ISBN: 978-605-2378-97-7

Constitutional Justice in Asia

© 2023, Constitutional Court

© All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of the Constitutional Court of the Republic of Türkiye.

The opinions expressed in this book are personal views of the writers, and do not necessarily reflect the official opinions of the national constitutional/ supreme courts, or the AACC.

Edited by

Yücel ARSLAN
Fatih Çağrı OCAKLI
Enise YÜZÜAK

Ankara 2023

Adress : Ahlatlıbel Mah. İncek Şehit Savcı
Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya, Ankara / TÜRKİYE
Phone : +90 312 463 73 00
Fax : +90 312 463 74 00
E-mail : tcc@anayasa.gov.tr
Twitter : twitter.com/aymconstcourt
Web : www.anayasa.gov.tr/en

Designed and Printed by
EPAMAT
Basın Yayım Promosyon San. Tic. Ltd. Şti.
Phone : +90 312 394 48 63
Fax : +90 312 394 48 65
Web : www.epamat.com.tr

Print Date
May, 2023

Constitutional Justice in Asia

- **Zühtü Arslan**
- **Agusweka Poltak Siregar**
- **Intan Permata Putri**
- **Rizkisyabana Yulistyaputri**
- **Minki Hwang**
- **Dami Park**
- **İsmail Emrah Perdecioğlu**
- **Nigar Dunyamaliyeva**
- **Abu Amar**
- **Kenad Osmanović**
- **Stiliyana Stoyanova**
- **Joseph Koudjou**
- **Lilian Awah Ngumaso**
- **Renata Gerkman Rudec**
- **Iva Khavtasi**
- **Tamari Kiknadze**
- **Altin Nika**
- **Manira Mohd Nor**
- **Wan Aima Nadzıhah**
- **Erdenebayar Batbold**
- **Bayarjargal Battulga**
- **Cho Mar Htay**
- **Ei Ei Soe**

- **Tatjana Janjic-Todorova**
- **Pavel Ulturgashev**
- **Nikita Igumnov**
- **Usmonova Manizha Abdulmuminovna**
- **Tanawoot Trisopon**
- **Ayşen Toroslu**
- **Rauf Kürşad**
- **Yuliia Reminska**
- **Marta Spodaryk**
- **Kamola Khamidova**
- **Kadir Özkaya**

MESSAGE OF THE PRESIDENT

The Center for Training and Human Resources Development (CTHRD) organized the 10th Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of "Interpretation of Constitution in the Protection of Fundamental Rights and Freedoms" on 21-23 September 2022 in hybrid format within the scope of the AACC activities.

We are pleased to organize the 10th Summer School of the AACC. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programs also serve for the expansion and strengthening of 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 of the Constitutional Court of Türkiye 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 Türkiye

PREFACE

The Constitutional Court of the Republic of Türkiye is a member of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) since 2012. The Constitutional Court also hosts one of the three Permanent Secretariats of the AACC under the Center for Training and Human Resources Development (CTHRD). The main activity of the Center is to organize academic programs on a yearly basis addressing mid-level judges/lawyers of constitutional/supreme courts/councils.

In this framework, the Center plays a vital role in the achievement of the AACC's objectives by fostering cooperation and exchanges of experiences and information among AACC members by organizing summer schools since 2013. While the first Summer School was attended by a number of courts from Asia, the participants of the program expanded over the years thanks to the growing interest of the member courts/councils of the AACC as well as guest courts from around the world. The last Summer School in 2020 included representatives of twenty-eight courts/councils from Africa, Asia, and Europe.

The Summer School is an academic event focusing on the constitutional justice and human rights law. The theme of each Summer School is determined on contemporary and global issues of constitutional and human rights law drawing particular attention to the debated issues thereof. Academic discussions target to deal with the theoretical framework of the theme as well as the practice in the respective jurisdictions, with a focus on the case-law of the apex courts. In this vein, the Summer School intends for a sincere discussion of timely and significant aspects of constitutional and human rights law.

Various themes discussed in Summer Schools so far include the principle of equality, the right to fair trial, the freedom of expression, the right to privacy, migration and refugee law, the right to liberty, presumption of innocence and restriction of human rights and freedoms in health emergencies. This year, for being of vital importance for the

protection of all constitutional rights and freedoms, the 10th Summer School is dedicated to "*Interpretation of Constitution in the Protection of Fundamental Rights and Freedoms.*"

It should be noted that the polysemy in language, that is to say the capacity for a word or phrase to have multiple meanings, inevitably entails interpretation, which is a process of comprehending and assigning of meaning. Judicial decision is the output of this interpretation process.[1]

In the presentations, the general practice followed by the respective constitutional courts/supreme courts in the interpretation of the constitution is succinctly touched upon. The striking cases and decisions of these bodies are also referred to foster a better understanding of the methodology adopted by the respective courts. This book, like the previous ones, will undoubtedly increase the collaboration and exchange of examples of good practices among all involved.

Following the last two years during which we had to hold the summer school events via video-conference due to the COVID-19 pandemic, the 10th Summer School was held in hybrid format with the participation of over 40 jurists and administrative staff from a total of 24 countries from Asia, Africa and Europe, 16 of which were represented in person. Just like the previous summer schools, the 10th Summer School was an excellent forum to share knowledge and information thanks to the active contribution of the participants.

We believe that this book will serve as important source on the constitutional and legal matters regarding interpretation of constitution in the protection of fundamental rights and freedoms.

It is our sincere wish that you find this publication useful!

The CTHRD

1 From the opening remarks of Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Türkiye.

CONTENTS

Message of the President
Prof. Dr. Zühtü ARSLAN 1

Preface
The Center for Training and Human Resources Development of the AACC 3

Opening Address on the Tenth Summer School of the AACC Organized by the Constitutional Court of the Republic of Türkiye
Prof. Dr. Zühtü ARSLAN 7

Margin of Appreciation in the Practice of the European Court of Human Rights
Olga Dmytrenko, COUNCIL OF EUROPE 13

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms – A Study of Education Rights for Children –
Agusweka Poltak Siregar, INDONESIA 23

A Decade Illegitimate Children Decision: Recognition and Protection for Equal Rights
Intan Permata Putri / Rizkisyabana Yulistyaputri, INDONESIA 35

Case Law from the Constitutional Court of Korea Interpreting the Constitution with regard to the Protection of Fundamental Rights and Freedoms
Minki Hwang / Dami Park, KOREA 57

Interpretation of the Constitution in the Protection of Human Rights and Freedoms
İsmail Emrah Perdecioğlu, TÜRKİYE 71

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms
Nigar Dunyamaliyeva, AZERBAIJAN 81

Interpretation of Constitution on Protecting Fundamental Rights in Bangladesh
Abu Amar, BANGLADESH 91

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms
Kenad Osmanović, BOSNIA AND HERZEGOVINA 103

Fundamental Rights and Freedoms in the Constitution of the Republic of Bulgaria and Relevant Case Law of the Constitutional Court
Stiliyana Stoyanova, BULGARIA 111

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms: A Summary of a Precedent Judgment of the Constitutional Council of Cameroon on the Established Case Law
Dr. Joseph Koudjou / Lilian Awah Ngumaso, CAMEROON 123

Outline of Constitutional Protection of the Personality Rights
Reneta Gerkman Rudec, CROATIA 137

A Role of the Constitutional Court of Georgia in the Formation of the Criminal Procedure - From Inquisitorial to Adversarial
Tamari Kiknadze / Iva Khavtasi, GEORGIA 155

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms
Altin Nika, KOSOVO 167

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms
Manira Mohd Nor / Wan Aima Nadzihah, MALAYSIA 185

Protecting Fundamental Rights and Freedoms through the Interpretation of the Constitution
Erdenebayar Batbold / Bayarjargal Battulga, MONGOLIA 217

Constitutional Interpretation in Protection of Fundamental Rights and Freedoms in Myanmar
Cho Mar Htay / Ei Ei Soe, MYANMAR 227

Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms-
Case-Law of the Constitutional Court of the Republic of North Macedonia
Tatjana Janjic – Todorova, NORTH MACEDONIA 239

Interpretation of the Constitutional Provisions on Rights and Freedoms:
The Role of the Constitutional Court of the Russian Federation
Nikita Igumnov / Pavel Ulturgashev, RUSSIA 251

Особенности Толкования Конституции В Защите Основных Прав И Свобод Человека И Гражданина
Usmonova Manizha Abdulmuminovna, TAJIKISTAN 263

Right and Freedom of Public Assembly: Legal Norms and Context in Thailand
Tanawoot Trisopon, THAILAND 275

Perspective of TRNC Constitution: Fundamental Rights and Freedoms and Restrictions
Ayşen Toroslu / Rauf Kürşad, TURKISH REPUBLIC OF NORTHERN CYPRUS 281

One Nation? One Language? The Human Rights in Language Domain:
The Case of Ukraine
Yuliia Reminska / Marta Spodaryk, UKRAINE 301

Конституционно-Правовое Толкование Основных Прав И Свобод Человека Конституционным Судом Республики Узбекистан
Kamola Khamidova, UZBEKISTAN 331

Closing Speech of the Tenth Summer School of the AACC
Kadir ÖZKAYA 339

Photographs from the 10th Summer School Program 340
Executive Committee of the 10th Summer School Program 354
Participants of the 10th Summer School Program *355*

OPENING ADDRESS

by

The President of the Constitutional Court of the Republic of Türkiye

21 September 2022, Ankara

Distinguished Guests,

Esteemed Participants,

First of all, I would like to welcome you to our country and the Turkish Constitutional Court, as well as extend you all my most sincere greetings.

I wish that the 10th Summer School event, organised by the Turkish Constitutional Court in its capacity as the Center for Training and Human Resources Development of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), be successful and fruitful.

As we all know that we had to hold the summer school events in the last two years via video-conference due to the COVID-19 pandemic. This year's event is fortunately held in a hybrid format. Taking this opportunity, I would like to express my gratitude for being able to host a significant part of the summer school participants at the Court after a long period of two years.

We are also pleased to have a broad participation in the 10th Summer School event we have just inaugurated. We are here today with over 40 jurists and administrative staff from a total of 24 countries, 16 of which are represented here in person, as well as from the European Court of Human Rights. This program, like the previous ones, will undoubtedly increase the collaboration and the exchange of examples of good practices among our courts and institutions.

Distinguished Participants,

Until the last year, the topics of the summer school events were chosen among the respective fundamental rights and freedoms every

year, and the representatives participating in the events exchanged their knowledge and experience on these topics. However, in the last year's event held online, the discussions and assessments were made regarding the execution of the Constitutional Court's judgments. The topic of this year's summer school is the interpretation of the constitution in the protection of fundamental rights and freedoms. It is explicit that the interpretation of the constitution is of vital importance for the protection of all constitutional rights and freedoms.

Let me hereby provide you with some introductory information notably in the light of the experience of the Turkish Constitutional Court.

It should be at the outset noted that the polysemy in language, that is to say the capacity for a word or phrase to have multiple meanings, inevitably entails interpretation, which is a process of comprehending and assigning of meaning. Judicial decision is the output of this interpretation process.

In fact, all decision-makers wielding public power in a legal system continuously engage in the interpretation of the constitution. The political, administrative or judicial decisions are all in any way based, directly or indirectly, on the interpretation of the constitution and laws. These interpretations may conflict with each other. In such cases, it is for the constitutional courts to designate the authentic interpretation in the final instance. In this sense, the authority to interpret, and assign a meaning to, the constitution and norms subject to constitutionality review in a final and binding manner is exercised by the constitutional courts.

It should be noted at this stage that the interpretation is decisive both in the constitutionality review cases and in individual applications. In this sense, in conducting the constitutionality review of provisions, the constitutional courts determine, both the meaning as well as the scope of the provision under review and the meaning of the constitutional provisions referred to as the binding rules.

Besides, the interpretation and implementation of a provision of law by the bodies wielding public power and inferior courts in the individual application are also subject to the review of the constitutional courts.

In this context, the Turkish Constitutional Court may find a violation of any fundamental rights and freedoms due to the interpretation and implementation of a provision of law, which the Court has not found it unconstitutional in the abstract constitutionality review, by public authorities including courts and may ultimately find unconstitutional the very same provision.[1]

On the other hand, it is known that in constitutional jurisdiction, the methods of literal, teleological, historical and systematic interpretation are employed. However, there are interpretation paradigms adopted by the constitutional courts that make use of these methods and are regarded as *"interpreting communities"*. In this regard, we may say that the interpretation followed within the constitutional jurisdiction is predicated on two main paradigms. The first paradigm is the ideology-based paradigm entailing a strict interpretation of the constitutional provisions such as nationalism and secularism, whereas the second one is the rights-based paradigm that prioritises the protection of fundamental rights and freedoms.

In its several judgments, the Turkish Constitutional Court has stressed that the approach that should be followed in the constitutional jurisdiction is the rights-based paradigm. According to the Court, the constitutional provisions, notably those related to political rights and freedoms, *"may fully and properly fulfil their functions only when they are interpreted in pursuance of pluralist democracy and through a rights-based approach."*[2]

Rights-based approach is predicated upon the assumption that freedom is essential, whereas limitation is an exception. This approach necessitates that the Constitution be interpreted in favour of the freedoms, by attaching priority to fundamental rights. As a matter of fact, as a repercussion of this approach, the Court has reiterated that the duty incumbent on the State in democracies is to protect and improve fundamental rights and freedoms, as well as to take measures that will secure the effective exercise thereof.[3]

1 *Atilla Yazar and Others* [Plenary], no. 2016/1635, 5 July 2022.

2 *Ömer Faruk Gergerlioğlu* [Plenary], no. 2019/10634, 1 July 2021, § 50; and *Ali Kuş* [Plenary], no. 2017/27822, 10 February 2022, § 50.

3 Constitutional Court's decision, no. E.2016/165, K.2017/76, 15 March 2017, § 17.

I would like to give an example to illustrate how these two paradigms differ and lead to the contradictory interpretations of the same constitutional principles.

In Türkiye, the headscarf ban for women in public institutions and universities was on the public agenda for many years. Unfortunately, at the outset, the Court, along with the Council of State, interpreted the Constitution by adopting an ideology-based paradigm, and endorsed and justified the impugned ban.

Such a prohibitive approach was predicated upon a strict interpretation of secularism. The Court found the legal regulation allowing for wearing a headscarf in universities in breach of the principle of secularism. According to the Court, "*The Constitution aimed to ensure the diligent protection of the principle of secularism regardless of freedoms, and did not allow this principle to be overridden by freedoms*."[4] Moreover, the Court took another step in 2008 and annulled the constitutional amendment prescribing the lifting of the headscarf ban on grounds of incompatibility with the principle of secularism.[5]

On the other hand, the Court has adopted a rights-based paradigm since 2012, thus making a liberal interpretation of secularism. Hence, the Court has found violations of constitutional rights of a lawyer expelled from the courtroom for wearing a headscarf, and of a student expelled from university and of a public official dismissed from office for the very same reason.[6]

Distinguished Participants,

One of the most challenging aspects of constitutional interpretation comes into play in the cases where fundamental rights conflict with each other. As is known, the reasons underlying the limitations on fundamental rights are not always abstract principles such as secularism, or the maintenance of national security and public safety. In such cases, it is relatively easier to interpret and apply the Constitution by adopting a rights-based approach.

4 Constitutional Court's decision, no. E.1989/1, K.1989/12, 7 March 1989.

5 Constitutional Court's decision, no. E.2008/16, K.2008/116, 5 June 2008.

6 *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014; *Sara Akgül* [Plenary], no. 2015/269, 22 November 2018; and *B.S.*, no. 2015/8491, 18 July 2018.

Besides, "*protection of the others' rights and freedoms*" is also among the reasons justifying any limitation on fundamental rights. A typical example of the conflicting rights is the conflict between freedom of expression and right to protection of honour and dignity, which is a frequent case in individual applications, especially in almost all defamation cases. In this sense, the duty incumbent on the constitutional courts is to strike a fair balance between the conflicting rights.

As a matter of fact, the Turkish Constitutional Court endeavours to strike such a balance not in an abstract manner, but under the particular circumstances of every individual case, taking into consideration the nature of the impugned expressions, the questions whether these expressions have a factual basis and have contributed to a public debate, the identity of the person using the impugned expressions, the questions whether the addressee is a public figure and has had the opportunity to respond to the impugned expressions against him, as well as whether the limits of acceptable criticism to which the addressee was subject should be wider than those of an ordinary citizen.[7] In this scope, it is of importance to make a holistic assessment of the impugned expressions within the context they are uttered.

In such cases, constitutional courts consider whether a sound and reasonable balance has been struck between the conflicting rights. At this point, the courts endeavour *to accord and assure the rights* by striking a fair balance. Such an effort is requisite for constitutional justice, since *the justice is to put everything in its place* as expressed centuries ago by Mevlânâ Jelaleddin Rumi.[8]

Distinguished Participants,

The approaches adopted, by the Turkish Constitutional Court and the other constitutional courts/equivalent institutions, in interpreting the constitution for the protection of fundamental rights will be discussed during the program. I believe that these considerations will serve the common purpose of protecting fundamental rights.

7 *Durmuş Fikri Sağlar (2)* [Plenary], no. 2017/29735, 17 March 2021, § 46.

8 *The Mathnawî of Jalâlu'ddîn Rûmî*, trans. Reynold A. Nicholson, (Konya: Konya Metropolitan Municipality Book, 2010), Book V, §§ 1085, 1090.

Ending my speech with these feelings and thoughts, I would like to express my thanks to everyone who have contributed to the organisation, especially the staff of the Center for Training and Human Resources Development, all speakers and participants.

I once again wish that the Summer School event be successful and fruitful. I would like to extend you all my sincere regards.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court
of the Republic of Türkiye

MARGIN OF APPRECIATION IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Olga Dmytrenko

EUROPEAN COURT OF HUMAN RIGHTS

MARGIN OF APPRECIATION IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Olga Dmytrenko[*]

The margin of appreciation is considered one of the most challenging concepts in the jurisprudence of the European Court of Human Rights (hereinafter – "the Court"). It is by the very words of Sir Nicolas Bratza, the President of the Court, "a variable notion which is not susceptible of precise definition", but above all "a complex [doctrine] about which there has been much debate". However, despite that difficulty (of giving a precise definition to it), the doctrine of margin of appreciation is indeed "a valuable tool devised by the Court itself to assist it in defining the scope of its review" [1].

I. ORIGINS AND NOTION OF THE MARGIN OF APPRECIATION

Being defined by its role, the notion of the margin of appreciation is totally a judicial make. It originates from the French administrative law and the notion "margin of appreciation" is a direct translation of the French *marge d'appréciation*. The latter refers to a notion of administrative law that was developed by the French Conseil d'État, however, equivalent concepts have also emerged in other jurisdictions. For example, two deference doctrines in the United States - the Chevron deference doctrine and the Skidmore deference doctrine - could be mentioned, both being principles of judicial review of federal agency actions. In particular, while the Chevron deference doctrine (taking its name from the 1984 U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*) requires federal courts to defer to an administrative agency's interpretation of a statute if the

---

[*] Lawyer, European Court of Human Rights. The views expressed in this paper are those of the author and do not represent the official position of the ECHR or the CoE.

1 Sir Nicolas Bratza, speech at the Brighton Conference, April 2012, https://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf

statute is ambiguous and the agency's interpretation is reasonable, the Skidmore deference doctrine, named for the 1944 U.S. Supreme Court decision in *Skidmore v. Swift & Co.*, allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position. Finally, in the context of the Auer deference (*Auer v. Robbins*), which expands the Chervon deference, courts uphold agency's interpretations of ambiguous regulations unless those interpretations are plainly erroneous or inconsistent with the regulation. As we see, the main characteristic feature of those doctrines is allocation of authority between reviewing courts and decision-makers, while the principle governing such allocation could be said to be the need to preserve the very essence of the regulation at stake[2].

The principle of subsidiarity is also relevant in the Court's jurisprudence, particularly in terms of ensuring a balanced allocation of responsibilities between the Court and national authorities. As in the administrative law, where the above doctrines acknowledge that agencies have expertise in their particular areas of responsibility, and that courts should be hesitant to second-guess their technical judgments, the Court defers to the expertise and proximity of domestic authorities to the events in question. As was noted by Sir Nicolas Bratza in the wake of opening of Protocol No. 15 for signatures at the Brighton conferences in April 2012, "the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes. However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court". In this context, the margin of appreciation doctrine is especially useful.

The emergence of the margin of appreciation was, thus, inevitable and, not surprisingly, it has already appeared in the early jurisprudence of the European Commission of Human Rights (hereinafter – "the Commission"). Being initially absent from the text of the European Convention of Human Rights (hereinafter – "the

2 "Because Congress has not "directly spoken to the precise question at issue," we must sustain the Secretary's approach so long as it is "based on a permissible construction of the statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Convention"), as well as from the *travaux préparatoires*, the reference to the margin of appreciation has appeared for the first time in 1958 in the Commission's report in the case brought by Greece against the United Kingdom over alleged human rights violations in Cyprus[3]. It has further firmly established itself in the Commission's jurisprudence throughout the 60-ies, first through the jurisprudence under Article 15 of the Convention. Later the Commission expanded this approach to the cases "in which the rights guaranteed in Articles 8 and/or 10 are at issue", noting on numerous occasions that "the Commission has the right, and indeed the duty, to appreciate whether or not interference by a public authority fulfils the conditions laid down in paragraph (2) of these Articles whereas the Commission has frequently held (see Application Number 753/60 (*E. v. Austria*)) that these Articles leave the Contracting Parties a certain margin of appreciation in determining the limits that may be placed on the exercise of the rights in question" [4].

Over the years, the use of the margin of appreciation by both the Commission and the Court highlighted the need to integrate this notion into the Convention's body, in order to reinforce the effectiveness of the Convention system. This led to the inclusion of the margin of appreciation in the text of the Convention's preamble in 2013, with the opening for signatures of Protocol No. 15 to the Convention. This integration is closely linked to another important concept for the Court's effective functioning - the principle of subsidiarity. Both notions are crucial for the Court's main task of monitoring compliance with the minimum standards necessary for a democratic society operating within the rule of law, as established by the Convention.

3 "…the Government concerned was in a better position than the Commission to know all relevant facts and to weigh in each case the different possible lines of action for the purpose of countering an existing threat to the life of the nation. Without going as far as to recognise a presumption in favour of the necessity of measures taken by the Government, the Commission was of the opinion, nevertheless, that a certain margin of appreciation mast be conceded to the Government.
The Commission adopted the opinion (by eight votes against three) that the Government of the United Kingdom had not gone beyond this limit of appreciation in finding that the detention of persons without trial under the Detention of Persons Law was strictly required by the exigencies of the situation." Commission (Plenary) Report (31) *Greece v. The United Kingdom* (Volume II), App. No(s). 176/56

4 See, among other cases, *X. v. the Federal Republic of Germany*, no. 1628/62, Commission decision (Plenary) of 12 December 1963

II. SCOPE OF THE MARGIN OF APPRECIATION

As already noted above, domestic courts, as the initial forum for human rights protection, possess a level of expertise in national law matters that cannot be replicated by an international institution. Having noted that in the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case (*Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, p. 35, § 10, Series A no. 6), the Court further underlined the variety of requirements of morals (since the case concerned the ban of a book under the Obscene Publications Act 1959) in the judgment of *Handyside v. the United Kingdom* (7 December 1976, § 48, Series A no. 24) and noted that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements". The Court thus has established a sequence which starts with the initial assessment by the national authorities and the subsequent review by the Court. And in the very same *Handyside* judgment the Court has already drew certain lines along which the margin of interpretation doctrine will be subsequently applied.

The Court has underlined that the Convention does not give the Contracting States an unlimited power. "The domestic margin of appreciation goes hand in hand with a European supervision" – this statement could be found throughout the Court's case-law since the *Handyside* judgment, and the scope of such supervision is defined, first of all, by the necessity to ensure compliance with the minimum level of human rights protection, which would vary from one area to another. The pivotal point, according to the Court's jurisprudence, would be when the domestic authorities' "assessment of the facts or domestic law were manifestly unreasonable or arbitrary, or blatantly inconsistent with the fundamental principles of the Convention"[5].

The Court has virtually never referred to the notion of margin of appreciation in the context of complaints under Articles 2-4 of the Convention, however, it could be argued that it applies it implicitly, for example, in cases concerning the question of whether a severely ill

5 See, for example, *Pla and Puncernau v. Andorra*, no. 69498/01, § 46, ECHR 2004-VII

person should remain in detention. In such cases the Court noted that "it is precluded from substituting the domestic courts' assessment of the situation with its own, especially when the domestic authorities have generally discharged their obligation to protect the applicant's physical integrity, notably by providing appropriate medical care"[6]. It is not contested though that the margin given here to the domestic authorities is extremely narrow if not auxiliary. It is further conditioned by the Court's analysis as for whether the authorities have complied with their primary obligations under Article 3 of the Convention as for the prohibition of torture and ill- or degrading treatment of detainees.

Likewise, Articles 5 and 6 of the Convention, which pertain to procedural rights, may allow for some discretion on the part of the States in effectively implementing them. An illustration of this is the right of individuals to access a court. The Court has underlined on numerous occasions that such right is not absolute but "may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals"[7]. Although the term "margin of appreciation" is not explicitly mentioned in this context, the Court refers to the discretion afforded to states based on their national circumstances, as long as the core of the right in question is not compromised. The Court has long acknowledged the importance of respecting the diversity of legal systems and cultures across Europe, and has, therefore, granted a certain level of deference to national authorities when interpreting and applying the Convention. The margin of appreciation serves to allow for some flexibility in light of the particularities of each jurisdiction, while also facilitating the reconciliation of practical differences in the implementation of the Convention, all in accordance with the supervisory principle.

The main area of implementation of the doctrine of the margin of appreciation remains, of course, case-law on alleged violations of Articles 8-10 of the Convention as well as Article 1 of Protocol No. 1. The Court has an extensive jurisprudence on the subject. In cases concerning

6 *Austrianu v. Romania*, no. 16117/02, § 89, 12 February 2013
7 *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012

these rights, the Court has recognized the need to take into account the particular circumstances of each case and the national context in which the violation is alleged to have occurred. Such approach is explained by the specific wording of the second paragraph of those Articles which enumerates conditions under which the enjoyment of a right could be limited. Cases ranging from issues of national security to planning policies and control of housing in cities, and matters raising various sensitive moral or ethical issues and where the balance should be established between various Convention rights or between private and public interests, were examined by the Court in this respect[8]. For example, in cases related to the regulation of media content or political speech, the Court has emphasized the importance of allowing a certain degree of discretion to national authorities, taking into account the cultural, historical, and social context in which the speech was made. This recognition of the margin of appreciation has also allowed the Court to strike a balance between the protection of individual rights and the preservation of national traditions and values.

Apart from the nature of the right at stake or of a public interest aspect, other factors have impact on the scope of the margin of appreciation. As the margin of appreciation is designed to reconcile practical differences on the national level, the existence of a consensus could be a reason for a limited discretion for the domestic authorities. At the same time the Court has once and again relied on the existence of a consensus to justify a dynamic interpretation of the Convention[9].

III. CONCLUSION

The margin of appreciation has been subject to extensive criticism, particularly with regard to its use in the case-law of the Court. One of the most common criticisms is that the doctrine is opaque and lacks consistency. Many legal scholars argue that the margin of appreciation has been overused, and that its excessive application in a wide range of cases is unfortunate because the doctrine should only be used in specifically circumscribed circumstances where it varies the strictness

8 *Leander v. Sweden*, 26 March 1987, Series A no. 116; *Garib v. the Netherlands* [GC], no. 43494/09, 6 November 2017; *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I; *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts)

9 *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI

of scrutiny conducted by the Court[10]. It was also argued that the margin of appreciation is not a classical doctrine but merely a technical tool used by the Court in implementing its role[11]. These criticisms highlight the need for greater clarity and consistency in the Court's application of the margin of appreciation as it plays a crucial systemic role in the application of the Convention. It is not argued against that it facilitates the Court's goal of supervising human rights provisions review conducted by national courts and enables an effective sharing of human rights responsibilities between the national and supranational levels. Recent developments indicate that the margin of appreciation is seen as a vital link between the respective systems of human rights protection by both the Court and the signatory countries. These developments also encourage national courts to make the most of the balancing powers that the margin of appreciation doctrine grants them, thus paving the way for further dialogue with the Court in the future. Ultimately, this form of dialogue between the courts has the potential to enhance human rights protection throughout Europe.

10 Jan Kratochvíl, The Inflation of the Margin of Appreciation by the European Court of Human Rights, Netherlands Quarterly of Human Rights, Vol. 29/3, 324–357, 2011.

11 Steven Greer, The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, Strasbourg: Council of Europe, Human rights files: no. 17, 2000.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS – A STUDY OF EDUCATION RIGHTS FOR CHILDREN –

Agusweka Poltak Siregar

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS – A STUDY OF EDUCATION RIGHTS FOR CHILDREN –

Agusweka Poltak Siregar[*]

ABSTRACT

The main issue is Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms. The Constitution is a form of delegation of people's sovereignty to the state, through the Constitution the people express their willingness to give some of their rights to the state. Therefore, the Constitution must be guarded because all forms of deviation, both by the holder of power and the rule of law based on the Constitution against the Constitution, is a tangible manifestation of betrayal of the sovereignty of the people.

One of the contents of the Constitution is the guarantee of human rights, Constitutional rights as citizens. These rights are contained in the Constitution comprehensively. In the 1945 Constitution there is one article, namely Chapter XA, which contains guarantees for human rights. The Indonesian government take it seriously with the education sector. The 1945 Constitution of the Republic of Indonesia stipulates a minimum education budget of 20 percent. When compared to several countries, not many countries include their education budget in the Constitution. Countries that include education budgets in the Constitution include Indonesia and Brazil. One of the constitutional rights of citizens guaranteed by the 1945 Constitution is the right to education. This right is specifically mentioned in Article 28C paragraph (1) regarding the right to obtain education and benefits from science and Article 28E paragraph (1) which talks about the right to

[Editor's Note: Indonesia is conducting the Permanent Secretariat for Planning and Coordination (PSPC) of the AACC.]

[*] Law scholar of the Constitutional Court of the Republic of Indonesia.

choose education and teaching. To test whether or not a law contradicts the Constitution, the agreed mechanism is a judicial review which is the authority of the Constitutional Court (hereinafter referred to as Court). If a law or one of its parts is proven to be contrary to the Constitution, the legal product will be annulled by the Court. So that all legal products must refer to and must not conflict with the Constitution. Through this judicial review authority, the Court carries out its function of guarding so that there are no more legal provisions that are outside the corridors of the Constitution. This paper tries to explain the interpretation of the Constitution in the specific context of the Court's decisions and discuss main issues that arose from interpretation of the Constitution and will be providing several recommendations and an overview of future challenges.

INTRODUCTION

The interpretation of the Constitution is one of the methods used to provide an explanation of how to interpret the Constitution. The importance of interpreting the constitution is related to the elaboration of the meaning contained in the Constitution.[1] The interpretation of the Constitution is generally influenced by differences in the social backgrounds and political views of the interpreters, thus allowing for broad differences or divergences of interpretation. The Constitution, which is generally static and difficult to change, causes an urgency to make changes to the Constitution with an interpretation that means changes other than Constitutional Conventions and formal changes.

The interpretation of the Constitution is not necessarily carried out by every state institution. Only state institutions that have judicial authority and are given by Constitution able to carry out interpretations. This is in line with the doctrine of judicial supremacy which states that only the judiciary can interpret the constitution or as the holder of authority regarding the interpretation of the constitution. The powers granted to an independent judiciary may prevent the interpretation of the constitution from irrelevant political views or public pressure.

In Indonesia, the only judicial institution that can interpret the constitution is the Constitutional Court. Decisions made by the Court in exercising its judicial authority are recognized as interpretations of

1 Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999)

the Constitution. The authority exercised specifically is the authority to examine the constitutionality of laws. The Court's decisions are final and binding.

The interpretation of this Constitution cannot be separated from the interpretation of the law. According to Robert Post[2], interpretation is the Court's action in using its authority to interpret the constitutionality of the rules through the source of authority in political life. Interpretation also has several different classifications according to experts. According to Tanto Lailam[3], there is a literal interpretation and a functional interpretation. Literal interpretation is an interpretation that does not come out of *litera legis* (word for word in the formulation of the law or its original intent). While functional interpretation has the meaning of interpreting a law by using other sources that provide more explanation. The Article 24C of the 1945 Constitution gives an emphasis that the Constitutional Court has the authority to adjudicate at the first and final resort, both to examine laws against the Constitution, disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, as well as decide on disputes regarding the results of the general election. The final decision suggests that the Court's decision is the first and the last attempt for justice seekers.[4] Namely, decisions that are final must also be binding and cannot be annulled by any institution.[5] It is the responsibility of all integrands of the nation and state bodies to enforce it non-stop because the Court's decision is final and binding. The execution of the Court's decision significantly predisposes the attributes of the Constitutional Court's decision, due to the final and binding nature of the decision. That is why the decision of the Court should be implemented and enforced consistently by involved parties.

2 Robert Post, Theorie of Constitutional Interpretation, Representation, volume 30 (University of California, 1990), p. 19

3 Tanto Lailam, Penafsiran Konstitusi Dalam Pengujian Konstitusionalitas Undang-Undang Terhadap Undang-Undang Dasar 1945, (Jurnal Media Hukum Vol. 21 No. 1, Juni 2014), p. 89-95.

4 Bambang Sutiyoso, Hukum Acara Mahkamah Konstitusi Republik Indonesia, (Bandung: PT. Citra Aditya Bakti, 2006), p. 160

5 Ni'matul Huda, Kekuatan Eksekutorial Putusan Mahkamah Konstitusi (Yogyakarta: FH UII Press, 2018), p. 141

I. The Interpretation of the Constitution

On the provisions of Article 47 of the Constitutional Court Law, it is emphasized that "The decision of the Constitutional Court has permanent legal force since it has been pronounced in a plenary session which is open to the public". This means that since the completion of the decision being pronounced or read out, from then on the order of the decision must be enforced.[6]

The decisions of the Constitutional Court are basically declaratory and constitutive. The declaratory means that decision of the Court contains a statement of what is the law. On the other hand, constitutive means it negates the legal circumstance and create a new legal circumstance.[7] Particularly in the judicial review, the Court's decision is declaratory because it states that the law of *cette* legal norm contrary to the 1945 Constitution and at the same time, the decision negates the legal norm and sometimes creates a new legal clause/ provision.

For example, in August 26, 2015, a request for a Judicial Review was submitted by Adri, an employee of the Padang Area PLN (State's Electricity Company), who is also the Chairman of the PLN Workers Union, and Eko Sumantri, an employee of PLN's Keramasan Generating Sector. The petitioners challenged the Electricity Law because they considered that electricity as a necessity for the livelihood of the people must be controlled by the state, and it should not be privatized. The two main challenged Articles were in Article 10 and Article 11. In article 10 (1), the business of providing electricity for the public interest as referred to in Article 9 letter for the people includes the following types of business: 1. power plant; 2. electric power transmission; 3. distribution of electric power; 4. and/or sale of electric power. Meanwhile in Article 10 (2), it is set forth that the business of providing electricity for the public interest as referred to in paragraph (1) can be carried out in an integrated manner. Article 11 states that the business of providing electricity for the public interest as referred to in Article 10 paragraph (1) shall be carried out by state-

6 Maruarar Siahaan, Hukum Acara Mahkamah Konstitusi Republik Indonesia (Jakarta: Sinar Grafika, 2012), p. 214

7 Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), p. 55-56.

owned enterprises, regional-owned enterprises, private enterprises, cooperatives, and non-governmental organizations engaged in the electricity supply sector. The Court has decided on the constitutionality of Article 10 paragraph (2) and Article 11 paragraph (1) of Law no. 30 of 2009 concerning Electricity related to the provision of electricity for the public interest. Through decision no. 111/PUU-XIII/2015, basically the two articles are declared unconstitutional as long as the business of providing electricity for the public interest remains controlled by the state.

II. The Challenges to Interpretation of the Court's Decisions

Even with the 1945 Constitution and Constitutional Court Act has recognized the Court's decision is final and binding, in practice there are still some effectuations that ignored and even disproved the Court's decision. The elaboration of the problems that arose from the interpretation of the Court's decision will be discussed here.

There are some views that Court's decision might be interpreted differently because of two factors. First, the Court does not have a special unit or body to guarantee the assuring of the execution of decisions. Second, the decision is solely dependent on the willingness of all related bodies outside the Constitutional Court to comply with the decision.[8] Maruarar Siahaan, a former Constitutional Justice, shared the factors that might influence the deviance in interpretation of Constitutional Court decision: (1) Political factors, legislators with various backgrounds of political conceptions, targets, and different agendas, may have policy choices and preferences which to differ from the Constitutional Court; (2) Economic and Financial factors, the implications for financial conditions and the economic situation, causing policymakers sometimes have difficulty to enforce the decisions; (3) Communication factors, inadequate relationship between state institutions and the Constitutional Court may lead to misunderstandings to the decisions; (4) The Clarity of formulation factors, the unclear and multi interpretation of decisions, even conflict between legal norm may greatly affect the implementation of decision; (5) Checks and Balances factor, the complex implementation of decision

8 Ahmad Syahrizal, "Problem Implementasi Putusan Mahkamah Konstitusi" Jurnal Konstitusi, Vol. 4 No. 1 (Maret 2007), p. 124.

reflects checks and balances which separated between branches of power in legislative, executive, and judicial powers.[9]

In addition, the response to the decision of Court as explained by Tom Ginsburg[10] which states there are four options whereby other parties specifically state institution will react to the Court decisions: "It can **comply** with the decision and accept the judgment. Alternatively, it can **ignore** the court decision and hope that whatever powers the court or other institutions have to enforce the decision will not be effective. Third, it can seek to **overturn** the court interpretation, through amending the constitution, or if such procedures are available, formally refusing to accept the decision. The final and most extreme option is for the party to **attack** the court as an institution, trying to reduce its jurisdiction or effective power in future cases. These options can be arranged in a simple figure." From these four responses, three of them (ignore, overturn, or attack) represent challenges that can take place in the interpretation of Court's decision. Out of those explanations, in fact, the interpretation of the Court's decisions has been consistently complied by the decision target. However, the disobedience to decisions still is the impending challenge for the Court to impose the predomination of the Constitution. Next, a case study will be presented to show how parties interpret Court's decision.

III. Case study: the interpretation of Court's Decisions no. 24/ PUU-V/2007

Educational problems are often handled by the Court in a number of exam materials. This has happened and was decided by the Court in the review of Law no. 20 of 2003 concerning the National Education System (UU Sisdiknas), specifically the explanation of Article 49 paragraph (1), which states "The fulfillment of education financing **can be done in stages**". The petitioner for review of this law considers the provision contradictory to Article 31 paragraph (4) of the 1945 Constitution which clearly states that the education budget allocation is at least 20% of the APBN (state's budget) and APBD (local's budget).

9 Maruarar Siahaan, *Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-undang (Studi tentang Mekanisme Checks and Balances)*, Disertasi, Fakultas Hukum Universitas Diponegoro, 2015, p.419-422

10 Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge: Cambridge University Press, 2003), p. 78

The Court granted the petition and stated that the explanation of Article 49 paragraph (1) of the National Education System Law contradicted the 1945 Constitution. In its consideration, the Court stated that the implementation of the Constitution could not be delayed. The Court considered that the explanation of Article 49 had opened the door not to implement or at least postpone the allocation of at least 20% of the APBN and APBD for the education budget. Then Decision no. 24/PUU-V/2007 related to the review of Article 49 Paragraph (1) of Law no. 20 of 2003 concerning the National Education System and Law no. 18 of 2006 concerning the 2007 State Budget. The Court stated that Article 49 Paragraph (1) of Law no. 20 of 2003 concerning the National Education System insofar as it concerned the phrase "teacher salaries and" contradicted the 1945 Constitution and had no binding legal force. These decisions faced a challenge when a local government tried to interpret them within the term of "limited budget availability" and decided to not prioritize the education financing until the next available budget which was not stated in their annual planning. The Court then wrote a letter, asked the Ministry of Education and related local government to make no other interpretation and obey the Court's decision effective immediately.

Next, Decision no. 5/PUU-X/2012 regarding the review of Article 50 paragraph (3) of Law no. 20 of 2003 concerning the National Education System (UU Sisdiknas). Article 50 paragraph (3) of the National Education System Law states, "The Government and/or Regional Government shall organize at least one educational unit at all levels of education to be developed into an international standard education unit". According to the Court, International Standard School has the potential to erode national identity; International Standard School lead to different treatment (discrimination); International Standard School is a form of commercialization of the education sector. Then came the interpretation of this decision by several parties which later became a national plus school. The national plus school is another form of international school that disguises itself by changing clothes so that it looks like a national school. This is, of course, an attempt to deflect the Constitutional Court's decision by creating a new school system which then continues to apply the old pattern which has been declared contrary to the Constitution. Related to this, the Ministry of Education

and Culture has also taken firm steps, namely stating that there should be no more schools that charge high fees and there are no fees outside of existing regulations, by implementing a 12-year compulsory education system that frees students from all education costs and is currently using Merdeka Curriculum. The Merdeka Curriculum is a curriculum with diverse intra-curricular learning where the content will be optimized so that students have sufficient time to explore concepts and strengthen competencies. Teachers have the flexibility to choose various teaching tools so that learning can be tailored to the needs and interests of students.

IV. Recommendations

A. Deferment on time-sensitive cases

Even though the decision is binding since it is pronounced in a plenary session which is open to the public, sometimes a time-sensitive case appeared in front of the Court and it's decided that a deferment is needed to make sure the law-makers, executive and legislative, have the needed time to prepare for the next stages in law making. This practice must have a clearly stated time limit. For example, Court Decision no. 4/PUU-XI/2013, the implementation of the presidential threshold must be used in the 2019 general election, not the 2014 one.

B. Harmonization and cooperation with other state bodies/ agencies

State institutions are obliged to act in accordance with the Court's decisions as an embodiment of constitutional predominance. It is very important to develop collective understanding among state bodies in order to have the same view on the decision and to continually comply with the Court's decisions. It can be through inter-sectoral Focus Group Discussions. The Court itself has a program of monitoring and evaluating the execution of decisions with numerous stakeholders such as Ministry of Law and Human Rights, and academicians from universities to offer inputs and references in strengthening the power of Court's decision to avoid any other interpretations. In the future, the Court also looks forward for a cooperation with other state institutions such as the Parliament, Supreme Court, and other related state and local governments or bodies/agencies.

C. Making known of the importance of concurring with Court's decisions to public

Mostly implemented by other state bodies, the Court's decision is not only imperative to them but also to every citizen in Indonesia, on which their willingness to put into effect of Court's decision can exert influence on state bodies submission. The dissemination through community involvement is an important thing to do because with the support of community members, they can participate in demanding and encouraging other state bodies to always comply with the Court's decision. Thus the decision will have more permanent legal force to prevent any interpretations, especially if there is negligence in the implementation of the decision.

CONCLUSION

The interpretation of the Court's decision is related to the execution of the decision. However, the Court's decisions face many renunciations. First, the Court needs an implementing unit task or special enforcement agencies to guarantee the execution of the decision without any misinterpretations. Second, the Court's decision is resting on the will of the authorities beyond the Court to comply with the decision and not making any interpretation other than the one adopted by the Court. The Court has several recommendations to address related interpretation of decision issues namely deferment on time-sensitive cases, harmonization and cooperation with other state bodies/agencies, and making known of the importance of concurring with Court's decisions to public through dissemination.

A DECADE ILLEGITIMATE CHILDREN DECISION: RECOGNITION AND PROTECTION FOR EQUAL RIGHTS

Intan Permata Putri
Rizkisyabana Yulistyaputri

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

A DECADE ILLEGITIMATE CHILDREN DECISION: RECOGNITION AND PROTECTION FOR EQUAL RIGHTS

Intan Permata Putri[*]
Rizkisyabana Yulistyaputri[**]

1. Introduction

The state's ruling on the issue of equal treatment for illegitimate children depends on ideology, religion, and political perspective. Indonesia is a country with high diversity, and the majority of the population is Muslim. In 2012, the Constitutional Court of the Republic of Indonesia contested an illegitimate child decision that can define paternity line with DNA profiling. This decision eliminates discrimination against nonmarital children and empowers court officials to issue order acknowledgment based on scientific evidence. From an ideological and religious perspective, this decision has pros and cons in the implementation process.

Biology is no longer the only foundation for parenthood in the modern era.[1] Although marriage was once a social status determinant for children, it now has a discriminatory impact on the lives of nonmarital children. In recent decades, the desire to become a parent has resulted in conception. Define intestate succession, citizenship, recovery bills and benefits, and financial support from a traditional standpoint.[2] Furthermore, labelling such people as "illegitimate children" and "bastards" based on their social perceptions is unjust. People in the modern era believe that children should not be punished for their parents' actions. The law's implied responsibilities to an unmarried child gradually lead to man's unconsciousness as a father.

* Researcher at the Constitutional Court of the Republic of Indonesia.
** Assistant judge at the Constitutional Court of the Republic of Indonesia.

1 Liefaard, T., & Vonk, M. (2016). The Rights of the Child in the Netherlands: A Family Law Perspective. In *The rights of the child in a changing world* (pp. 313-330). Springer, Cham.

2 Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345.

Some people object to the "no penalties for nonmarital children receiving financial support" viewpoint and instead seek financial support boundaries in divorce.[3]

DNA[4] is a piece of evidence in the criminal justice system. There are many forms of evidence, including technical, forensic, and some weaker modes of "scientific" evidence. The absence of evidence creates a situation that can only be resolved by morals and mathematics. As stipulated in decision no. 46/PUU-VIII/2010, using DNA in a lawsuit to determine paternal line is a new chapter in Indonesia's legal system.

Children are an investment for every country because they are its future human resources and have a large influence on its development and growth.[5] Children born in marital or nonmarital circumstances have equal rights; they are protected by human rights. The state has recognized and protected nonmarital children. Indonesia has adopted the CRC (Convention on the Rights of the Child); it has the responsibility to fulfil the right to know his or her origin based on the best interest of the child doctrine.

The national law of Indonesia gives non-married parents two ways to get their children recognized:

1. Civil code, voluntary recognition from the biological father

2. Constitutional Court decision to find out what can be done if the child is not recognized.

After a decade of this constitutional decision, there has been no decision from the court regarding the recognition of children out of wedlock based on DNA profiling evidence. Is there a similar decision in 2022 that is compatible with decision no. 46/PUU-VIII/2010? How is it implemented? What's the obstacle? Is the "best interests of the child" doctrine-based right to know his/her origins respected?

3 Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345.

4 Lynch, M. (2013). Science, truth, and forensic cultures: The exceptional legal status of DNA evidence. *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences*, *44*(1), 60-70.

5 Ratri Novita Erdianti, *Hukum Perlindungan Anak*, (Malang: Penerbit Universitas Muhammadiyah Malang, 2020), hal. 1

2. Discussion

2.1. Illegitimate Children in Indonesia

2.1.1. Illegitimate Children in Marriage Law, Civil Code (BW), and the Compilation of Islamic Law

The Indonesian National Law ruling on protecting children out of wedlock is divided into several regulations. The Marital Act no.1 of 1974, for example, indirectly categorizes children into legal and illegitimate children in Article 42. According to this provision, "legitimate children" are children born into or as a result of legal marriages. Although there is no definition of "illegitimate children," those definitions exclude legitimate children. The Marital Act also stated that children born out of wedlock had only a civil relationship with their mother and her kin prior to the decision of the Constitutional Court no. 46/PUU-VIII/2010. Again, it's excluding the paternal line from illegitimate children.

The Compilation of Islamic Law (KHI, its ijtihad, which is only valid in Indonesian territory) makes no mention of illegitimate children. In Article 100, it states that "nonmarital children only have a kinship relationship with their mother and her family." According to Article 186 of the KHI, "Nonmarital children only have an inherited relationship with their mother and their mother's family." Nonmarital children do not have a paternal line and cannot inherit wealth or property from their parents, according to the provisions.

According to Article 250 of the Indonesian Civil Code, every child born or raised during a marriage has the husband as the father. These two laws state that legally recognized children are those born into a valid marriage, so the validity of both parents' unions determines whether or not a child is legal. Witanto defines illegitimate children as children born to a woman who was not married to the man when the child was in her womb.[6] Illegitimate children have to deal with discrimination during their whole lives,[7] even though state and religious law say that having a child outside of marriage is wrong. The traditional perspective has the same reason as punishment for parental action.

6 D. Y. Witanto, *Hukum Keluarga: Hak dan Kedudukan Anak Luar Kawin Pasca Keluarnya Putusan MK tentang Uji Materiil UU Perkawinan*, (Jakarta: Prestasi Pustaka), hal 46.

7 *Ibid*.

However, Article 272 of the Civil Code states that "Children born out of wedlock, except those born from man and woman, are legalized by marriage, and if they have made recognition for a nonmarital child, or if the confession appears in the marriage certificate itself." The other provisions of the Civil Code in Article 250 define, "The husband can deny/rebut the legality of a child born before 180 days of marriage." However, the denial should be avoided in the following circumstances:

1. If the husband was aware of the pregnancy before marriage;

2. If he is present at the time of making a birth certificate and the certificate is signed by him or contains a statement from him stating that he cannot sign it;

3. if the child is stillborn.

It can be concluded from the two provisions in the Civil Code prevail into condition: while the Civil Code provides its understanding of illegitimate children who are conceived out of wedlock but are born after their parents are legally married; and Children out of wedlock are not recognized by the father and/or parents.[8]

2.1.2. The Decision of the Constitutional Court no. 46/PUU-VIII/2010

In the case of Machicha Mochtar, the Constitutional Court issued a decision no. 46/PUU-VIII/2010, which addressed the issue of the "obligate biological father" to recognize children born out of wedlock and annul provisional marriage registration. The petitioners filed a petition for judicial review of Article 2 (2) and Article 43 (1) of the Marital Act against provisions in Article 28B (1) and (2), and Article 28D (1) of the 1945 Constitution.

Article 2 (2) of the Marriage Law, which states that "every marriage is registered according to the laws and other regulations," renders the marriage of Petitioner Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim invalid under Indonesian marriage law regulated by the Marriage Law because it was not registered. They suffer constitutional losses as a result of the provisions in Article 43, paragraph (1), of the 1945 Constitution, which state that "Children born out of wedlock only

8 Adv. Adi Kurniawan, S.H., *Pengertiian Anak Sah dan Anak Luar Kawin,* https://www.hukumonline.com/klinik/a/pengertian-anak-sah-dan-anak-luar-kawin-lt5e3beae140382, diakses pada tanggal 29 Agustus 2022

have a civil relationship with their mother and their mother's family," regardless of whether or not the marriage is legally recognized in that country.

The marriage was done by Petitioner Aisyah Mochtar, but the Marriage Law (registered provision) says that the marriage is invalid. This means that children born from the marriage, like Petitioner Muhammad Iqbal Ramadhan bin Moerdiono, are considered children born outside of marriage and have no civil rights.

The decision of the Constitutional Court granting children born out of wedlock a civil relationship with their mother and their family, as well as with their biological father, is supported by science, technology, and/or other evidence. In its legal considerations, the Constitutional Court stated that the main legal issue for children out of wedlock is the legal meaning of the phrase "born out of so it is not an appropriate or fair thing when the law stipulates that a child born out of a sexual intercourse outside of marriage only has a relationship with a woman who is the biological mother, but it does not have a relationship with a man who has sexual intercourse, which then causes pregnancy and the birth of the child.[9]

Also, the Constitutional Court thinks that children born outside of a legal marriage and without clear information about their father's status are often stigmatized by society. Because of this, the law must be able to provide fair legal certainty and protection for the child's status, even if the validity of the marriage is still in question.[10] Because of advances in technology, it is possible to prove whether a child is related to a specific man or not. Therefore, the provisions in Article 43, paragraph (1), of the Marriage Law must read: "Children born out of wedlock have a civil relationship with their mother and their mother's family, as well as with a man as his father who can be proven based on science, technology, and/or other evidence according to the law to have blood relations, including civil relations with his mother."

The Constitutional Court's decision is a bright spot in the relationship of a child born out of wedlock, also known as an illegitimate child, with his father, whose blood relationship has been proven through science, technology, and/or other legal evidence. The decision also strengthens

9 Constitutional court decision no. 46/PUU-VIII/2010, pages 37-38, and 34-35.
10 Constitutional court decision no. 46/PUU-VIII/2010, pages 37-38, and 34-35.

the mother's position over the child born out of wedlock by requesting recognition of the biological father of the child born out of wedlock when the biological father has not made voluntary recognition of the child he has given birth to.[11]

According to A. Mukti Arto, the purpose of the Constitutional Court's decision to reform Article 43, paragraph (1), of the Marriage Law is to provide legality to the child's blood relationship with his biological father so that the child's basic rights are protected, as well as to provide fair treatment of children, affirming the existence of civil relations between children and their biological fathers.[12] Many parties consider that the decision of the Constitutional Court no. 46/PUU-VIII/2010 is a breath of fresh air against efforts to enforce child protection laws in Indonesia, but on the other hand, some consider this decision to be an injury to the life order of Muslims in Indonesia, because it makes the position of the child resulting from adultery equal to the position of the child born from a legal marriage relationship. Despite all existing views on the decision, the decision of the Constitutional Court no. 46/PUU-VIII/2010 is a *declaratoir constitutief* decision, which affirms that Article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution, and subsequently abolishes and creates a new law about the problem of the position of children outside of marriage.[13] The creation of a new law regarding the position of a child outside of marriage provides a legal umbrella for the child, so that the obligations of parents, in this case, the biological father, will come to the fulfillment of the rights of the child, where this is given through the lens of rational justice, which Civil relations between father and son can be realized not only through marital relations but also through blood relations, which science can prove.

2.1.3. Banten High Court Decision no. 109/PDT/2022/PT BTN

The Constitutional Court decision no. 46/PUU-VIII/2010 is one of

11 Kudrat Abdillah dan Maylissabet, *Sejarah Sosial Status dan Hak Anak di Luar Nikah*, (Pamekasan: Duta Media Publishing, 2020), hal 44

12 Bahruddin Muhammad, *Akibat Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Terhadap Pembagian Hak Waris Anak Luar Perkawinan*, dipublikasikan di website https://badilag.mahkamahagung.go.id/artikel/18859-akibat-hukum-putusan-mahkamah-konstitusi-nomor-46puuviii-2010-terhadap-pembagian-hak-waris-anak-luar-perkawinan--oleh-dr-h-bahruddin-muhammad-1712.html pada 17 Desember 2013, diakses pada 30 Agustus 2022.

13 A. Zamakhsyari Baharuddin. *Review* Terhadap Putusan Mahkamah Konstitusi Tentang Status Anak Di Luar Nikah. *Jurnal Al-'Adl*, 12 (1), Januari 2019. Hal 161.

those that can be called a landmark decision because it has a wide-ranging impact. After a decade, the Banten High Court Decision no. 109/PDT/2022/PT BTN, issued on April 26, 2022, is one of the shards of evidence of the Constitutional Court's decision being implemented. In the decision, the appellant was Wenny Ariani Kusumawardani, who claimed to have given birth to a daughter from her relationship with the appellant, Rezky Adhitya Drajadmoko. The Appellant feels that he has been harmed because, starting from the birth of the child until the time of filing the appeal, the Appellant has shown no good faith at all to acknowledge and care for the child he has given birth to, where the child is the result of a nonmarital relationship between the plaintiff and defendant. However, the process of proving this lawsuit is still experiencing problems with the sample collection process for DNA profiling. The decision taken by the judge was made without scientific evidence.

2.2. Illegitimate Children's Protection in Law Cases

The recognition has legal implications, such as equal treatment and some rights for illegitimate children. These rights include the right to inherit a portion of a person's wealth and property or to provide facilities for a dependent biological parent. In contrast to surrogacy and MAP (Minor Attracted Person) cases, illegitimate children face unequal treatment in the absence of an acknowledgment mechanism. The state defines responsibility as the relationship between a legal and biological parent and their child based on the child's best interests and the right to know his or her origin.

First, in the United States, unmarried mothers and children could not inherit wealth and property from their biological fathers. When a child's mother dies, the Levy v. Louisiana case law is used to protect the child's right to inherit from their biological father.[14] The mother and illegitimate child are identified as vulnerable groups in this decision, and the child is directed to recover from their loss. This decision has legal reasoning, such as excluding an illegitimate child from the inheritance list as invidious discrimination and expanding protection for an illegitimate child of deceased mother or relative kin.[15]

14 Kahn, R. (1968). Constitutional Law-Equal Protection of Illegitimate Children-Levy V. Louisiana, 192 So. 2d 193 (La. 1966). *William & Mary Law Review*, *10*(1), 247.

15 Kahn, R. (1968). Constitutional Law-Equal Protection of Illegitimate Children-Levy V. Louisiana, 192 So. 2d 193 (La. 1966). *William & Mary Law Review*, *10*(1), 247.

Trimble v. Gordon in 1977 and Reed v. Campbell in 1986 contested the other case law that defines an illegitimate child's right to inherit property from the biological father. The court will always consider the rights to inherit from biological parents in those decisions, excluding any constitutional violations. The court has the authority to create or prohibit probate for properties that exclude portions of the illegitimate child, according to the legal reasoning in Reed v. Campbell.[16] When a child is recognized out of wedlock, a legal relationship is formed between the child and the father, as stated in Article 280 of the Civil Code: "With the recognition of the child out of wedlock, a civil relationship is formed between the child and the father or her mother."[17]

A nonmarital child cannot inherit unless there is a court judgment about paternity acknowledged in open court or a signed letter, according to another case law for intestacy succession established in the Lalli v. Lalli case. Other states offer sufficient proof of paternity to establish the legitimacy of inheritance rights (acknowledgment or DNA profiling). Although the law forbids it, some people insist on inheriting certain circumstances[18]:

1. As long as the father's name appears on the child's birth certificate, a nonmarital child can inherit from him, and

2. Some parents erroneously believe that if an unmarried father has ever lived with or supported his child, a legal parent-child relationship is automatically established for probate purposes.

A mother's actions for a minor child that require her to file a paternity action or require his father to formally acknowledge paternity are not entirely legal at some point.

Second, Mathew v. Lucas[19] upheld that people have the right to get social security benefits. This case also upheld parts of the Social Security Act that require unmarried children to obtain surviving child insurance. This is to demonstrate that their father was either living with them or providing financial support at the time of his death. The

16 McLeod, R. A. (2003). Illegitimate Children's Rights in Probate Proceedings-In Re Estate of James A. Palmer, Deceased. *Wm. Mitchell L. Rev.*, *30*, 529.

17 *Ibid*.

18 Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345.

19 Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345.

classifications in the Social Security Act were upheld by the Court because they were "reasonably related" to the likelihood that a child would be dependent on his father at death. Inequitable social security provision for illegitimate children violates their rights to protection.

Third, rights for financial support from the parent in Linda R.S. v. Richard D.[20] in this case, the court decided to impose financial support for both marital and non-marital children. The court refuses to punish the father so he can provide financial support for their child.

2.3. Comparation Perspective and Case Law

The right to know one's ancestors, guaranteed by the CRC, extends to children born out of wedlock. The care and current private rights, such as a person's name and the facilities they require to live, can differ under national law depending on the state's culture and ideas. There are options for fulfilling parental, maternal, or none of these rights. Furthermore, Article 7 (1) of the Convention on the Rights of the Child states that a child should have a name, and nationality, and be cared for by his or her parents. Under national and international law, the state is responsible for ensuring those rights.

The diversity of national law that stipulates recognition and protects the right for equal treatment for an illegitimate child, in conditions[21]:

- State has established recognition for maternity or paternity to their child, child born out of wedlock is treated equally as child born in wedlock. Example Australia, Canada, Croatia, Denmark, France, Germany, Portugal, Serbia and Uzbekistan.
- State has mechanism for paternity recognition to child born out of wedlock, such Japan, Romania, Spain, the Netherlands, UK, USA, Venezuela.
- child born out of wedlock has unequal treatment, state only admit maternity legal relation (India). Iran extremely erases recognition child born out of wedlock from their biological parent.

Seeing the practice of national law regulating the obligations of the

20 Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345

21 Shackel, R. (2016). The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations. In *The Rights of the Child in a Changing World* (pp. 37-60). Springer, Cham.

state, parents, and biological fathers in fulfilling children's non-marital rights. Here are some examples of conditions:

a) Croatia

An unmarried child must have both the mother's and the father's consent. According to Article 55 of the Family Act, obtaining recognition is possible in two different ways: by a court's decision or through acknowledgment. A kid born outside of marriage requires the mother's consent for paternal recognition. Croatia upholds the right to discover a child's paternity up until the age of 25. For a mother's legal defence to launch a lawsuit for paternal recognition, the child must be at least 18 years old. Up until the age of 25, the child has the right to question the mother's and father's acknowledgment.[22]

b) Germany

All children, including those born both in and out of wedlock, have the right to demand that their parents' consent to scientific investigations to ascertain their true biological origin. The child's right to know their biological parents is connected to these rights. According to the German Civil Code, the married father, not the biological father, is the legal parent of an unmarried child. It is admissible to acknowledge the paternal pathway for a child born outside of marriage, according to the Ahrens v. Germany (2012) case law. A "paternity determination litigation" is a legal process that can be used to prove paternity in Germany under the Civil Code. (Vaterschaftsfeststellungsverfahren).[23]

c) India

The right to prove the mother's nonmarital status belongs to the child born out of wedlock. A child born to legally married parents has no legal standing to contest his husband's paternity.[24]

d) Iran

Iran's national law prohibits recognizing a child born outside

22 Hlača, N., & Winkler, S. (2016). The Rights of the Child: Croatian National Report. In *The Rights of the Child in a Changing World* (pp. 83-96). Springer, Cham.

23 Schmahl, S. (2016). The Rights of the Child in Germany: The UN Convention on the Rights of the Child and Its Implementation in National Law. In *The Rights of the Child in a Changing World* (pp. 123-150). Springer, Cham.

24 Yadlapalli, V. (2016). Implementation of the United Nations Convention on the Rights of the Child in Indian Legal System. In *The Rights of the Child in a Changing World* (pp. 167-182). Springer, Cham.

of wedlock as having a paternal link. Neither their legal nor their natural parents could pass on any fortune to those children. Then the child's biological parents are not responsible for providing for their child's bodily, mental, or financial needs. The child does not live with the biological parents. Children born outside of wedlock in illicit partnerships lack parental citizenship.[25]

e) Japan

National law in Japan states that children born outside of marriage belong to the mother. Being acknowledged by the mother is very important. The admission of the biological father is optional and must be secured through legal means (determined by a court decision). The small child was subject to unjust treatment on the family registration form because his father and an unmarried child were no longer living together.[26]

f) Portugal

Portuguese law concerns the principle of ruling a child out of wedlock in the best interest of the child. The public prosecutor will investigate a mother who bears a child out of wedlock and is incapable of raising it. Portuguese law also establishes that if the mother is still a minor and they are willing to commit the child, they do not need authorization from their parents or other legal representatives. The court decision should be based on paternal acknowledgment of a child born out of wedlock in conjunction with the paternal investigation. The procedure of acknowledgment includes not only the ability of the father or mother to propose a lawsuit but also the public prosecutor's competence to inform the court about a paternity lawsuit.[27]

g) Romania

According to Romania's National Law, a court ruling can be used to establish a child's paternal lineage. The court action is brought against the father or his heirs that the kid or mother (even though the mother

25 Baloutaki, H. A. (2016). A Study on the Rights of the Child in Iranian Legal System. In *The Rights of the Child in a Changing World* (pp. 183-189). Springer, Cham.

26 Ohmura, Y. (2016). Legal Status of the Child in Japan, Especially in Family Law Matters. In *The Rights of the Child in a Changing World* (pp. 191-199). Springer, Cham.

27 Baptista Lopes, M. (2016). Legal Framework for the Rights of the Child in Portugal. In *The Rights of the Child in a Changing World* (pp. 201-219). Springer, Cham.

is a minor) proposes. Additionally, this operation will continue for this child until a year after the death of the biological father.[28]

h) Scotland

According to the Scottish definition of parenthood, a mother is a woman who gives birth, and a father is a man who marries the mother before the baby is born or who registers the birth on the birth certificate. Because taking a DNA sample can be challenging, the court has the power to order the submission of a DNA sample, which is acknowledged in the court process as evidence and requires DNA profiling. Obtaining a DNA sample from a child (under the age of 12) will require parental or guardian consent.[29]

i) Serbia

In Article 64, the right to one's origin is established. The family right is protected by the Constitution of the Republic of Serbia, although this right is constrained by the biological identity-based definition of family. Then it is disregarded in cases of MAP or surrogacy with individuals who are not part of the biological identity. In Serbian law, a mother is defined as someone who has given birth to a child and recorded the birth but has not signed the child's acknowledgment. In those conditions, the court has the authority to determine maternity lines. The paternity line has a different mechanism to acknowledge children established by court decision. Paternity can also be contested by the man who married the woman and biological father, and the court will dispute the final decision.[30]

j) Netherland

The Netherlands national law establishes that child's mother can declare in the birth registrar, and the father has to make such a declaration. If a father doesn't sign the opportunity to acknowledge the child, this duty falls on the Burgomaster. In those certain cases, the child's surname on birth register depends on[31]:

28 Deteşeanu, D. A. (2016). The Rights of the Child: Romanian National Report. In *The Rights of the Child in a Changing World* (pp. 221-233). Springer, Cham.

29 McCarthy, F. (2016). The Rights of the Child in Scotland. In The Rights of the Child in a Changing World (pp. 235-250). Springer, Cham.

30 Šahović, N. V., & Savić, I. (2016). The rights of the child in Serbia. In *The Rights of the Child in a Changing World* (pp. 251-262). Springer, Cham.

31 Liefaard, T., & Vonk, M. (2016). The Rights of the Child in the Netherlands: A Family Law Perspective. In *The rights of the child in a changing world* (pp. 313-330). Springer, Cham.

- the mother's marital status and/or the parents' decision to use the name of the other legal parent instead of the birth mother's
- the name of the birth mother and the other person with parental responsibility

It is true that a child has a right to know where they came from; but, a biological parent's claim does not imply that the child's legal parent-child connection should be ignored. The District Court may, upon the mother's request, determine the paternity of a child born outside of marriage. If the child was born during a valid marriage, there is a chance to contest paternity and a formal process to do so. If the legal father is not the biological father, he may request that the kid, the legal mother, and the court dispute his paternity. There is a time constraint on this treatment, and it has only ever been done right after birth.[32]

k) United Kingdom

Provisions under the Welfare Reform Act 2009 require registration of the name of the father where the parents are not married. In Scotland and Northern Ireland, the Registration of Births, Deaths and Marriages Act precludes biological fathers from being named on the birth certificate unless there is agreement. This agreement is a court order to declare the father or statutory declarations by both parents[33].

Under the Family Law Act 1986, any person may apply to the court for a declaration that a person named in the application for the child born out of wedlock; or for a declaration that the applicant is the legitimate child of his or her parents. The court may investigate the recognition of the child's right to know his or her origin. However, children are not able to make their applications to court and need to be represented by the Official Solicitor.[34]

l) Uzbekistan

The biological father of a nonmarital child must acknowledge his paternity according to Uzbekistan national legislation.

32 Liefaard, T., & Vonk, M. (2016). The Rights of the Child in the Netherlands: A Family Law Perspective. In *The rights of the child in a changing world* (pp. 313-330). Springer, Cham.

33 Driscoll, J. (2016). The rights of the child: United Kingdom national report. In *The Rights of the Child in a Changing World* (pp. 331-348). Springer, Cham.

34 Driscoll, J. (2016). The rights of the child: United Kingdom national report. In *The Rights of the Child in a Changing World* (pp. 331-348). Springer, Cham.

A court case has not considered a child born out of wedlock or acknowledged biomedical assistance to learn information about the father. Establishing paternity lines at mother initiations is typical.

The recognition of the biological father's paternity cannot be started by the child. The rebuttal of Paternity or Parental Line is only undertaken with court judgments and not the acknowledgment process.[35]

Seeing the fulfillment of rights to know his/her origin in several countries, issues that need to be regulated include the lawsuit mechanism, what rights can be granted after the recognition process, etc. The next part of this paper will discuss improvements for regulation, mechanism and officer to the implementation of Constitutional court decisions.

2.4. Reframing Acknowledge Policy

Darwan Prinst states that children are the successors to the ideals of the nation's struggle, and that in such a position, children have a strategic role and special characteristics, so children require protection to ensure physical, mental, and emotional growth and development, as well as to be socially harmonious, and balanced. Children's legal protection cannot be separated from their human rights, and the regulation of these rights is stated in Law no. 39 of 1999 concerning Human Rights (Human Rights Law), which through Article 1 no. 1 provides the understanding of Human Rights as a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld by the state, government law, and everyone, for the sake of redress.[36] Human rights are stated in the 1945 Constitution, so that these rights have become the constitutional rights of citizens, where this means that constitutional rights mean the rights guaranteed in and by the constitution of the 1945 Constitution in Articles 27 to 34.[37]

The Right of the Child to Know About His/Her Origin: Although Article 7 of the CRC provides for that the child shall have, as far as

35 Djuraeva, I. (2016). The Rights of Children: An Uzbek Perspective. In *The Rights of the Child in a Changing World* (pp. 371-388). Springer, Cham.

36 Karto Manalu, *Hukum Keperdataan Anak Luar Kawin*, (Pasamanan Barat: CV. Azka Pustaka, 2021), hal 10.

37 Indah Cahyani, *Hukum Pelayanan Publik di Indonesia*, (Surabaya: Scopindo Pustaka. 2021), hal 50.

possible, the right to know and be cared for by his or her parents, there are still the States Parties which forbid or restrict the possibility of contestation of paternity of the child born in wedlock, and thus restrict the right of the child to discover its origin. It seems that the right of the child born out of wedlock to have established his/her maternity or paternity in most States Parties is no longer an issue, since the legal status of the child born out of wedlock is equalised with the child born in wedlock in several state.[38]

Concerning the rights of children born out of wedlock, the decision of the Constitutional Court no. 46/PUU-VIII/2010 establishes that children born out of wedlock have a civil relationship with their father when the blood relationship between the child and the father can be proven through science, technology, or other evidence. According to the decision of the Constitutional Court, children born out of legal marriages are legally positive in Indonesia and have the same civil rights as children born from or in legal marriages. Children born outside of marriage should have the same constitutional rights as children born in or as a result of a legal marriage. Article 27 paragraph (1) of the 1945 Constitution states that all citizens have the same position in law and government, which can be used to establish equal rights between them. Not only are constitutional rights related to equality before the law, but all constitutional rights listed in the 1945 Constitution should apply equally to children born out of wedlock and children born in a legal marriage.

For starters, the Civil Code permits the voluntary recognition of the biological father. Second, the Constitutional Court's decision outlines the procedures that must be followed when their biological father refuses to recognize them. This mechanism establishes the responsibility to act in the child's best interests, including the right to know their origin. Eight articles of the CRC explicitly mention the child's best interests: 3/1, 9/1, and 9/3; 18/1, 20/1, and 21/1; 37/c; 40/2 (b); iii; and 40/4. In Article 3/1, it is provided that the best interests of the child shall be a primary consideration in all actions concerning children, no matter

38 Jančić, O. C. (2017). The Rights of the Child in a Changing World. The UN Convention on the Rights of the Child: 25 Years After. In *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé* (pp. 491-511). Springer, Dordrecht.

'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.[39]

Article 272 of the Civil Code stipulates that children out of wedlock, except those born from adultery or victim of rape, can be legalized through marriage that follows from their father and mother, or legal recognition of the child before marriage, or there is an acknowledgment in the marriage certificate. In addition, the provisions in Article 275 of the Civil Code state that there are several ways that children outside of marriage are recognized according to law, namely:

a. If the child is born to parents whose marriage is not carried out due to the death of one of them;

b. If the child is born to a mother who belongs to the Indonesian class or is equated with that group; if the mother dies or if there are significant objections to the parents' marriage, as determined by the President.

However, there is an exception through Article 284 of the Civil Code, namely when the mother is of the Indonesian class or the equivalent, then as long as the mother is still alive and does not agree to the acknowledgment, the acknowledgment of the child out of wedlock cannot be accepted.

There are differences in the acknowledgment and ratification of illegitimate children based on the Civil Code. If the mother and biological father are married after the birth of an illegitimate child, she had changed to complete the ratification process. In reverse, unmarried spouses have no choice in such acknowledgment processes.[40] In Indonesia, illegitimate children are ratified through a court ruling, followed by a side note on the birth certificate register or birth certificate quote, and/or registering on the child legitimacy certificate register and issuing a child ratification certificate to the local population and civil registry office.[41]

39 Jančić, O. C. (2017). The Rights of the Child in a Changing World. The UN Convention on the Rights of the Child: 25 Years After. In *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé* (pp. 491-511). Springer, Dordrecht.

40 https://www.hukumonline.com/klinik/a/cara-mengurus-pengesahan-anak-luar-kawin-lt55dc9350262f7, diakses pada tanggal 1 September 2022.

41 *Ibid*.

Court officials must require the biological father or anybody else expected to collect the samples due to the difficulty in gathering DNA samples. In paternity litigation, this authority alludes to a Scottish court.

Which rights are acknowledged are not specified in the Indonesian National Law. The right to inherit property, intestate succession, citizenship, payment of recovery costs, the benefit of social security, and financial support are just a few of the rights recognized in the previous area of US case law. Some of these rights, like inheritance rights and the right to financial support, have been asserted in Indonesia and are currently being charged. But just like with custody, neither parent makes an effort to promote.

3. Conclusion

The whole part of discussion made some conclusions:

a) After Constitutional court decisions, the non-marital children may be now recognized in two ways. First, Civil code for voluntary recognition from biological father. Second, Constitutional Court decision, for procedures that can be taken when there is a refusal to acknowledge the child;

b) One situation where there are still challenges with implementation is when the party refuses to gather samples for DNA testing. Due to difficulties in gathering DNA samples, court officials must order the biological father or anybody else expected to gather the samples. This alludes to the Scottish judiciary's role in paternity determination litigation.

c) Several rights, including those to inherit property, intestate succession, citizenship, payment of debts, and the Social Security benefit, as well as financial help, have been acknowledged.

References

A. Zamakhsyari Baharuddin. Review Terhadap Putusan Mahkamah Konstitusi Tentang Status Anak Di Luar Nikah. Jurnal Al-'Adl, 12 (1), Januari 2019. Hal 161.

Adv. Adi Kurniawan, S.H., Pengertiian Anak Sah dan Anak Luar Kawin, https://www.hukumonline.com/klinik/a/pengertian-anak-sah-dan-anak-luar-kawin-lt5e3beae140382, diakses pada tanggal 29 Agustus 2022

Bahruddin Muhammad, Akibat Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Terhadap Pembagian Hak Waris Anak Luar Perkawinan, dipublikasikan di website https://badilag.mahkamahagung.go.id/artikel/18859-akibat-hukum-putusan-mahkamah-konstitusi-nomor-46puuviii-2010-terhadap-pembagian-hak-waris-anak-luar-perkawinan--oleh-dr-h-bahruddin-muhammad-1712.html pada 17 Desember 2013, diakses pada 30 Agustus 2022.

Baloutaki, H. A. (2016). A Study on the Rights of the Child in Iranian Legal System. In The Rights of the Child in a Changing World (pp. 183-189). Springer, Cham.

Baptista Lopes, M. (2016). Legal Framework for the Rights of the Child in Portugal. In The Rights of the Child in a Changing World (pp. 201-219). Springer, Cham.

D. Y. Witanto, Hukum Keluarga: Hak dan Kedudukan Anak Luar Kawin Pasca Keluarnya Putusan MK tentang Uji Materiil UU Perkawinan, (Jakarta: Prestasi Pustaka), hal 46.

Deteşeanu, D. A. (2016). The Rights of the Child: Romanian National Report. In The Rights of the Child in a Changing World (pp. 221-233). Springer, Cham.

Djuraeva, I. (2016). The Rights of Children: An Uzbek Perspective. In The Rights of the Child in a Changing World (pp. 371-388). Springer, Cham.

Driscoll, J. (2016). The rights of the child: United Kingdom national report. In The Rights of the Child in a Changing World (pp. 331-348). Springer, Cham.

Hlača, N., & Winkler, S. (2016). The Rights of the Child: Croatian National Report. In The Rights of the Child in a Changing World (pp. 83-96). Springer, Cham.

Indah Cahyani, Hukum Pelayanan Publik di Indonesia, (Surabaya: Scopindo Pustaka. 2021), hal 50.

Jančić, O. C. (2017). The Rights of the Child in a Changing World. The UN Convention on the Rights of the Child: 25 Years After. In General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé (pp. 491-511). Springer, Dordrecht.

Kahn, R. (1968). Constitutional Law-Equal Protection of Illegitimate Children-Levy V. Louisiana, 192 So. 2d 193 (La. 1966). William & Mary Law Review, 10(1), 247.

Karto Manalu, Hukum Keperdataan Anak Luar Kawin, (Pasamanan Barat: CV. Azka Pustaka, 2021), hal 10.

Kudrat Abdillah dan Maylissabet, Sejarah Sosial Status dan Hak Anak di Luar Nikah, (Pamekasan: Duta Media Publishing, 2020), hal 44

Liefaard, T., & Vonk, M. (2016). The Rights of the Child in the Netherlands: A Family Law Perspective. In The rights of the child in a changing world (pp. 313-330). Springer, Cham.

Lynch, M. (2013). Science, truth, and forensic cultures: The exceptional legal status of DNA evidence. Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences, 44(1), 60-70.

Maldonado, S. (2011). Illegitimate harm: law, stigma, and discrimination against nonmarital children. Fla. L. Rev., 63, 345

McCarthy, F. (2016). The Rights of the Child in Scotland. In The Rights of the Child in a Changing World (pp. 235-250). Springer, Cham.

McLeod, R. A. (2003). Illegitimate Children's Rights in Probate Proceedings-In Re Estate of James A. Palmer, Deceased. Wm. Mitchell L. Rev., 30, 529.

Ohmura, Y. (2016). Legal Status of the Child in Japan, Especially in Family Law Matters. In The Rights of the Child in a Changing World (pp. 191-199). Springer, Cham.

Ratri Novita Erdianti, Hukum Perlindungan Anak, (Malang: Penerbit Universitas Muhammadiyah Malang, 2020), hal. 1

Šahović, N. V., & Savić, I. (2016). The rights of the child in Serbia. In The Rights of the Child in a Changing World (pp. 251-262). Springer, Cham.

Schmahl, S. (2016). The Rights of the Child in Germany: The UN Convention on the Rights of the Child and Its Implementation in National Law. In The Rights of the Child in a Changing World (pp. 123-150). Springer, Cham.

Shackel, R. (2016). The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations. In The Rights of the Child in a Changing World (pp. 37-60). Springer, Cham.

Yadlapalli, V. (2016). Implementation of the United Nations Convention on the Rights of the Child in Indian Legal System. In The Rights of the Child in a Changing World (pp. 167-182). Springer, Cham

CASE LAW FROM THE CONSTITUTIONAL COURT OF KOREA INTERPRETING THE CONSTITUTION WITH REGARD TO THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Minki Hwang
Dami Park

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA

CASE LAW FROM THE CONSTITUTIONAL COURT OF KOREA INTERPRETING THE CONSTITUTION WITH REGARD TO THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Minki Hwang[*]
Dami Park[**]

1. Introduction

In this presentation, I will introduce some of the case law from the Constitutional Court of Korea which interpreted the Constitution with regard to the protection of fundamental rights and freedoms. Firstly, I will present the cases where the Court derived unenumerated fundamental rights through the constitutional interpretation. Next, I will explore how the Court interpreted the Constitution to determine the scope of the protection of fundamental rights guaranteed by the Constitution and resolve conflict of fundamental rights. Lastly, I will look into the Court's approach to constitutional interpretation when questioned about the issue of recognizing constitutional rights holders. Before jumping into the main discussion, I will provide a brief overview of the fundamental rights provisions enshrined in the Constitution of the Republic of Korea (hereinafter referred to as the Constitution).

2. Fundamental Rights Provisions Enumerated in the Constitution

Fundamental rights are provided for in Articles 10 through 37 under the heading of "Rights and Duties of Citizens" in Chapter 2. The current Constitution first stipulates the right to human dignity and worth and the right to pursue happiness (Article 10), which is the core goal and idea of the protection of fundamental rights. It then prescribes the right to equality before the law (Article 11), liberty rights

[Editor's Note: Korea is conducting the Permanent Secretariat of for Research and Development (PSRD) of the AACC.]

[*] Constitutional Rapporteur Judge at the Constitutional Court of the Republic of Korea.
[**] Constitutional Researcher at the Constitutional Court of the Republic of Korea.

(Articles 12 through 23), rights to political participation (Articles 24 and 25), claim rights (Articles 26 through 30), and social rights (Articles 31 through 36). Liberty rights include personal liberty (Article 12), the right to privacy (Article 17), freedom of conscience (Article 19), freedom of the press and publication and freedom of assembly and association (Article 21) and the right to property (Article 23).

Article 37 of the Constitution takes a liberal approach to fundamental rights by prescribing respect for the freedoms and rights of citizens unenumerated in the Constitution (Section 1) and sets out the principles of general statutory reservation and rights restrictions (Section 2).

3. Deriving Fundamental Rights through Constitutional Interpretation

While it is important to interpret the express rights provisions, it is not enough to ensure only the fundamental rights explicitly enshrined in the Constitution. Fundamental rights should be affirmed or derived through constitutional interpretation in order to ensure the basic freedoms and rights, strengthen the effective protection of fundamental rights, and seek the unity and openness of the Constitution. There are several means to derive and affirm fundamental rights through constitutional interpretation.

1) Firstly, unenumerated constitutional rights can be affirmed and identified by interpreting individual rights provisions.

While Article 14 of the Constitution guarantees "the freedom of residence and the right to move at will" by prescribing that "All citizens shall enjoy freedom of residence and the right to move at will," this provision can also be interpreted to include the "right to renounce one's nationality." The Constitutional Court reviewed whether the provisions of the Nationality Act and its Enforcement Rule, which set the requirements and procedures for persons with dual nationality who wish to choose foreign nationality to declare their intention to renounce Korean nationality, infringed upon the Petitioner's freedom to renounce his nationality (2016Hun-Ma889, September 24, 2020).

Also, the Constitutional Court viewed that the right to bodily freedom enumerated in the first paragraph of Article 12(1) of the Constitution guarantees the freedom not to have one's bodily integrity

infringed by external physical forces or psychological threats and the freedom to enjoy physical activity at one's discretion and will (92Hun-Ka8, December 24, 1992). Article 12 of the Constitution stipulates that "all citizens shall enjoy personal liberty" and therefrom "the right not to have one's body harmed" can be derived.

The Court recognized the right to know by holding that freedom to access, collect and process information, that is, the "right to know", should be viewed as being naturally included in freedom of expression (88Hun-Ma22, September 4, 1989).

The Court also recognized other unenumerated rights as fundamental, including the right to sexual self-determination (89Hun-Ma82, September 10, 1990) and the general right to personality (89Hun-Ma165, September 16, 1991). In addition, the Constitutional Court viewed the right to general freedom of action as a comprehensive right to freedom and acknowledged different rights and freedoms derived therefrom, such as freedom of contract, freedom of transit, and the right of the detainee to meet and interact with others (89Hun-Ma204, June 3, 1991; 2002Hun-Ma193, November 27, 2003; 2011Hun-Ba51, November 24, 2011).

2) The existence and content of new fundamental rights can be derived by considering two or more fundamental rights provisions together. A case in point is a fundamental right called "the right to self-determination of personal information." The Constitutional Court ruled that "the right to self-determination of personal information is protected by the general right to personality drawn from the first sentence of Article 10 of the Constitution, which specifies human dignity, worth and the right to pursue happiness, as well as the right to privacy included in Article 17. This refers to the right for the information holder to determine on his or her own as to when, to whom, and to what extent his/her personal information can be disclosed and used" (2003Hun-Ma282, etc., July 21, 2005).

The Constitutional Court also found that "while the freedom of the founder of a private school to operate it freely is not enumerated in the Constitution, it is recognized as a fundamental right protected by the right to general freedom of action included in the right to pursue happiness under Article 10 of the Constitution, Article 31(1) of the

Constitution, which prescribes that all citizens shall have an equal right to an education corresponding to their abilities, and Article 31(4) of the Constitution, which specifies that independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed" (99Hun-Ba63, January 18, 2001).

3) Article 10 of the Constitution stipulates that "All citizens shall be assured of human worth and dignity and have the right to pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." This provision encapsulates the core value of the Constitution, which provides general and comprehensive protection of individual freedom, and a fundamental right can be derived therefrom.

In addition, Article 37(1) of the Constitution, as mentioned above, provides for respect for unenumerated fundamental rights by stipulating that "Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution." This explicitly discloses the possibility of deriving fundamental rights unenumerated in the Constitution. The above-mentioned Article 37(1) may provide the means to supplement Article 10 or the grounds for deriving individual constitutional rights as itself.

Concerning the right to life, the Constitutional Court recognized the right to life as a fundamental right by holding that "Human life is the source of the dignified human being. Such right to life, though not expressly provided in the Constitution, is a transcendental right granted by the law of nature based on the human instinct to survive and the purpose of human existence. It is thus considered as one of the most essential fundamental rights functioning as the prerequisite for all fundamental rights" (2004Hun-Ba81, July 31, 2008).

Previously, the Constitutional Court held that "the right to live peacefully can be drawn from Article 10 and Article 37(1) paragraph 1 of the Constitution. The basic contents of such rights is to ask the country for peaceful livelihood which would not be forced upon by committing aggression" (2005Hun-Ma268, February 23, 2006). But the Court overturned the existing case law by holding that "pacifism, asserted as the right to peaceful livelihood, is the goal and spirit of the Constitution and therefore is nothing more than absolute concept. Not

enumerated in the Constitution as the basic right, the right to peaceful livelihood does not meet the reality as concrete right and therefore cannot be acknowledged as a new right. Therefore, it is not the right guaranteed by the Constitution" (2007Hun-Ma369, May 28, 2009).

The Court presented several conditions for the recognition of fundamental rights unenumerated in the Constitution. The Court noted that "in order to newly acknowledge a fundamental right unenumerated in the Constitution, i) we should find the special need and ii) the content of the right (the scope of protection afforded to the right) should be relatively clear, so that the right should be acknowledged as having concrete substance of a fundamental right (2007Hun-Ma369, May 28, 2009).

4) Fundamental rights can also be derived from Constitutional provisions outside of the "Rights and Duties of Citizens" Chapter. Article 8(1) of the Constitution stipulates that "The establishment of political parties shall be free, and the plural party system shall be guaranteed." While this provision is not included in the abovementioned Chapter, it guarantees the right to establish political parties as a fundamental right of the citizens. Moreover, the "freedom of parties" can also be drawn from this provision. Concretely, freedom of parties include individuals' freedom of party formation, freedom of joining parties and freedom of the organizational or legal form. Freedom of party formation includes the corresponding freedom of dissolving parties and merging and dividing parties. Freedom of party formation includes individuals' negative freedom of not joining any party or any particular party and of withdrawing from the party that they have previously joined (2004Hun-Ma246, March 30, 2006).

Meanwhile, fundamental rights can also be derived from non-rights provisions in the Constitution. For instance, Article 72 of the Constitution prescribes that "The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary." Article 130 that provides for constitutional amendments sets out in Section 2 that "The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be

determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly." The above provisions can be perceived as ensuring the right to participate in national referenda concerning important policies relating to the national destiny and proposed constitutional amendments as a fundamental right.

Concerning Article 3 of the Constitution which stipulates that "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands," the Court opined that while it may not be possible to file a constitutional complaint based on the territorial clause alone, the right to territory could be regarded to constitute one of the basic rights (99Hun-Ma139, etc., March 21, 2001; 2008Hun-Ma517, November 27, 2008).

4. Constitutional Interpretation in Concretizing Constitutional Rights

Since constitutional interpretation is required in the entire process of confirming and concretizing constitutions which often contain abstract values, it is not an issue confined to a specific area. Nevertheless, I will look into several cases regarding the protection area of fundamental rights and conflicts between them.

4.1. Cases on the Protection Area of Fundamental Rights

There are a number of cases that affirmed and determined the scope of such protection through constitutional interpretation. In the following part, I will introduce some of the cases.

- The scope of the right to assistance of counsel for persons detained under administrative procedures

The main text of Article 12(4) of the Constitution prescribes that "Any person who is arrested or detained shall have the right to prompt assistance of counsel." The Constitutional Court previously ruled that the right to assistance of counsel prescribed in the above provision only applies to "criminal proceedings" and should not be applied to procedures for protection or deportation under the Immigration Act (2008Hun-Ma430, August 23, 2012).

However, the Court later reversed this decision and opined that "given the language of the main text of Article 12 Section 4 of the Constitution, the structure of the provisions of Article 12 of the Constitution, the nature of the right to assistance of counsel, and the purpose of the Constitution's guarantee of physical freedom, the 'detainment' prescribed in the main text of Article 12 Section 4 includes not only detention under judicial proceedings, but also detention by administrative procedures." It further viewed that the act of detaining the Complainant, who applied for recognition of refugee status at Incheon International Airport but was denied a referral for refugee status screening, for over five months in the waiting room for repatriation at the Airport and denying the access to the transit area is considered the "detainment" prescribed in the main text of Article 12 Section 4. Therefore, the Court concluded that the rejection of the Complainant's request to meet with counsel infringed upon the right to receive assistance of counsel guaranteed under the above provision (2014Hun-Ma346, May 31, 2018).

- Whether the "expression of false information" or "obscene expressions" are included within the scope of protection area of the freedom of expression

Whether the "expression of false information" and "obscene expressions" are included within the scope of protection area of the freedom of expression was challenged before the Constitutional Court.

Firstly, in the case concerning the expression of false information that challenged a provision of the Electric Telecommunication Act, which criminalizes those who transmit false information through electric communication facility with the intent to harm the public interest, the Constitutional Court held the following: "We cannot exclude a certain expression from the protection of the freedom of expression because it contains certain contents and the 'expression of false information' is against the social ethics to some extent. Rather, we find that even the 'expression of false information' remains within the scope of protection under the freedom of speech and the press as set in Article 21 of the Constitution and yet it may be restricted for the purpose of national security, public order and public welfare as specified in Article 37(2) of the Constitution" (2008Hun-Ba157, etc., December 28, 2010).

Accordingly, the Court viewed that the "expression of false information" also remains within the scope of protection area of fundamental rights. Yet, it also affirmed that, as with other fundamental rights, its restriction may be justified under Article 37(2) of the Constitution.

Next, as found with "the expression of false information", the Court also views that obscene expressions are also included within the scope of protection area of the freedom of expression. Previously, the Court found that "'obscenity' is a naked and unabashed sexual expression which distorts human dignity or humanity; it appeals only to the prurient interest, has overall no literary, artistic, scientific or political value, degrades the sound sexual ethics of the society, and causes harms not dissolvable in the mechanism of competition of ideas. Stringently defined, obscenity is not protected under freedom of speech and publication" (95Hun-Ka16, April 30, 1998).

However, the Court has overturned the precedent to place obscene expressions under the protection area of the freedom of speech and publication as specified in Article 21 of the Constitution. The Court noted that "if an obscene expression is interpreted to be outside of the boundary of freedom of speech and publication protected by the Constitution, it will not only be impossible to conduct a constitutional review of an obscene expression in accordance with basic constitutional principles for restriction on freedom of speech, such as the rule of clarity and ban on censorship, but also be difficult to apply constitutional basic principles for restriction on fundamental rights. In the end, it cannot be overlooked that obscene expressions are highly likely to be denied even the minimum constitutional protection" (2006Hun-Ba109, etc., May 28, 2009).

4.2. Conflicts between Fundamental Rights

A conflict between different fundamental rights is resolved through constitutional interpretation. In the case where there is a clash between the right to freely smoke cigarettes and the right to avert cigarette smoking, the Court viewed that "while the right to freely smoke cigarettes is practically based upon the right to privacy, the right to avert cigarette smoking is based not only upon the right to privacy but also upon the right to life, and thus the right to avert cigarette smoking

is the basic right of a higher rank compared with the right to smoke cigarettes" and found that the right of a higher rank takes precedence over the right of a lower rank (2003Hun-Ma457, August 26, 2004). Also, the Court found that labor unions' right to active organization prevails over an individual employee's freedom not to organize (2002Hun-Ba95, etc., November 24, 2005).

However, in most cases where there is a conflict between different fundamental rights, it is difficult to see that a certain fundamental right takes unilateral precedence over the other right. There is case law from the Constitutional Court, which found that "the collision between two basic rights demands a balancing point where the function and effects of two colliding basic rights are fully respected, in order to maintain unity of the Constitution (2009Hun-Ba42, August 30, 2011)." Although the following is not case law from the Constitutional Court, there is case law in the Supreme Court, which held that "where two basic rights conflict around a single legal relation, the matter should be resolved through a harmonized interpretation of the two basic rights, along with weighing of the interests by considering the totality of the circumstances of specific cases" (Supreme Court Decision, 2008da38288, April 22, 2010).

5. Constitutional Rights Holders

5.1. Regarding Foreigners' Constitutional Rights

Since most of the constitutional rights provisions specify in the text that "citizens" are entitled to fundamental rights, a question is raised as to whether foreigners may be subject to fundamental rights.

Fundamental rights can either be "the rights of citizens" or "human rights" according to their character. The Constitutional Court acknowledges that foreigners can be entitled to the fundamental rights which possess the character of a human right. The Court held that human dignity and worth and the right to pursue happiness are generally recognized as human rights, to which foreigners are also entitled, and while the right to equality can be granted to foreigners as a human right, it may come with certain restrictions, given the nature of political rights, etc. and the principle of reciprocity (99Hun-ma494, November 29, 2001).

The Court further recognized that the right to legal counsel (2014Hun-Ma346, May 31, 2018) and the freedom to choose work place (2007Hun-Ma1083, etc., Sep. 29, 2011; 2009Hun-Ma351, Sep. 29, 2011) may also be granted to foreigners.

The Constitutional Court found that "the 'constitutional right to work' not only includes the 'right for a working seat' but also the 'right to a working environment.' Since the latter is the right to defend against infringement upon human dignity, it is also guaranteed to foreigners. It includes the right to claim a healthy working environment, just remuneration for work done, and the guarantee of reasonable working conditions." (2014Hun-Ma367, March 31, 2016).

5.2. Regarding Legal Persons' Constitutional Rights

Also at issue is whether a legal person may enjoy fundamental rights. In the case which concerned the notice of apology, the Court recognized the ability of a legal person to enjoy fundamental rights by holding that "the right to personality, which should be protected for free development of personality for a legal person as well, is impaired in the process of publishing a notice of apology, and thus is necessarily followed by fragmentation in personality" (89hun-ma160, April 1, 1991).

Although legal persons may not enjoy the fundamental rights to life, personal liberty, family life and one's image, they may be entitled to freedom of business, freedom of contract and the right to property (2001Hun-Ba71, February 24, 2005).

5.3. Regarding Constitutional Rights of the Fetuses and the Dead

Concerning the question of whether fundamental rights may be recognized before birth and after death, the Constitutional Court denied the recognition of early human embryos as the holder of fundamental rights, yet it found that a fetus is entitled to the right to life and thus can be regarded as possessing fundamental rights (2004Hun-Ba81, July 31, 2008; 2017Hun-Ba127, April 11, 2019).

There is also case law where the Court based its ruling on the premise that the dead may be entitled to the right to personality (2007Hun-Ka23, October 28, 2010).

6. Conclusion

A wide and diverse range of issues are recognized concerning constitutional interpretation in the protection of fundamental rights and freedoms. This presentation only addresses some of the issues, and the discussion on this topic is not limited to what has been covered here. I hope that this meeting will lay the groundwork for further discussions to come concerning the issue of constitutional interpretation in the protection of fundamental rights.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF HUMAN RIGHTS AND FREEDOMS

İsmail Emrah Perdecioğlu

CONSTITUTIONAL COURT OF THE REPUBLIC OF TÜRKİYE

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF HUMAN RIGHTS AND FREEDOMS

İsmail Emrah Perdecioğlu[*]

I. Introduction

The Turkish Constitutional Court, which celebrated its 60th anniversary this year in April, has regularly performed the task of constitutionality review of laws for nearly half a century. Through the constitutional amendment in 2010, the individual application mechanism, also known as constitutional complaint in many countries, was introduced into the Turkish legal system. Accordingly, every person may apply to the Constitutional Court, alleging that the public power has violated any one of his/her fundamental rights and freedoms secured under the Constitution, which also fall into the scope of the European Convention on Human Rights.

In accordance with the period specified in the Turkish Constitution, examinations of individual applications started in 2012 and since then, the Constitutional Court has experienced a transformation in many aspects together with the dynamic structure of the individual application system. This transformation has had an impact on many areas from the organisational structure of the Constitutional Court to the management of the examination processes. It also has a significant bearing on the Constitutional Court's case-law on the protection of fundamental rights and freedoms.

II. The Dynamics of the Transformation in the Constitutional Court's Case-Law

Let me provide you with a brief overview of the dynamics of the transformation in the Constitutional Court's case-law on the protection

[Editor's Note: Türkiye is conducting the Center for Training and Human Resources Development (CTHRD) of the AACC.]

[*] Rapporteur-judge at the Constitutional Court of the Republic of Türkiye.

of fundamental rights and freedoms by giving examples from the Court's judgments.

While the individual application system is a remedy integrated into the Turkish legal system, it is also part of the legal mechanism for the protection of fundamental rights and freedoms through the European Court of Human Rights of which jurisdiction is recognised by the states in the Council of Europe where Türkiye is a founding member. In other words, the applicants who are not satisfied with the Turkish Constitutional Court's judgment may finally bring the matter before the European Court of Human Rights. This practice has led the Constitutional Court to take into account the European Court of Human Rights case-law more intensively in the protection of fundamental rights and freedoms as an obligation to ensure the sustainable functioning of this protection mechanism.

Of course, it should not be forgotten that before the examination of individual applications, the Constitutional Court had over fifty years of tradition and jurisprudence in the interpretation of both fundamental rights and freedoms and also other constitutional norms. However, individual application examinations have increased the diversity of disputes before the Court in terms of fundamental rights and freedoms, so that the Constitutional Court has had to spend more energy and time on the analysis of such disputes. This change has, in turn, resulted in the enrichment of case-law for the protection of fundamental rights and freedoms.

At this point, I would like to inform you that since 2012, when individual application examinations started in Türkiye, no remarkable amendment has been made in the part of the Constitution concerning fundamental rights and freedoms, and I would like to emphasise that the enrichment in the case-law has been achieved through the interpretation of these unaltered Constitutional provisions. This fact shows the importance of interpretation in order to maintain the ability of a nearly forty-year-old text to contribute to serve justice in terms of the Turkish Constitution in present time conditions.

By interpreting the Constitution in the cases brought before it, the Court gives life to the norms, which are more limited in number and more abstract in nature compared to the legal norms, and determines

how they will affect the concrete cases. Of course, the Constitutional Court's interpretation process has a systematics. Thus, it is aimed to provide legal predictability. In this framework, the Court tries to interpret a constitutional norm dynamically in the light of the conditions of the present time, in accordance with the meaning of its text, in harmony with other constitutional norms and the Constitution as a whole, taking into account the past historical process within the limits drawn by the Constitution's framers. Hence, since the results of the interpretation are binding on the legislature, the executive and the judiciary in accordance with Article 153 of the Constitution, these results affect the legal system and serve the resolution of disputes arising from constantly evolving legal relations in accordance with the spirit of the time.

III. Some of Judgments That Expand the Scope of Constitutional Fundamental Rights and Freedoms

The first judgment will be an example in which the limits of "*the right to legal remedies*" are discussed.

In a judgment on constitutionality review in 2018, the Court interpreted Article 36 of the Constitution and has noted that the right of appeal, which is not explicitly mentioned in the text of the Constitution, has a constitutional status. Article 36 of the Constitution, which is the source of this interpretation, reads as follows:

"*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.*

No court shall refuse to hear a case within its jurisdiction."

It has been observed that the right of appeal is not explicitly included in this provision. However, the Constitutional Court refrained from reaching a conclusion by focusing directly on the text. According to the Court, it can be encountered that some mistakes could be made in the application of the provisions in a trial process and accordingly it could be possible to come up with unfair judgments. For this reason, in order to effectively enjoy the right to legal remedies guaranteed under Article 36 of the Constitution, it is necessary that a judgment that is considered unfair by the parties to the dispute should be reviewed by another judicial authority. This necessity is a criterion that must be

taken into consideration in terms of determining the scope of the right to legal remedies when other fundamental constitutional principles such as the rule of law are taken into consideration.

In this judgment, the Court also took into consideration the constitutional definitions of the Court of Cassation (*Yargıtay*) as the highest judicial authority for the final examination of judicial disputes and the Council of State (*Danıştay*) as the highest judicial authority for the final examination of administrative disputes under Articles 154 and 155 of the Constitution. According to the Court, even if the Court of Cassation and the Council of State are regulated as the final review authorities for the examination of the judgements rendered by the courts of first instance, the final review duties that are not constitutionally assigned to them should be granted to other judicial authorities by law, since these articles state " …*is the last instance for reviewing decisions and judgments given by civil/administrative courts that are not referred by law to other civil judicial authority*".

The judgement also referred to Article 2 of Protocol No. 7 to the European Convention on Human Rights and Article 14 of the Convention. Although it is clear from the referred texts that the right to appeal to higher courts is guaranteed being limited to criminal disputes, the Constitutional Court, invoking Articles 154 and 155 of the Constitution mentioned above, has explained that this right cannot be limited to criminal disputes and it may be extended to the any other sphere.

Consequently, in this judgment, the Constitutional Court annulled the statutory provision that precludes the right to appeal the conviction decisions rendered by the higher judicial authority upon re-examination of the acquittal decision rendered by the court of first instance for offences involving an upper limit of imprisonment of up to two years.

Similarly, in another judgment rendered in 2021, the Court, on the same grounds, annulled the sentence stipulating that the administrative fines imposed on building inspection companies may be appealed to the competent administrative courts within fifteen days, and that the court decisions given upon appeal are final.

Another example concerns the scope of the right to hold public service guaranteed under Article 70 of the Constitution.

Article 70 of the Turkish Constitution regulates the right to hold public service. The article reads as follows:

"*Every Turk has the right to enter public service.*

No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service."

According to the text of the article, it is clear that the Constitution directly covers a guarantee for initial holding of a public service. However, will Article 70 of the Constitution provide a guarantee for those who are already in public service or have been dismissed from public service?

The Court dealt with this issue in its judgement in 2021. In this case, the Court examined the legal provision that stipulates the transfer of the research assistants at the university to a different status. As it can be deduced, these persons had already entered public service before this regulation. In this respect, the main area of discussion in the case is whether an action taken with respect to the status of persons already in public service falls within the scope of Article 70 of the Constitution.

In its judgement, after firstly pointing out that according to the first paragraph of Article 70, the guarantee regulated in the article can be perceived as limited to the stage of initial holding of public service, the Court stated that the scope of the right to hold public service cannot be determined solely on the basis of the first paragraph of the article.

Within this framework, the Court stated that in determining the scope of a right, the entire article, the section of the Constitution in which it is included, its interrelation with other articles of the Constitution, its purpose, as well as the way the right has been regulated in previous constitutions in the historical process should be taken into consideration.

In this regard, the Court, invoking the provision "*Declaration of assets by persons entering public service and the frequency of such declarations shall be determined by law.*" in Article 71, pointed out that it is clear that the Constitution-maker has made the declaration of assets, which is

considered as a matter within the scope of the right to hold public service, compulsory not only during the "initial holding" of public service but also during the "continued performance of" public service.

It has emphasised that this provision also confirms that the right to hold and maintain public service is within the scope of the right to hold public service. Furthermore, it stated that in the United Nations Conventions on human rights, the right to hold public service is listed among the political rights (rights of participation), which means the right of citizens to participate in the conduct of public affairs of their country. From this point of view, it should be accepted that the right to hold public service also covers the participation in the conduct of public services. In the light of these conclusions, the Court has stated that the right to hold public service, which is guaranteed in Article 70, covers the right to continued performance of public service when it is evaluated by considering the way it has been organised in the historical process and the systematic and purposive methods of interpretation.

Following these two judgments on constitutionality review, met me mention a case in the individual application process, which I think is particularly instructive for the courts of first instance in terms of the scope of the right to property.

In a judgment in 2017, the Court handled the alleged violation of the right to property due to the decrease in rental income on account of the closure to vehicles or pedestrians of a street by the administration so as to ensure the security of the Embassy of Israel Residence. The applicants were the owners of an immovable in this street and were exposed to a decrease in their rental income. The applicants sought redress for the damage allegedly incurred due to the street's closure to pedestrians and vehicles.

In this judgment, the Court found a violation on the ground that the trial court sought the condition of finding of a fault on the part of the administration in order to hold an examination as to the existence of a damage and a causal link in the action for compensation. According to the Court, during the judicial proceedings, a discussion must be made that took into consideration due to the damages arising from the acts and actions of the administration without seeking the condition of fault (tort) pursuant to Article 35 of the Constitution. That is because

the right to property guaranteed under Article 35 requires that individuals must be afforded a set of possibilities capable of balancing their interests.

However, the applicants were deprived of the possibility of balancing the burden imposed on them. The fact that the applicants were forced to bear the burden arising from this measure taken for the benefit of the whole society has resulted in the upset of the reasonable balance to the detriment of the owner needed to be struck between the aim of public interest and the owner's right to property. Thus, it has rendered the interference with the right to property disproportionate.

IV. Conclusion

In the Turkish legal system, the Constitutional Court, as the authority entrusted with the interpretation of the Constitution in the judicial sense, renders judgements that transfer constitutional guarantees regarding fundamental rights and freedoms to social life, both in the constitutionality reviews of norms and the examination of individual applications. In comparison to other legal provisions, these judgments are of great importance for the constitutional provisions, which are more static and rather abstract in nature, to provide effective protection for individuals. Therefore, the interpretation of the Constitution plays a key role in the protection of fundamental rights and freedoms in our country, as in the legal systems of many countries. That is because constitutional provisions, which are the main legal norms guaranteeing fundamental rights and freedoms, are perhaps the most in need of interpretation within a legal system.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Nigar Dunyamaliyeva

CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Nigar Dunyamaliyeva[*]

The world community faces various problems. Mutual relations among states are strengthening, interdependence is also strengthening, at the same time global problems become more challenged and more difficult to resolve. Of course, the world is made up of diversities. Interests are also different. Whether it is state interests or individual interests. Interests do not always coincide. And probably it will continue like this. Cultural, religious, civilizational, ethnic diversity is the reality of the modern world. But among all this diversity there are unifying factors. These are universal values: Justice, Prosperity, Peace, Security, the Safety of a Person, his Dignity, Fundamental Rights and Freedoms. These are general, universal, unifying values. And the responsibility for ensuring of these values lies with all states and, primarily with states. All states must share this responsibility.

To do this, as well as to effectively solve global problems, it is necessary to maintain and preserve close cooperation among states and other participants of the international community, to ensure the rule of law, whether at the national or international levels, and to strengthen the efficiency and resilience of relevant institutions, both at national and international levels.

In this sense, the protection of human rights and freedoms is undoubtedly one of the main issues of importance both at national and international levels. Human rights are the rights that determine the existence of a person, characterize his legal status. Human rights ensure a person's life, human dignity and freedom of action in all spheres of public life. Human rights are natural and inalienable.

---

[*] Deputy Head of the Department of International Law and International Cooperation of the Constitutional Court of the Republic of Azerbaijan.

The issue of human rights protection settled on the international agenda and increased its relevance, it became clear that human rights are not a matter of purely domestic jurisdiction of any state, and this process led to the improvement of national legislations, the emergence and strengthening of mechanisms for the protection of human rights both nationally and internationally.

We can confidently say that recognition of human rights and freedoms and the mechanisms of their protection constitute the basis of any democratic society. Development of society, its economic, moral prosperity and civil peace are possible when the state conceives the supreme value of a human being and guarantees his/her rights and freedoms.

And the Republic of Azerbaijan, as an active member of world community, closely monitors global and regional processes, including legal processes and trends, and acts as both initiator and active participant of cooperation events of global and regional importance.

Azerbaijan is a democratic and civil state governed by the rule of law. After obtaining independence there were a number of challenges on this direction in our country, as a result of successful economic, political, social and legal reforms the substantial changes have taken place in everyday life. Economic, political and legal foundations of our country that is comprehensively integrating into world community constituted the solid guarantees for protection of human rights and freedoms as well as the legitimate interests of physical and legal entities.

Being the foundation of Azerbaijan's legislative system, the Constitution that was adopted in 1995 – first time within the history of our independence – determined the promotion of our people on the path to democracy. The role of Constitution in development of Azerbaijan's statehood is of exclusive significance. Basic Law launched a new stage in the history of our statehood and gave a big impetus to a dynamic development of state formation, economic and social-political life.

Azerbaijan's Constitution, which is based on democratic values and declares securing of rights and freedoms of everyone as the

State's supreme goal, has set the mechanism of constitutional control and defined the important role and place of the Constitutional Court, which guarantees the Constitution's supreme legal force, within the system of state power.

Competences of Constitutional Court are envisaged directly in the Constitution. The main powers of Constitutional Court within constitutional proceedings are the constitutional review over the acts adopted by executive, legislative, judicial and municipal authorities and the interpretation of the Constitution and laws.

According to the Constitution of Azerbaijan, the following entities may apply to the Constitutional Court: President of the Republic of Azerbaijan; Milli Majlis of the Republic of Azerbaijan (Parliament); Cabinet of Ministers of the Republic of Azerbaijan; Supreme Court of the Republic of Azerbaijan; Prosecutor's Office of the Republic of Azerbaijan; Ali Majlis of Nakhichevan Autonomous Republic; Courts; every person; Ombudsman.

Among these entities the President, the Parliament, the Cabinet of Ministers, the Supreme Court, the Prosecutor's Office, the Ali Majlis of the Autonomous Republic of Nakhichevan may submit a request on interpretation of the Constitution and laws, and also courts may address the Constitutional Court, with respect to the interpretation of the Constitution and laws in connection with the issues of the implementation of human rights and freedoms.

Interpretation of the Constitution is an activity of high legal importance in the activity of the Constitutional Court. Interpretation of legal norms is usually understood as the activity of clarifying and explaining legal norms for subjects of law (state bodies, public organizations, officials, citizens). By its nature, the powers of the Constitutional Court always require, to one degree or another, an interpretation of the Constitution.

Interpretation constitutes the essence of the daily activity of the Constitutional Court. Interpretation of the Constitution and legal norms is important for the correct understanding and correct application of their meaning and content. Interpretation is necessary for both law enforcement and law creation. The interpretation of the Constitution

makes it possible for the legal subjects to understand the Constitutional norms in the same way, and as a result, the emergence of legal disputes is prevented, and the long-term functioning and development of the Constitution is ensured.

Society is in constant development and new challenges are constantly emerging. As social relations develop, the catalogue of human rights and freedoms is also expanding. As the legislator, as a rule, cannot foresee all further processes when regulating human rights and freedoms, the constitutional review and interpretation play an important role in this area. In particular, the political, economic and social factors, which should be taken into account within interpretation of the Constitution, as well as the direction of the legislator's will, designation of Constitution, supreme purpose of a state, and other issues are the aspects that influence the process of interpretation.

Decisions of the Constitutional Court significantly affect the development of legislation based on constitutional values and principles. In the decisions of the Constitutional Court, important legal positions are formed taking into account the foundations of the Constitution, its supremacy and direct force, a principle of a priority of human rights and freedoms, the international acts which the Republic of Azerbaijan is a party to.

The legal force of the decision of the Constitutional Court applies to all parts of it, including its legal positions. In some cases, legal positions have an independent meaning. The force of the legal positions of the Constitutional Court is equal to the legal force of its decisions and is of a general nature, therefore it applies not only to the case that is the subject of the constitutional case, but also to similar cases, and are used as a source of law in law enforcement practice, and in this regard, they act as an important resource not only for courts but all law enforcement institutions.

In principle alongside with ensuring of supremacy of Constitution and human rights and freedoms, the Constitutional Court decides on whether the rights were restricted and on the issues of the extents of admissibility of such restrictions. This is connected with examination of admissible limits of restrictions. For instance, as regards the complaints submitted against normative acts of legislative authority, one should

take into account that Constitution entitles the legislator to regulate the human and citizen's rights and freedoms through adoption of laws and corresponding thereto the normative acts which determine the forms of responsibility and guarantees as well as the preconditions and procedures of implementation of human and citizen's rights and freedoms.

The legal position of the Constitutional Court including the interpretation of Constitution, having both general and compulsory character, being of substantial and procedural direction are binding for legislators and law enforcement entities and constitute the basis of court decisions. By explanation of constitutional meaning of the provisions of Constitution and legislation or other normative acts, it also eliminates the existing uncertainty in certain situations. They have the precedent character. It means that the legal positions connected with the constitutionality or the interpretation should be guided by judiciary or other bodies and officials, within their competence when dealing with the cases with similar acts or norms.

The Constitutional Court carries out its activities in an environment of mutual cooperation with other state bodies. For example, courts may address the Constitutional Court, with respect to the interpretation of the Constitution and laws in connection with the issues of the implementation of human rights and freedoms. Important legal issues aimed at the protection of fundamental rights and freedoms are raised in the requests submitted to the Constitutional Court. Based on these requests the Constitutional Court, with its decisions, makes a significant contribution to the elimination of uncertainties existing in the legislation by its decisions, ensuring the principle of legal certainty, the formation of common judicial practice, effective protection of fundamental rights and freedoms.

As an example, in the Decision of May 27, 2008 "On Article 228.5 of the Civil Code of the Republic of Azerbaijan", adopted on the basis of the court of appeal address, the Plenum of the Constitutional Court noted that "The constitutional law doctrine recognizes a principle of legal certainty as one of the basic element of rule of law, found it's the reflection in a preamble of the Constitution of the Republic of Azerbaijan. And the principle of legal certainty, along with other

requirements, provides for clearness and definiteness concerning an existing legal situation in the most general sense. From this point of view, people should trust reliability of the data of the state register of real estate via the procedure established by the law. People should not expect constantly other new data calling the data obtained from this register into question having changeable character and becoming the reason of negative consequences for them." In this Decision it was recommended to the Milli Majlis of Azerbaijan to adopt the housing legislation regulating the legal status of the members of the family of the proprietor of a living space and other persons. According to this recommendation, by the Law of June 30, 2009, the new Housing Code was approved.

In the decision from 28th March 2019 "On interpretation of Articles 92.10.1, 92.10.3 and 244.2 of the Criminal Procedure Code of the Republic of Azerbaijan in their interrelation" adopted on the basis of the request of the Prosecutor's Office of the Republic of Azerbaijan, the importance of the right to receive legal assistance reflected in the Constitution of the Republic of Azerbaijan and international legal acts was emphasized. The Plenum of the Constitutional Court noted that "…Public value of the right of obtaining by everyone the qualified legal assistance consists that the granted right inherently is a necessary guarantee of realization of the rights and freedoms of the person and the citizen. Preventive function which is one of functions of this right, promotes not only to realization by the person of the rights and freedoms according to the law, but also guarantees prevention of actions of public authorities and their officials directed on illegal restriction of the rights and freedoms of the person and the citizen.

…The right to protection, together with the guarantee of a person's legitimate interests, is a guarantee of the interests of justice and social value. The legal relations that have arisen in connection with ensuring the right of everyone to legal assistance reflect the public interest and therefore confirm the fulfilment by the State of its constitutional obligations in this field. This requires the State to take positive measures, if necessary, to protect the rights of the person.

…In this context, the need to ensure the right of the accused to receive qualified legal assistance serves for full, objective and comprehensive

examination of the circumstances of the case and, as a result, is aimed at the effective implementation of justice. Thus, the right to receive qualified legal assistance should be regarded not only as ensuring the protection of a person's rights and freedoms, as well as his legitimate interests, but also as an initial condition for the exercise of justice on the basis of the principles of equality of parties and competition."

The Constitutional Court also closely cooperates with the institution of the Human Rights Commissioner of the Republic of Azerbaijan for the protection of human rights and freedoms enshrined in the Constitution. The Human Rights Commissioner may submit a request to the Constitutional Court of the Republic of Azerbaijan in relation to normative acts of the legislative and the executive, acts of municipalities, and judicial acts infringing upon human rights and freedoms, for resolving their conformity to the Constitution and laws. The Constitutional Court, while checking the compliance of normative acts or judicial acts with the Constitution and laws, also interprets the relevant norms of the Constitution and laws and clarifies their real content. As an example, in one of the latest decisions "On verification of compliance of Article 9.6 of the law of the Republic of Azerbaijan "On labour pensions" with Part I of Article 13, Article 25, part I and IV of Article 29, part I and III of Article 38, Part I and III of Article 149 of the Constitution of the Republic of Azerbaijan" from 2nd February 2022 the Plenum of the Constitutional Court once again noted the essence of the right to social security, which is one of the main socio-economic rights, the functioning of the pension system in the Republic of Azerbaijan based on the principles of social solidarity and social insurance, the issues of strengthening of these principles in the pension system, and interpreted the legislative norms regulating the implementation of labour pension rights.

When talking about the activities of the Constitutional Court, individual complaints should be especially noted. As practice shows, the institution of individual complaints is of great importance as one of the effective methods of ensuring the fundamental rights and freedoms reflected in the Constitution. In addition to the restoration of the violated rights and freedoms of the applicants in the decisions adopted on the basis of individual complaints, important legal positions have

been formed concerning judicial guarantee of protection of rights and freedoms, the right to equality, the right to property, the right to work, the right to housing, the right to rest, the right to social security, the right to education and etc. As an example, in the decision from 25th January 2017 "On verification of conformity of some provisions of the Law of the Republic of Azerbaijan "On social security of children who have lost their parents and were deprived of parental care" with Article 25.1 of the Constitution of the Republic of Azerbaijan that was adopted on the complaint of Javidan Gafarov, the Plenum of Constitutional Court noted that "…The principle of social state provides for ensuring the fair social system as the legal commitment of the state. This principle proceeds from the Preamble of the Constitution that declares the adequate standards of living for everybody in accordance with the fair economic and social norms. Namely the effective social state policy ensures the establishment of peace and prosperity within society. Without disclosing the concept of the social state, the Constitution envisages the development of economy based on the different types of ownership, and serves for the increasing the welfare of people. In order to recognize the state as the social one, the Constitution contains the outlines and duties of social policy that is subject to the attention of state. Thus, according to the provisions of the Constitution, state undertakes the commitment to set up the civil society, social security of a human being by state in the conditions of market economy as well as to respect the principle of social justice by means of policy implemented in the field of social and economic rights".

In conclusion, we can say with certainty that from the beginning of its activity until today, the Constitutional Court of the Republic of Azerbaijan has been successfully contributing to the supremacy of the Constitution, to clarifying the content of the Constitution and the rights and freedoms reflected in it, to protecting fundamental rights and freedoms, and to effectively restoring the violated rights with its decisions and the legal positions formed in them.

INTERPRETATION OF CONSTITUTION ON PROTECTING FUNDAMENTAL RIGHTS IN BANGLADESH

Abu Amar

SUPREME COURT OF BANGLADESH

INTERPRETATION OF CONSTITUTION ON PROTECTING FUNDAMENTAL RIGHTS IN BANGLADESH

Abu Amar[*]

If only a single piece of document is to be invoked displaying the entire journey, struggle and growth of Bangladesh, together with the glorious saga of Bangladeshi people to bring about a decisive charter for their own governance, it would undeniably be the constitution of Bangladesh. Serving as the foundational legislation of Bangladesh, functioning as a reservoir of fundamental rights, and performing as a radiant beacon for millions of people to enlighten them with the dictums of civilization, this constitution is also a majestic edifice to understand the existing socio-politico-economic context within which Bangladesh navigates. This essay endeavors to familiarize readers with some elementary notions regarding interpretation of constitution in respect of fundamental rights by exploring both its historical context and salient features.

History

Glued with the ethos of a number of glorious movements, mass mobilization and tumultuous political events, stretching from the emergence of India and Pakistan in 1947 to the independence of Bangladesh in 1971, and carrying along the aspiration of equality, justice and human rights, which the nation had long been deprived of, the history of constitution of Bangladesh is indeed indivisible from the history of Bangladesh itself. Cardinal episodes and documents relating to the development of constitution of Bangladesh can be listed as follows (Haque, 2022):

[*] Senior Assistant Judge at the Bangladesh Judicial Service. The author would like to express gratitude and extend sincere thanks to Mr. Saifur Rahman, *Bar-at-Law*, Registrar (Appellate Division) (District & Sessions Judge), Bangladesh Supreme Court, for providing invaluable support and necessary resources to complete this essay.

- 26 March 1971: Declaration of Independence by Bangabandhu Sheikh Mujibur Rahman
- 10 April 1971: Proclamation of Independence, for and on behalf of the Constituent Assembly of Bangladesh
- 10 April 1971: Laws Continuance Enforcement Order
- 16 December 1971: Independence of Bangladesh
- 11 January 1972: Provisional Constitution of Bangladesh Order
- 22 March 1972: Constituent Assembly of Bangladesh Order
- 10 April 1972: Constituent Assembly started
- 4 November 1972: Constitution finalized
- 16 December 1972: Constitution came into effect

Basic Layout

The constitution of Bangladesh, as to its organization and structure, is primarily arranged as below-

1. PREAMBLE
2. PART I: THE REPUBLIC
3. PART II: FUNDAMENTAL PRINCIPLES OF STATE POLICY
4. PART III: FUNDAMENTAL RIGHTS
5. PART IV: THE EXECUTIVE
6. PART V: THE LEGISLATURE
7. PART VI: THE JUDICIARY
8. PART VII: ELECTIONS
9. PART VIII: THE COMPTROLLER & AUDITOR-GENERAL
10. PART IX: THE SERVICES OF BANGLADESH
11. PART IXA: EMERGENCY PROVISIONS
12. PART X: AMENDMENT OF THE CONSTITUTION
13. PART XI: MISCELLANEOUS

14 SCHEDULES (Contents, 2019)

Salient Features

Through preamble, the constitution starts with-

> "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh; …". (The Constitution of the People's Republic of Bangladesh, 2019)

The very first article then goes on as below-

> "1. Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh." (The Constitution of the People's Republic of Bangladesh, 2019)

Thereafter, article 7 states-

> "7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." (The Constitution of the People's Republic of Bangladesh, 2019)

Thus, while the people of Bangladesh are the exclusive owners of the constitution, this very document is the supreme law of the country. All the branches of the Republic derive powers from the 'People' (Haque, 2022). As opposed to a federating unit, Bangladesh, by express provision of constitution, chose to become a unitary republic and 'any kind of monarchy, oligarchy, aristocracy or dictatorship is an anathema to its republican character (Kamal, 2001).

Additionally, provisions for supremacy of the constitution, separation of powers, fundamental rights, parliamentary form of government, local government, judicial review, independence of judiciary are some of the noteworthy features of the Constitution of Bangladesh (Islam, 2003).

As set out in article 8, fundamental principles of state policy are nationalism, socialism, democracy and secularism. Part II also encompasses democracy, human rights, freedom of religion, freedom from exploitation, emancipation of peasants and workers, provision of basic necessities, rural development and agricultural revolution, free and compulsory education, public health and morality, protection and improvement of environment and biodiversity, equality of opportunity, protection and development of the culture of tribes, minor races, ethnic sects and communities, among others, as some of the important pledges of the constitution (The Constitution of the People's Republic of Bangladesh, 2019). According to article 25, promotion of international peace, security and solidarity is also part of state policy (2019). This article states that-

> "25. The State shall base its international relations on the principles of respect for national sovereignty and equality, non interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for
>
> international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall –
>
> (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
>
> (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
>
> (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism."

Separation of the judiciary from the executive and security of tenure of Judges are also important as regards independence of judiciary. These ideas have successfully been incorporated through articles 22 and 96 of the constitution (The Constitution of the People's Republic of Bangladesh, 2019), and further fortified by some of the landmark

judgments of the apex court in Anwar Hossain Chowdhury etc v. Bangladesh and others, BLD 1989 (SPI) 1 and Secretary, Ministry of Finance v. Md. Masdar Hossain and others, reported in 2000 BLD (AD) 104. In order to uphold the principles of rule of law, the constitution guarantees 'impartial application of laws by law enforcement agencies and by an independent judiciary free from the interference and influence, in particular, of the executive and ruling political party.' (Hossain, 2021).

Fundamental Rights

Fundamental rights are incorporated in Part III of the constitution. Some of the important rights are-

- Equality before law
- Protection from discrimination on grounds of religion, race, caste, sex or place of birth
- Equality of opportunity in public employment
- Right to protection of law
- Protection of right to life and personal liberty
- Safeguards as to arrest and detention
- Prohibition of forced labor
- Protection in respect of trial and punishment
- Freedom of movement
- Freedom of assembly
- Freedom of association
- Freedom of thought and conscience, and of speech
- Freedom of profession or occupation
- Freedom of religion
- Rights to property
- Protection of home and correspondence

Enforcement of fundamental rights (The Constitution of the People's Republic of Bangladesh, 2019)

Regarding fundamental rights, a great deal of careful and subtle balance between individual's rights & collective interests has been maintained (Halim, 2008). It is to be noted that, by no means the authority of state to make special provisions for women, children, or any backward section of citizens is meant to be curbed.

Read together, article 44 & 102 unlock a boundless avenue for enforcement of fundamental rights by High Court Division through what is popularly known as 'writ jurisdiction', meaning 'the power and jurisdiction of the HCD under the provisions of the Constitution whereby it can enforce fundamental rights as guaranteed in Part III of the Constitution and can also exercise its power of judicial review.' (Halim, The Legal System of Bangladesh, 2006).

Interpretation of Constitution on Fundamental Rights

The Supreme Court of Bangladesh acts as the guardian of constitution by carrying out the sacred duty of interpreting it. One of the most significant powers in this regard comes from the enforcement mechanism of fundamental rights incorporated in Part III, as well as from judicial review. Clauses (1) and (2) of Article 26 states that-

> "26. (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
>
> (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void." (The Constitution of the People's Republic of Bangladesh, 2019).

It is up to the Supreme Court, in this regard, to examine such consistency and constitutionality of any legislation. Such a strong form of judicial review, along with Article 7 as introduced earlier, is an expression of popular sovereignty and constitutional supremacy, and enables the Court to authoritatively practice constitutionalism (Hoque, 2018), even in the case of constitutional amendments, as occurred in Anwar Hossain Chowdhury, (1989) BLD (AD) (Special) 1 (Hoque, Constitutionalism and the Judiciary in Bangladesh, 2013).

In Kazi Mukhlesur Rahman vs. Bangladesh, (1974) 26 DLR (SC) 44,

a case involving an international treaty, the Supreme Court observed that the appellant's rights 'to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise' are not 'local', rather 'they pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf' (A. M. Sayem).

In Sheikh Abdus Sabur v. Returning officer, district education officer in charge, Gopalganj and others, 41 DLR (AD) 1989 (30), while interpreting Article 27 of the constitution, the Appellate Division took a broader view on 'equality before law'-

> ''all citizens are equal before law and are entitled to equal protection of law. Equality before law does not mean absolute equality and is not be interpreted in its absolute sense, to hold that all people are equal in all respects disregarding different conditions and circumstances or special qualities and characteristics, which some of them may possess but which are lacking in others," (Hassan, 2015).

In Ain o Shalish kendro v. Bangladesh, by taking a wide-ranging view of right to life, the court held that this right extends beyond animal existence and 'includes right to live consistently with human dignity' (Hassan, 2015). In Professor Nurul Islam vs. Bangladesh (2000) 52 DLR (HCD) 413, the court treated right to life encompassing 'protection of health enshrined in Article 18(1)', and 'issued necessary directions as such prohibiting advertisement of tobacco related products' (Sarwar, 2014).

In Blast and others vs. Bangladesh and others reported in 55 DLR (2003) 363, the High Court Division, in response to petition relating to ''violations of citizens' fundamental rights to life and liberty, to equal protection of law, to be treated in accordance with law and to be free from cruel, inhuman and degrading treatment and punishment as guaranteed under articles 32, 27, 31, 33 and 35 of the Constitution', provided a set of guidelines for arrest and remand (BLAST, 2010) which were later upheld by the Appellate Division. Currently, these guidelines are strictly followed by the subordinate courts in the

country.

When Bangladesh started experiencing a new dawn of democracy after 'prolonged period of martial laws and autocratic regimes', Public Interest Litigations (PIL) flourishingly came into play (Ahmed, 1999). In Dr. Mohiuddin Farooque v. Bangladesh 49 DLR (AD) 1997, the Supreme Court entertained PIL by expanding the scope of *locus standi* and justiciability. 'PIL cases were successfully allowed by the Apex Court in various circumstances for protection of fundamental human rights and rule of law, securing basic structure of the Constitution and constitutional provisions, protection of environment, challenging lawlessness of the government and public authority, protection of the court from scandalizing, etc.' (Khan, 2021).

Ending Remarks

The incidents referred to above are just previews of interpretation mechanism undertaken by the highest echelon of the judiciary of Bangladesh, consequently paving way for uplifting human dignity, protecting fundamental rights and improving quality of life. Contemporary trends of expounding the provisions of constitution present overabundance of progressive decisions and proactive measures by the courts which embody the scheme of egalitarianism, fairness and rule of law as envisioned in the constitution of Bangladesh.

References

A. M. Sayem, C. (2022). A Citizen is a Citizen in every inch of Bangladesh. In S. C. Bangladesh, *Fifty Years' (1972-2022) Literature & Legacy* (First ed., p. 39). Dhaka, Bangladesh: Md. Golam Rabbani, Registrar General (Senior District Judge), Supreme Court of Bangladesh. Retrieved March 12, 2023

Ahmed, N. (1999). *Public Interest Litigation Constitutional Issues and Remedies.* Dhaka, Bangladesh: Fazlul Huq, Executive Director, BLAST. Retrieved March 11, 2023, from http://182.160.97.198:8080/xmlui/handle/123456789/702

BLAST. (2010). *BLAST and others vs. Bangladesh and others ['Section 54 Guidelines Case', or 'Rubel Killing Case' or 'Guidelines on Arrest and Remand Case']*. Retrieved March 11, 2023, from bangladesh legal aid and services trust: https://www.blast.org.bd/issues/justice/214-3806of1998

Halim, M. A. (2006). *The Legal System of Bangladesh* (Second ed.). Dhaka, Bangladesh: CCB Foundation. Retrieved March 11, 2023, from http://182.160.97.198:8080/xmlui/handle/123456789/714

Halim, M. A. (2008). *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (Fourth ed.). Dhaka, Bangladesh: CCB Foundation. Retrieved March 11, 2023, from http://182.160.97.198:8080/xmlui/handle/123456789/906

Haque, J. A. (2022). Prologue. In L. Commission, J. K. Haque, & J. F. Kabir (Eds.), *The Journey of the Constitution of the People's Republic of Bangladesh* (pp. xxix-xxxi). Dhaka, Bangladesh: Law Commission. Retrieved March 10, 2023

Hassan, N. (2015, August 18). *Constitutional interpretation and our Supreme Court: a critical appreciation*. Retrieved March 11, 2023, from Bangladesh Law Digest: https://bdlawdigest.org/constitutional-interpretation-and-our-supreme-court-a-critical-appreciation.html

Hoque, R. (2013). Constitutionalism and the Judiciary in Bangladesh. (S. K. al, Ed.) *Comparative Constituionalism in South Asia*, 308. Retrieved March 11, 2023, from https://scholar.google.com/citations?view_op=view_citation&hl=en&user=vhiRn_cAAAAJ&citation_for_view=vhiRn_cAAAAJ:ufrVoPGSRksC

Hoque, R. (2018, December). Constitutional Positioning of the Supreme Court of Bangladesh. *The Supreme Court of Bangladesh, Revised Bilingual Version*, 305. Retrieved March 11, 2023

Hossain, D. K. (2021, September). Bangabandhu, The Judiciary and The Rule of Law. *Nyaykantha (ন্যায়কণ্ঠ)* , 109-112. Retrieved March 11, 2023

Islam, M. (2003). *Constitutional Law of Bangladesh.* Dhaka, Bangladesh: Mullick Brothers. Retrieved March 11, 2023, from http://182.160.97.198:8080/xmlui/handle/123456789/670

Kamal, J. M. (2001). *Bangladesh Constitution: Trends and Issues* (Reprint ed.). Dhaka, Bangladesh: Dhaka University Publishers Bureau. Retrieved March 11, 2023, from http://182.160.97.198:8080/xmlui/handle/123456789/736

Khan, A. S. (2021, September 10). Public Interest Litigation: Locus Standi and Justiciability: The Case of National Board of Revenue v. Abu Saeed Khan and others. (D. M. others, Ed.) *Ain Darpan (আইন দর্পণ)*, 101. Retrieved March 11, 2023

Legislative and Parliamentary Affairs Division, M. o. (2019). Contents. In M. o. Legislative and Parliamentary Affairs Division, *The Constitution of the People's Republic of Bangladesh.* Dhaka, Bangladesh: Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat. Retrieved March 10, 2023, from http://bdlaws.minlaw.gov.bd/act-367.html

Legislative and Parliamentary Affairs Division, M. o. (2019). *The Constitution of the People's Republic of Bangladesh*. Retrieved March 10, 2023, from Laws of Bangladesh: http://bdlaws.minlaw.gov.bd/act-details-367.html?lang=en

Sarwar, T. B. (2014, April-June). *Society & Change, VIII*(2), 84. Retrieved March 12, 2023, from https://societyandchange.com/uploads/1509598235.pdf

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Kenad Osmanović

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Kenad Osmanović[*]

INTRODUCTION

The Constitution of Bosnia and Herzegovina has several specific features. It is part of the international agreement, as the Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (herein: Dayton Peace Agreement). In the Constitution, as well as in other annexes of the Dayton Peace Agreement (there are 11 of them in total), a significant emphasis is placed on the protection of human rights and fundamental freedoms.

Article II of the Constitution is entirely dedicated to human rights and freedoms. In Article II/2, the Constitution stipulates that the rights and freedoms guaranteed by the European Convention on Human Rights (herein: European Convention) are directly applied in Bosnia and Herzegovina and that European Convention has supremacy over all other laws. Also, Article II/3 stipulates that all persons on the territory of Bosnia and Herzegovina enjoy the rights guaranteed by the European Convention, and contains a catalogue of human rights and fundamental freedoms guaranteed by the Constitution itself. Finally, Article II/4 stipulates that, in addition to the rights and freedoms prescribed in Article II, all persons in Bosnia and Herzegovina also enjoy the rights contained in the international agreements of Annex I of the Constitution without any discrimination, while Article II/5 regulates the rights of refugees and displaced persons.

It is interesting to mention the relationship between the European Convention and the Constitution because the Convention was applied

[*] Judicial Associate at the Constitutional Court of Bosnia and Herzegovina.

before Bosnia and Herzegovina became a member of the Council of Europe, and only few countries have directly incorporated the Convention into their constitutional systems.

The Constitutional Court, in addition to ensuring the exercise of legislative power in accordance with the Constitution, also represents the supreme mechanism (within national boundaries) for the protection of human rights and fundamental freedoms. An appeal (in other legal systems constitutional lawsuit) can be filed against the judgment of any court in Bosnia and Herzegovina (in certain situations and when there is no judgment) and represents the last chance for Bosnia and Herzegovina to correct human rights violations.

1. AP-3430/16 – FREEDOM OF EXPRESSION

The appellant was sentenced to one year of probation for inciting national, racial, and religious hatred, division, or intolerance because he publicly published on his Facebook profile a photo of Jesus Christ in Rio de Janeiro with the text "Let's tear", with the flag of Bosnia and Herzegovina in the background and two dragons, while "the first dragon has an open mouth and attacks the statue". The photo was later published by certain portals in an article, while some comments on that article incited national hatred. In this way, according to the regular court's assessment, he publicly caused religious hatred and intolerance towards Croats, members of the Roman Catholic religion, who live in Bosnia and Herzegovina, by exposing religious symbols to mockery.

The appellant stated that he had published the photo before the match of the national football team of Bosnia and Herzegovina in the qualifications for the World Cup in Brazil and that the photo seemed appropriate to him, because the statue represents the symbol of Rio de Janeiro and Brazil, while the dragon is the symbol of the national team of Bosnia and Herzegovina. Also, he said that he wrote "Let's tear" only in sports jargon. Finally, appellant said that he did not see the dragons attacking Jesus, nor he didn't know that it was a statue of Jesus at all.

The Constitutional Court pointed out that the regular courts did not provide a sufficient and relevant explanation why they could not accept the appellant's defence that he published the photo only as

sports support for the national team of Bosnia and Herzegovina. The courts did not examine the contexts and circumstances in which the photo was published. Also, they did not explain why they took into account that the statue of Jesus above Rio de Janeiro was not exclusively a religious, but also a globally recognized cultural symbol of that city and Brazil, which the appellant pointed out and which could not have been unknown to the court. Finally, the Constitutional Court stated that courts did not explain why the appellant should be blamed for the hatred expressed in the comments on the article published on portals, because he published the photo on his Facebook profile accessible only to a limited number of people, or why it cannot be understood in any other way than as the intentional commission of a criminal offense.

Based on all of the above, the Constitutional Court concluded that the regular courts did not even try to achieve a fair balance between the protections of the rights of believers on the one hand and the protection of the appellant's right to freedom of expression on the other hand. For this reason, the Constitutional Court considers that the appellant's right under Article II/3.h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention has been violated.

2. AP-3040/21 – IMPOSSIBILITY OF FULL ADOPTION

The appellant's request for full adoption was rejected because the administrative authorities and regular courts concluded that the appellant did not meet the legal requirements for full adoption because the appellant was seven months older than the legal limit (10 years) at the time of submitting the application for adoption, and the appellant was not in a married or cohabiting union at least five years to be able to fully adopt the appellant.

The Constitutional Court pointed out, among other things, that the appellant was placed in a home for children and youth without parental care as a young child (one and a half years old). The appellant's biological father is unknown, and his biological mother was completely deprived of business capacity due to health reasons. At the time when the appellant adopted him, the appellant was five years and four months old and was qualified as a "high-risk child". The Constitutional Court further indicated that the expert body

assessed that the best solution for the appellant would be to terminate the incomplete adoption and at the same time establish a full one, but that this was not possible because the appellants did not meet the conditions prescribed by law for full adoption. The appellants also pointed out that they encounter difficulties in their everyday life in situations where the appellant's activities require parental consent, which the appellant herself cannot give because she is not listed as a parent on the appellant's birth certificate.

Bearing all this in mind, the Constitutional Court concluded that for many years there have been *de facto* close family relations between the appellants which are in the appellant's best interest, *i.e.* in the interest of his further development and integration into the appellant's family and that the decision rejecting him the request for full adoption did not give sufficient and relevant reasons to justify the necessity of making such a decision. In the specific circumstances of the specific case, the Constitutional Court concluded that, on the whole, reasonable proportionality was not achieved between the interference with the appellants' right to private and family life and the legitimate goal pursued, which is why the appellants' right under Article II/3.f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has been violated.

3. AP-3683/20 – COMPULSORY WEARING OF MASKS AND PROHIBITION OF MOVEMENT

The appellants submitted appeals to the Constitutional Court against the orders of the Federal Headquarters of Civil Protection, which, due to the pandemic of the COVID-19 virus in the Canton of Sarajevo, imposed the obligation to wear masks and restricted the movement of the population throughout the territory of the Federation of Bosnia and Herzegovina (one of two entities in Bosnia and Herzegovina) from 11 p.m. to 5 a.m. the following day.

The Constitutional Court pointed out that the legal framework for the activities of the crisis headquarters was set in an overly broad manner and without adequate control of the executive and legislative authorities, which resulted in serious violations of basic human rights. The Constitutional Court also pointed out that in a democratic society such significant measures, although aimed at health protection, after a

long period of existence of the pandemic danger and when its duration and course are uncertain in the future, must be under the constant control of the legislative power and with the participation of the highest executive body authorities. Failure to take responsibility and the expressed passivity of the Federation of Bosnia and Herzegovina Parliament to clearly and timely establish the framework for the actions of the executive power during the pandemic inevitably opened up the possibility of disrupting the achievement of a balance between different interests (rights).

The Constitutional Court, therefore, concluded that the (non)action of the public authorities, primarily the Parliament of the Federation of Bosnia and Herzegovina, in the specific circumstances of the specific case, is in contradiction with ensuring respect for the guarantees covered by the right to "private life" and the right to "freedom of movement", considering that in this particular case interference with constitutional rights does not satisfy the principle contained in the test of necessity, which is why the appellants' right under Article II/3.f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and Article 1 of the Protocol No 2 to the European Convention.

CONCLUSION

The aforementioned, as well as other decisions of the Constitutional Court, show that the Constitutional Court, interpreting the provisions of the Constitution, protects human rights at the domestic level, i.e. where the protection of human rights is most effective. With its decisions, the Constitutional Court tells the regular courts that they must fulfil their obligations in accordance with the principles of the European Convention.

FUNDAMENTAL RIGHTS AND FREEDOMS IN THE CONSTITUTION OF THE REPUBLIC OF BULGARIA AND RELEVANT CASE LAW OF THE CONSTITUTIONAL COURT

Stiliyana Stoyanova

CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

FUNDAMENTAL RIGHTS AND FREEDOMS IN THE CONSTITUTION OF THE REPUBLIC OF BULGARIA AND RELEVANT CASE LAW OF THE CONSTITUTIONAL COURT

Stiliyana Stoyanova[*]

Like other modern Constitutions, the Constitution of the Republic of Bulgaria sets the dignity of the human person and the protection of his fundamental rights and freedoms as the main objective of the current legal order. Embedded in modern constitutionalism is the understanding that the protection of fundamental human rights and freedoms is in fact the primary purpose and justification for the exercise of power in the state. These rights and freedoms are recognized as objective values that place legal constraints on any state aimed at protecting the individual.

In the Bulgarian Constitution, the fundamental rights and freedoms are regulated in a separate chapter entitled "Fundamental rights and duties of citizens", but some of them find their place in chapter one, such as equality and the right to private property. They are not grouped according to importance or any other criterion. Their holders are primarily natural persons, but for certain cases outside this chapter, the right of legal entities to be holders of fundamental rights is also explicitly recognized. An example of such a right is the right proclaimed in Article 120 of the Constitution for legal entities to appeal against administrative acts affecting them, except those expressly provided for by law.

In the diversity of fundamental rights there are possible hypotheses of accumulation, competition and collision of rights that make their realization difficult, and the task of constitutional jurisprudence is to find a way out and solutions. The Constitution and the jurisprudence consider that the rights of the individual encounter the rights of other

[*] Legal Expert at the Constitutional Court of the Republic of Bulgaria.

individuals. As a matter of principle, a fundamental right should not be allowed to be exercised if it infringes on the liberty and interests of another one. The exercise of any fundamental right requires clarity as to the limits of its content.

The protection of human rights and freedoms as the most important value of modern constitutionalism is fundamental in the activity of every constitutional jurisdiction, including the Bulgarian Constitutional Court, and outlines this field for useful interaction between it and the legislator. This protection, exercised by the Constitutional Court, is directly dependent on the powers at its disposal. At present, the Bulgarian Constitutional Court cannot yet be appealed directly by citizens and legal entities whose rights and freedoms are affected, as the possibility of an individual constitutional complaint as a means of direct protection is excluded. It is encouraging that there is a heated debate on the possibility of adopting the institute of the individual constitutional complaint, the outcome of which suggests an expectation of future challenges to the Court and its case law.

Another important role of the Constitutional Court is to monitor the conformity of laws with the generally recognized norms of international law and with the international agreements to which Bulgaria is a party, as well as to ensure the primacy of the international normative agreements over the national legislation. The decision of the Constitutional Court, which only rules if it is referred to it, is of a declaratory nature, and as a final result puts an end to judicial or administrative case law to a dispute in which the primacy of the international normative agreement was relevant. In this way that the Court fulfil its task for securing the consistent application of international law for the future.

In the context of the current topic, an international instrument of fundamental importance for the protection of human rights and freedoms is the European Convention on Human Rights. Following Bulgaria's accession to the Council of Europe in May 1992, four months later the Republic of Bulgaria became a party to the Convention.

The incorporation of the Convention into the Bulgarian legal order stems unequivocally from Article 5(4) of the Constitution, which states that " International treaties which have been ratified in accordance

with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation." The Convention meets all three legislative conditions - ratified by Parliament, entered into force, and promulgated in the State Gazette. It is part of the domestic law of the country and its norms prevail over those norms of domestic law that contradict them.

As Lyuben Kulishev (a jurist and specialist in international law) says in his article on the application of the Convention in the Bulgarian legal order, "the constitutional framework on the status of international treaties, established in Article 5(4) of the Constitution, obliges courts and administrative authorities to apply the directly applicable provisions of the ECHR *ex officio* and to give them precedence over laws and regulations that contradict them. Persons subject to the jurisdiction of the Bulgarian state have the possibility to invoke the Convention before the courts and other state bodies, to challenge both individual administrative acts and judicial decisions and laws and regulations that are contrary to it. All national, judicial, and administrative remedies for fundamental rights also apply to the rights guaranteed by the ECHR." [1]

In view of the norm of Art. 149(1)(1) of the Constitution, the Constitutional Court gives *erga omnes* binding interpretations of the Constitution. This is the so-called abstract interpretation or interpretation by direct request. In the exercise of this power, since the adoption of the current Constitution in 1991, the Bulgarian Constitutional Court has rendered several decisions directly related to the protection of fundamental rights and freedoms. Examples of such decisions are: **Decision no. 14 of 10 November 1992**, by which the Court held that the equality of all citizens before the law (the constitutional text of Article 6(2)) implies equality before all legal acts; **Decision no. 5 of 11 June 1992**, by which the Court held that freedom of religion is an absolute, personal, inviolable and fundamental right of every citizen, a value of a higher order and a guarantee for the existence of civil society; **Decision no. 3 of 17 May 1994**, which held that the right of defence is a fundamental and universal right of a procedural nature; **Decision**

1 Kulishev, L. (1994). Закон, Legacon

no. 10 of 6 October 1994 on freedom of association, which held that citizens may form associations with permitted purposes and means of activity, even though such a possibility is not provided for by law or other enactment; **Decision no. 14 of 24 September 1996**, devoted to the interpretation of the constitutional right to strike, in which the Court held that this right is irrevocable by law, may only be limited in exceptional cases where the suspension of work creates an obvious and imminent danger to the life and health of the population; **Decision no. 7 of 4 July 1996**, interpreting three constitutional provisions guaranteeing the right to freedom of expression and dissemination of opinion, freedom of the press and mass media and prohibition of censorship, the right to information - the CC found that the three fundamental rights are interrelated and can be summarized by the concept of communication rights.

There are still a sufficient number of decisions of the Constitutional Court of the Republic of Bulgaria, dedicated to the protection of the fundamental rights and freedoms of citizens, but I would still like to highlight two decisions from the most recent case law of the court. These are the decisions **Decision no. 13 of 5 October 2021** and **Decision no. 11 of 28 July 2022**.

The first decision, rendered in Constitutional Case no. 12/2021, with Judge Pavlina Panova as judge rapporteur, was initiated at the request of the Ombudsman of the Republic of Bulgaria seeking to establish the unconstitutionality of a provision of the Code of Criminal Procedure that allows the participation of the accused by videoconference in the proceedings before the court for taking a pre-trial detention order. According to the petitioner, the norm contradicts:

- Article 56 of the Constitution, guaranteeing the right to defence of every citizen, in conjunction with Article 122 of the Constitution, regulating the right to defence at all stages of the trial;
- Article 29(1) - the right of everyone not to be subjected to torture, cruel, inhuman, or degrading treatment;
- Art. 30(1) of the Constitution, guaranteeing the right to liberty and security of the person.

In his reasoning, the Ombudsman referred to Article 5(3) of the Convention, Article 9(3) of the International Covenant on Civil and Political Rights and the jurisprudence of the ECtHR and the Human Rights Committee.

Before stating its decisive conclusions, the Court clarifies in its decision that the contested provision creates a legal possibility for the accused detained in prison or in custody to participate in the proceedings before the first instance for the adoption of a pre-trial detention order by means of a video conference.

- that by its nature this is an exception to the rule that the bringing of the detained accused before the court must be ensured immediately by the prosecutor;
- that the detention in the hypothesis of Art. 64(2) of the Code of Criminal Procedure is necessary insofar as it provides the prosecutor with the opportunity to bring the accused before the court in the presence of a reasonable presumption that he has committed a crime, as well as in the presence of a reasonably recognized need to prevent a crime or concealment in order to request the most severe detention measure and constitutes a classic case of restriction of the right to personal liberty and inviolability.
- The Court also takes into account that the Constitution permits the restriction of the right to liberty and security of the person, in cases of detention, under the conditions and in the manner prescribed by law.
- It also notes that the general prerequisites for the permissibility of a restriction on a fundamental right, namely that it be **provided for by law**, that it be **aimed at securing essential constitutionally recognized goods**, that it **be proportionate to the danger existing to the object of protection** and that **it be subject to effective judicial review**, are valid in these cases.
- The Court also explained that the European legal standard under Article 5 of the Convention and the international legal standard under Article 9 of the International Covenant on Civil

and Political Rights also allow for the restriction of the right to liberty in accordance with procedures laid down by law, the Convention exhaustively specifying the permissible hypotheses for this, while at the same time regulating mandatory judicial review of the legality.

In the light of the foregoing, in view of the nature and content of the fundamental rights to defence, to liberty and security of the person, and not to be subjected to torture or to inhuman or degrading treatment, as enshrined at the constitutional level and in the texts of the Convention and the Covenant, the Court, proceeding also from the paramount importance of the right to effective judicial review against unlawful and arbitrary detention, holds the following on the referral:

- The contested provision restricts the right of the accused to be brought before a judge without introducing the standard for such a fence. In order for the temporary restriction on the exercise of citizens' rights under Article 57 (3) of the Constitution, a state of martial law or other state of emergency must have been declared by law in order that it may (if necessary and after consideration of the particular situation requiring state intervention) temporarily restrict the exercise of individual rights of citizens in order to neutralize and overcome the particular threat to the existence of the state and society.
- The provision also fails to meet the standards of the rule of law in the formal sense, which requires laws to be clear, precise, and consistent, which is not the case here because there are no definitions of disaster, epidemic and other force majeure circumstances.
- The provision of Article 64(2), 2nd sentence of the Code of Criminal Procedure is also in conflict with the right to personal liberty and security guaranteed in Article 30(1) of the Constitution. The envisaged remote conduct by videoconferencing of the procedure for deciding on the issue of the accused's permanent detention deprives the court of the opportunity to obtain direct and immediate impressions of the person's objective condition and, in this connection, of the veracity of his allegations of

physical injuries or ill-treatment. The prohibition of torture, cruel, inhuman, or degrading treatment is thus jeopardized and not fully guaranteed. The possible restrictions on citizens' liberty and especially their procedural regulation constitute a sensitive indicator of the balance between citizens' liberty and state coercion.

- The Court also held that, by impermissibly affecting the substance of the right to a defence, the provision upset that balance and was therefore contrary to the right to a defence at all stages of the proceedings and to the right of every citizen to a defence. The possibility of using videoconferencing in times of extraordinary crises does constitute a means by which the State can ensure the functioning of the courts. However, uninterrupted access to justice should be regulated in accordance with the principles of the rule of law, and the possibilities provided by law for the use of videoconferencing should allow for an effective and fair judicial process in accordance with international standards on fundamental rights, so that the rule of law remains the rule of law in situations of extraordinary and devastating events, when human rights are most in need of protection.

The **second** decision, which I would like to summarize briefly, concerns the provision of Paragraph 5 of the Transitional Provisions of the Law on Amendments and Supplements to the Family Code. The subject of the appeal is again the Ombudsman of the Republic of Bulgaria, who claims that the contested provision contradicts:

- the principle of the rule of law and the protection of the family, motherhood and children by the State and society, as well as stability and security as guiding principles in the legal framework of the origin.

According to the Family Code, Article 62, paragraph 1, the presumptive de jure father may contest that he is the father of the child within one year of knowledge of the birth (sentence 1), or within one year of knowledge of the circumstances that refute paternity if the knowledge occurred later for reasons beyond his control, but not later than the child's majority (sentence 3).

In 2020, a new provision, Article 62(5), was also adopted, expanding the circle of persons who are legitimate to contest paternity based on marital descent to include any third party who claims to be the biological father of the child. A condition precedent to the existence of the third party's right of action, apart from his claim to be the biological father, is the bringing of an action for the establishment of paternity, the time limit for exercising that right being one year from the knowledge of the birth and no time limit being specified.

The provision under appeal - paragraph 5 of the transitional provisions provides that for persons for whom the circumstances determining the right to claim under Article 62(1) sentences 3 and art.62(5) sentence 1, were present before the entry into force of the Act, the time limits for bringing the respective claims shall run from the entry into force of the Act. By the contested par. 5, the legislator changed the time limit established in Art. 62(1), sentence 3 and par. 5, to which it refers, the starting point of the time limit within which the mother's husband and the person claiming to be the biological father may contest the presumption of paternity. It is not the time of knowledge of the circumstances that disprove paternity, respectively the time of knowledge of the birth, but the entry into force of the Law on the Amendment of the Family Code, while maintaining the duration of the period of 1 year, that is, the contested paragraph 5 has a bearing only on facts that occurred before the entry into force of the law.

Taking into account the legal technique of reference used by the legislator, the overall regulatory potential of § 5 is established by taking into account the content of the norms to which it refers - Art. 62(1) sentence 3 and (5) sentence.

In its decision, the court recognized that of the constitutionally protected universal human values proclaimed in the preamble of the Constitution, those related to the origins are equality and justice, and the rights of the individual, his dignity and security are proclaimed as a supreme principle.

- That the right to privacy is established as a fundamental right in its own right in the Constitution and the right to protection against unlawful interference with one's private and family life

and attacks on one's honour, dignity and reputation is expressly provided for, along with the general right to defence.

- It also recognizes that the Constitution expressly declares that both children and the family are under the protection of the State and society, that is, they are fundamental constitutional values to which the State and society owe protection, patronage, and protectiveness. Corresponding to this obligation of the State is the right of the child and the family members to demand that the rights relevant to them and guaranteed by the Constitution to be implemented in a manner that protects their interests to the maximum extent possible.
- The Court also recognizes that the origin of each person and the relationships arising from it have invariably been accepted as an essential element of the right to private and family life within the meaning of Article 8 of the Convention, and that in its case law the ECtHR has considered matters of origin to be related to the right to respect for private and family life.
- Considering the Convention's status as part of the domestic law of the country, directly applicable with, and taking precedence over, those provisions of domestic law that contradict it, the Court also takes into account the relevant ECtHR jurisprudence, insofar as the Bulgarian Constitution does not guarantee a higher standard of protection of the right to private and family life relating to the origins than that guaranteed by the Convention.
- In reaching its decision, the Court also found relevant the fundamental principles of the rule of law, the equality before the law and the protection of the family and children.

Analysing the contested provision in the light of the foregoing, the Court concludes that:

- the contested paragraph 5 is not inconsistent with the requirements arising from the rule of law.
- does not affect the enhanced constitutionally guaranteed protection of children and the family, and

- does not intrude in a constitutionally intolerable manner on the privacy and family life of the persons concerned.

This judgment is signed by a dissenting opinion of two judges of the Constitutional Court, who take the view that the possibility for a third party to bring a claim challenging the origin from the father, is disproportionate and excessive, and therefore - unconstitutional as violating the principle of the rule of law and the principle of personal and family life, which also encompasses the interest of the child as a supreme value recognized by the legal order. In the present case, for the reasons set out in detail in the dissenting opinion of the two judges, there has been an interference which, although arising from the law, appears arbitrary in that it disregards the personal and family harmony of the child and his relatives at the expense of a third party's desire to impose his paternity.

These two decisions represent the most recent case law of the Bulgarian Constitutional Court on issues related to the protection of human rights. The Court's case law is rich in this area and there are also pending proceedings at the moment which are awaiting a decision.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS: A SUMMARY OF A PRECEDENT JUDGMENT OF THE CONSTITUTIONAL COUNCIL OF CAMEROON ON THE ESTABLISHED CASE LAW

Dr. Joseph Koudjou
Lilian Awah Ngumaso

CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF CAMEROON

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS:

A SUMMARY OF A PRECEDENT JUDGMENT OF THE CONSTITUTIONAL COUNCIL OF CAMEROON ON THE ESTABLISHED CASE LAW

Dr. Joseph Koudjou[*]
Lilian Awah Ngumaso[**]

Our presentation is built on the pedagogic method. In this respect, we shall start off by saying what we will say. There after we will develop what we said we will say and lastly, we shall sum up our points. We want to start off with a citation that crystalizes the importance of the topic.

Thomas Jefferson, one of the American Founding Fathers, the main Author of the Declaration of Independence (1776) and the Third President of the United States is reported to have once said "The Constitution is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please." This statement highlights the importance of issues of interpretation. The courts interpret the statute or the Constitution in order to see in all cases the intention expressed by the words used and to ascertain the mind of the legislature from the national and grammatical meaning of the words or phrases used in the statute.

On their part, fundamental rights are those rights that are enshrined in the constitution in order to ensure the fullest physical, mental and moral development of every citizen. Freedom is the basic characteristic of a free democracy usually referred to as right to Freedom.

---

[*] Head of Documentation and Archives at the Constitutional Court of the Republic of Cameroon.
[**] Secretary at the Constitutional Court of the Republic of Cameroon.

Issues of Human Rights and Freedoms have gained credence over the years and Cameroon as a State has not been left out in this quest for the supremacy of Human Rights. And to understand the subject matter of the topic, we need to identify the problem. The problem or issue at stake in the topic are two-fold and may be summarized thus:

1- What are the various approaches adopted by the Constitutional Court of Cameroon to interpret the Constitution with respect to the protection of Fundamental Rights and Freedoms?

2- What are some landmark decisions or leading cases in this respect?

I- THE VARIOUS APPROACHES ADOPTED BY THE CONSTITUTIONAL COURT OF CAMEROON TO INTERPRET THE CONSTITUTION WITH RESPECT TO THE PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

Before dwelling on the approaches *per se*, it may be instructive to have a broader view of the Cameroonian judicial system before the appraisal of the various interpretation tools.

THE COURT SYSTEMS AND THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Cameroon is a bi-jural system because two distinct and dominant legal systems coexist in two separate legal districts, the Common Law operating in the two Anglophone regions and the Civil Law operating in the other 8 regions.

a) The Common Law system as practiced in Cameroon

The following main features are particular to this system.

1- It is basically and judge make law.

2- Legal rules seek to provide solutions to the cases at hand and do not seek to formulate general rules of conduct for the future.

3- The primacy of adjectival law (rules related to the administration of justice, procedure, evidence and execution of judicial decision) have an interest equal or even superior to substantive law.

4- The accusatorial procedure which is oral, in the main procedure used in common law.

The sources of this law include:

- Received extraneous basic law
- Enactments by English colonial legislative authorities
- Enactment by the national legislative authority since independence
- International treaties

b) The Civil Law in Cameroon

Inspired by the Roman law, the civil law as practiced in Cameroon has the following specificities.

1- Civil law procedure is inquisitorial and essentially written.

2- The rule of law is enacted mainly by scholars not judges.

3- It has evolved as a means of regulating private relationships between individual citizens.

4- It is essentially a codified law.

However, we are witnessing the emergence of a specific Cameroon. Cameroonian law which is a blind of both systems is defined and elaborated by local legislation and decisions of Cameroonian courts.

We also got customary laws which govern only matters of personal status (customary marriage, divorce, custody, inheritance, customary). Customary laws are subject to the provisions of laws in force and which are not repugnant or incompatible.

As for the court systems in Cameroon, it falls under two grand categories: courts of ordinary jurisdiction and courts with special jurisdiction:

- Courts of ordinary jurisdiction:

  They are courts having an all-embracing jurisdiction to hear and entertain matters of every kind, both civil and criminal. They are Customary Courts, Magistrate Courts, High Courts, Courts of Appeal and Supreme Court.

- Courts with special jurisdiction are those dealing with specific matters formally provided for by statute. They include: Military Courts, the State Security Court, the Court of Impeachment and the Constitutional Council.

Three main structures partake in the interpretation of the Constitution in the protection of fundamental rights and freedoms; The Civil Courts, the Administrative Courts and the Constitutional Court. Each in its specific sphere of competence:

1) The role of the High Court

By virtue of Section 18 (1) of law no. 2006/015 of 29 December 2006 on Judicial Organization, the High Court has original jurisdiction to entertain matters relating to the breach of fundamental human rights as provided for in the Preamble of the Constitution. In non-administrative matters, the High Court has been conferred jurisdiction to hear and determine all petitions for an order prohibiting any person(s) or Authority from doing or performing an act in respect of which he is not entitled by law. (Prohibition and mandamus)

2) The role of Administrative Courts

Section 2(2) and (3) of Law no. 2006/022 of 29 December 2006 to lay down the Organization and Functioning of Administrative Courts provides that:

Administrative Courts shall have jurisdiction to determine at the First Instance litigations on Regional and Council elections and at the First Instance all administrative litigations concerning Decentralized Public Authorities and Local Administrative Authorities. Administrative litigations shall include;

a) Petitions for the quashing of all ultra vires acts and in civil matters, acts made without lawful authority. Ultra vires within the meaning of the law are acts that are invalid for the following reasons:

- They are bad in form.
- They were made without jurisdiction.
- They infringed a legal provision or regulation.
- They constitute an abuse of authority.

b) Claims for damages for loss caused by administrative acts.

c) Dispute relating to contracts (excluding those drawn-up expressly or implicitly under private law or public service concessions).

d) Disputes concerning State Land.

e) Dispute relating to the maintenance of law and order.

THE VARIOUS INTERPRETATION TOOLS

We may make a distinction between general rules of interpretation and that which is specific to the Council.

1. General forms of constitutional interpretation

At the heart of every constitutional decision is the court's appraisal of what the provision of the constitution relating to the matter at hand means; why it exists in the shape and form that it does and above all what injustice is meant to remedy or prevent. These general forms of interpretation include;

- Textualism: is a mode of interpretation that focus on the plain meaning of the text or a legal document. In this light, textualists believe in an objective meaning of the text and they do not typically inquire into questions regarding the intent of the drafters, adopters or rectifiers of the constitution.
- Original meaning: Originalist approaches consider the meaning of the constitution as understood by at least some segment of the populace at the time of the Founding.
- Judicial precedent: For most justices, judicial precedent provides possible principles, rules and standard to govern judicial decisions in the future cases with arguably have similar facts.
- Pragmatism often involves weighing the possible practical consequences of one interpretation of the constitution against other interpretation and selecting the one that will yield the perceived best outcome or results.
- Moral reasoning: According to this perception, certain moral concepts or ideals underline some terms in the text of the constitution and these concepts should inform and help judges in the interpretation of the Constitution.

- Structuralism: This interpretation draws inference from the design of the constitution. That is the way the constitution is drafted. The relationship among the three branches of Government, relationship between Government and the People etc. to draw inference.
- Historical practices: Long established historical practices are an important source of constitutional meaning and it can be used as a tool of interpretation.

SPECIFIC INTREPRETATION TOOLS

By all indications, the Constitutional Council of Cameroon has adopted a strict textualist approach espoused by the famous Justice Hugo Glode who was consistent with the view that those interpreting the Constitution should look no further than the literal meaning of its words.

The advantages of textualism are its simplicity and transparency because it focuses solely on the objectively understood meaning of language independent from ideology and politics.

Also, textualism prevents judges from deciding cases in accordance with their own personal policy views. Lastly, textualism promotes democratic values because it adheres to the words of the Constitution adopted by the "people" as opposed to what individual judges think or believe.

However, textualism also has limits. For example, interpreting the constitution solely on the text suggests that judges and other interpreters may ascribe different meanings to the constitution's text depending on their background. A problem compounded by textual provisions that are broadly worded or fail to answer fundamental constitution questions.

Lastly, establishing textual meaning to words written many years ago may not be necessarily a valid tool to ensure the contemporary preservation of fundamental constitutional rights or guarantees.

II- SOME LANDMARK DECISIONS OR LEADING CASES IN THIS RESPECT

In the first place, understanding the jurisdiction of the court is an important factor in appraising landmark decisions.

-The jurisdiction of the constitutional court

According to Law no. 2008/001 of April 14, 2008, the Constitutional Council has jurisdiction in matters pertaining to the constitution and is endowed with the powers to rule on the constitutionality of laws and ensure the regulation and functioning of institutions. In this respect, it gives final rulings on:

- the Constitutionality of laws, Treaties and International Agreements;
- the Constitutionality of the Standing Orders of the National Assembly and the Senate prior to their implementation;
- any conflict of powers between state institutions; between the State and the Regions, and between the Regions.

With regard to matters within the jurisdiction of the Constitutional Council other than electoral matters Article 47 (2) of the Constitution provides that such matters may be brought before the Constitutional Council by the President of the Republic, the President of Senate, the Speaker of the National Assembly, one-third of Senators or one-third of members of the National Assembly.

The said law asserts that the Constitutional Council shall ensure the regularity of presidential elections, parliamentary elections and referendums. It shall ensure the voting process be conducted in a free and fair manner and it shall proclaim the results thereof.

The Constitutional Council shall rule on the eligibility of candidates for the presidential election and parliamentary elections.

Objections or Petitions relating to the rejection or acceptance of candidacy, those relating to colour, initials or emblem adopted by a person. Matter may be brought before the Constitutional Council by any candidate or political party taking part in the election or any person serving as a Government representative in the said elections within two days following the publication of results.

All petitions for the total or partial cancellation of electing operations shall reach the Constitutional Council within no more than seventy-two (72) hours of the close of the poll.

- The precedent judgment of the court

Common law legal systems place great value on deciding cases according to consistent principle rules so that similar facts will yield similar and predictable outcomes and observance of precedent is the mechanisms by which that goal is attained- stare decisis. In contrast, civil law systems adhere to a legal positivism where past decision does not always have precedential binding effect.

To buttress this fact section 59 of the Constitution states that the Constitutional Council shall rule by reasoned decision. This notwithstanding the Constitutional Council of Cameroon has been at a vanguard of the protection of constitutional rights and freedoms. Lately **the ruling no. 29/srcer/g/20 of 25 February 2020 in the matter of post-electoral disputes between *hon ndong larry hills and 10 others an elections Cameroon (Elecam) and 5 others as respondents was issued and it constitutes a vivid illustration.***

The petitioners sought the cancellation of the electoral operations in some constituencies in the North West Region and South West Region;

On the ground of their similarity in facts and the law, the petitions were consolidated;

The petitioners petitioned the council on the following grounds;

a. The Electors in the villages were not informed of this change of the locations of their polling stations.

The creation of the polling centers in Andek grouping 32 polling stations to 1 polling center grossly violated Section 96 of the Electoral Code supra and prevented many electors from exercising their right to vote. Section 4(2) of the Electoral Code provides that "Elections Cameroon shall perform its duties in keeping with the Constitution and laws and regulations in force".

The Preamble of the Constitution of Cameroon (Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972) provides inter alia as follows:

" ... Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, ... "

And Article 21 of the Universal Declaration of Human Rights provides as follows:

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government;

This will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

While Article 13(1) of the African Charter on Human and Peoples Rights provides as follows:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

And Article 25 of the International Covenant on Civil and Political Rights provides as follows:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c. To have access, on general terms of equality, to public service in his country".

By moving the 32 polling stations from their locations mostly in villages, to one polling center in Andek, ELECAM expected electors from far off villages like Azem, to trek about 12 kilometres to the polling center in Andek

to vote and to trek back to their villages, violating a Ministerial Order and putting their lives in danger.

Electors were therefore prevented from choosing their representatives by conveniently moving to their polling stations and voting. That electors were prevented from voting by insecurity as on the eve of the elections and even on the day of the polls there was gun battle between Security Forces and Armed Separatists in Abieha, Azem and Tinechung. The gunshots scared and kept most of the electors in Andek indoors throughout the day of the polls.

That while most of the SDF militants were unable to make it to the 1 polling center in Andek as explained hereinabove, ambulant voters who had been ferried into Andek from Bafoussam by the CPDM were transported to the 1 polling center by the military in armored cars to vote for the CPDM.

That before and during the elections there existed no Andek Council Branch office of ELECAM in the constituency due to insecurity and this hindered the circulation of information relating to electoral operations such as nomination of chairpersons of polling stations, list of security officers brought in for security during electoral operations and polling station activities.

That prior to the election, the list of polling stations was never posted up at least days to the polling as provided by Section 97 of the Electoral Code which provides as follows:

''The list of polling stations shall be forwarded to Council Branches of Elections Cameroon for posting up at least 8 (eight) days before the day of election".

That the Representatives of the administration in the polling stations were not chosen from amongst electors registered in the electoral registers of the polling stations concerned and this is violation of Section 54(2) of the Electoral Code which provides that:

''The names of the representatives of the administration and candidates, lists of candidates or political parties chosen from amongst electors registered in the electoral register of the polling station concerned shall be notified to the council branch of Elections Cameroon, no later than the sixth day before the election day".

The petitioners prayed the council to find merits in the petition and totally cancel the electoral operations of the Legislative Elections of 9th February 2020 in Momo West Constituency of the North West Region.

The Constitutional Council, ruling as a final jurisdiction, in open session after full hearing from all the parties on post-electoral disputes, and with the unanimous vote of its members;

Declared the petitions admissible as having been filed in the form and within the time limit provided for by law;

Declared them founded on the merits;

Cancelled the electoral operations of 9 February 2020 for the election of members of the National Assembly in the following constituencies:

- North West Region:

  Menchum North, Bui West, Mezam South, Bui Center, Bui South, Mezam Center, Momo East, Menchum South, Momo West and Mezam North

- South West Region:

Lebialem;

To wrap up this presentation, we can say that the Cameroon legal system is quite unique. Uniqueness in terms of the legal system and also quite peculiar to the multiplicity of actors that partake in the protection of fundamental rights and freedoms: the civil and penal judges, the administrative judge and the constitution judges. The Constitutional Council has both adjudicatory and advisory functions and as such appears as a formidable instrument for the protection of fundamental rights and freedoms enshrined in the constitution. However, its effective deployment in this realm is compounded by the fact that in non-electoral matters referral before the council is limited to:

- the President of the Republic
- the President of the Senate
- one third of Members of Parliament
- one third the Senators
- Presidents of Regional Executives wherever the interest of their region is at stake

The main beneficiaries of the fundamental rights and freedoms enshrine in the preamble of the Constitution are hereby put aside;

however, this is more apparent than real. Due to the polyvalent nature of judicial system, victims of violations of fundamental rights and freedoms can seek redress elsewhere. However, as the primary custodian of the constitution referral of matters to the Council should necessarily evolve. The will and political commitment of leader augurs a bright future in this respect.

OUTLINE OF CONSTITUTIONAL PROTECTION OF THE PERSONALITY RIGHTS

Reneta Gerkman Rudec

CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

OUTLINE OF CONSTITUTIONAL PROTECTION OF THE PERSONALITY RIGHTS

Reneta Gerkman Rudec[*]

INTRODUCTION

The basic legal source guaranteeing and protecting the personality rights in the Republic of Croatia is the Croatian Constitution (hereinafter: the Constitution). More precisely, Article 35 of the Constitution[1] prescribes:

> *"Article 35*
>
> *Every citizen is guaranteed respect and legal protection of his / her personal and family life, dignity, reputation and honour*."

Protection of personal/political freedoms and civil rights is also regulated in Articles 21 to 47 of the Constitution.

Therefore, not only every Croatian citizen, every EU citizen, but also every other person who happens to find himself / herself on the Croatian territory is guaranteed respect and legal protection of his / her personal and private life. The Constitution further ensures that these rights are not interfered with by public authorities unless, of course, there is a need to protect the general and public interest and security of the Republic of Croatia.

In this sense, the Croatian public authorities are therefore obliged to protect every person on the Croatian territory from any kind of arbitrary interference and encroachment on the right to privacy and personality. This also includes guarantee of protection from infringement the respective rights by others (persons / entities apart from public authorities).

---

* Senior adviser at the Constitutional Court of the Republic of Croatia.

1 The Constitution of the Republic of Croatia, "Official Gazette" nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14).

As a signatory to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) [2], the Republic of Croatia undertook to protect and guarantee personality rights (over and above its Constitution) as defined in Article 8 of the Convention. Just as a reminder, Article 8 states the following:

"Article 8. THE RIGHT TO RESPECT PRIVATE AND FAMILY LIFE

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 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*

Other Croatian legislation in more detail

The protection of personality rights, guaranteed by the fundamental legal sources (the Constitution), has been translated to the level of legislative norming. For the purpose of this presentation, we have singled out the following essentially relevant acts / laws:

- The Civil Obligations Act[3] defining personality rights in the following text of Article 19:

"Article 19

(1) Every natural and legal person has the right of protection of his personality rights under the presumption established by law.

(2) Personality rights in the sense of this Act shall mean: the right to life, physical and mental health, reputation, honour, dignity, name, privacy of personal and family life, freedom, etc.

(3) A legal person has all the rights of personality, except those related to the biological essence of a natural person, and in particular the right to reputation and good name, honour, company name, business secret, freedom of business, etc.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms ("Official Gazette - International Treaties" nos. 18/97, 6/99 - revised text, 8/99 - correction, 14/02, 1/06 and 13/17).

3 The Civil Obligations Act ("Official Gazette", nos. 35/05, 41/08, 125/11, 78/15, 29/18 and 126/21).

- The Media Act [4] regulating the protection of privacy in Article 7 paragraph 1:

"*Article 7*

(1) Every person has the right to protection of privacy, dignity, reputation and honour.

(...)."

Also, Croatia had only recently, on 22 of October 2021, adopted the brand-new Electronic Media Act[5]. This Act regulates rights, obligations and responsibilities of legal and natural persons who provide audio and audio-visual media services and electronic publications services (services using electronic communication networks, video exchange platforms) in the interest of the Republic of Croatia, and in the field of electronic media.

This Act is worthy of our attention here due to standardization mechanisms provided in Article 11, points 3 and 8, and in Article 14 which read:

"*Article 11*

The activity of publishing audio-visual and radio programs and the content of electronic publications is of public interest when the programs relate to:

(...)

- realization of human rights and political rights of citizens and improvement of legal and social state and civil society,

(...)

– the culture of public dialogue,

(...)"

"*Article 14*

(1) Audio and/or audio-visual media services which threaten the constitutional order, national security and which publicly foster the

4 The Media Act (Official Gazette nos. 59/04, 84/11 and 81/13).
5 The Electronic Media Act ("Official Gazette", no. 111/21).

commission of crime of terrorism in Article 99 of the Criminal Code ("Official Gazette", Nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18 and 126/19) are prohibited.

(2) Audio and/or audio-visual media services must not encourage hatred or discrimination on the basis of social origin, property status, union membership, education, social origin, marital or family status, age, state of health, illness, genetic heritage, gender identity, expression or sexual orientation and anti-Semitism and xenophobia, ideas of fascist, Nazi, communist and other totalitarian regimes."

Therefore, having been aware of the possibilities that might occur in practice, the legislator ensured that the guarantee of individual's right to personality has been enshrined in this legislative Act, or specifically, Article 14 point 2.

Called on by the Constitution and the Convention to recognize the threat to the guarantee of personality rights, the legislator provided the layer of protection and aimed to prevent any activity of audio-visual and radio program service providers which might hamper individual's privacy guarantees. Once again, being the signatory state, the Republic of Croatia is also obliged to ensure the protection that complies with the spirit and standards as defined in Article 8 of the Convention (as is, of course, "reflected" in Article 35 of the Croatian Constitution).

Further, kindly note the following: Article 21, paragraph 4, points 1 and 2 of the Electronic Media Act prescribes that audio-visual commercial communications must not:

"call into question respect for human dignity, that is, include or promote any discrimination based on the race or skin colour, gender, language, religion, political or other belief, nationality or social origin, property status, trade union membership, education, social position, marital or family status, age, health condition, disability, genetic inheritance, gender identity, expression or sexual orientation."

Misdemeanour provisions of this Act - Article 98 paragraph 1 points 7 and 8 - standardize the scope of sanctions for behaviours contrary to the cited rules, and essentially prescribe very high nominal (monetary) fines.

The Constitutional Court decided on the interpretation and application of the aforementioned laws in the area of the protection of personality rights, as well as possible violations, in several proceedings in response to constitutional complaints filed by private applicants based on the provisions of Article 62 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.[6] Recent decision of the Constitutional Court no. U-III-4383/2020 of July 14, 2021,[7] and decision no. U-III-5534/2020 of March 29, 2022.[8]

Let me say a few more words in this regard.

In its stable and consistent case-law, the Constitutional Court interpreted the scope of the right to respect and legal protection of personal and family life, dignity, reputation and honour, guaranteed in Article 35 of the Constitution.

In each of the considered cases, the Constitutional Court considered the right to protection of reputation, honour and dignity as an integral part of the right to respect for personal life guaranteed in Article 35 of the Constitution, or the related right to respect for private life guaranteed in Article 8 of the Convention.

In order to be able to apply Article 35 of the Constitution or Article 8 of the Convention, the Constitutional Court has always assessed the level of seriousness of the threat for an attack on a person's reputation, i.e. whether the threat is of such intensity that it calls into question the personal enjoyment of the right to private life. The Constitutional Court's assessment of the seriousness of the violation has also been influenced by the circumstance of whether the violation of the right to personality was a foreseeable consequence of the individual's (the applicant claiming the violation) own behaviour.

In cases falling within the scope of Article 35 of the Constitution, and to eliminate the established violation, the Constitutional Court finds the award of fair monetary compensation to be extremely important. In this sense, the development of Croatian legislation in the area of protection of personality rights has explicitly opened up the space for the courts to eliminate violations of personality rights.

6 Constitutional Law on the Constitutional Court of the Republic of Croatia ("Official Gazette" nos. 99/99, 29/02 and 49/02 - consolidated text;).

7 www.us.hr of August 10, 2021.

8 ww.us.hr of May 2, 2022.

In one of its earlier decisions no. U-III-6791/2014 of May 30, 2018[9], the Constitutional Court pointed out that in accordance with the practice of the Court of Justice of the European Union related to occupational safety and protection of workers' dignity, basic social rights of workers must be interpreted broadly and exceptions and limitations very restrictively. To this light, the domestic regulations regulating the area of protection of workers' dignity should be interpreted in accordance with the mandatory interpretations arising from the case-law of the EU Court of Justice. The interpretation of these regulations must be extensive because the dignity, health and safety of workers should be protected not only from discriminatory behaviour at work and in connection with work, but also from all unacceptable and unwanted behaviour that can harm the aforementioned personality rights. The employer's obligation to protect the worker's dignity is directly related to unwanted mistreatment at work and in connection with work.

Under the term mobbing, the Constitutional Court includes any type of psychophysiological abuse or harassment at workplace, caused either by one of the prohibited grounds stipulated in the Anti-discrimination Act ("Official Gazette nos. 85/08 and 112/12) or by harassment grounded on some other motives outside the said Act. The Constitutional Court deems that the content of the rights, obligations and responsibilities of the subjects of the employment relationship, and in connection with the risk of work-related harassment, derives from the legal rules of the Constitution, laws and by-laws, for example from the Labour Act ("Official Gazette" Nos. 149 /09, 61/11, 82/12 and 73/13;) and the Civil Obligations Act. According to Article 103, paragraph 2 of the Labour Act, the right of a worker to compensation of damages suffered at work or in connection with work also applies to damage caused to the worker by the employer by violating the worker's rights stemming from the employment relationship, and the employer is liable for damages in accordance with the general regulations of the obligation law.

In other words, in such cases the provisions of the Civil Obligations Act apply, which provide the worker exposed to mobbing with the right to claim from a court to order the employer termination of the

9 www.usud.hr of June 14, 2018.

harassing activities that violate the worker's dignity and personality right.

Aspects of the right to private life developed in the Constitutional Court's case law

As indicated above, Article 35 of the Croatian Constitution reads: *Respect for and legal protection of each person's private and family life, dignity, and reputation shall be guaranteed.*

Article 35 mirrors Article 8 the European Convention on Human Rights[10] which is just as well because the Convention has *de facto* quasi-constitutional position in the hierarchy of legal sources.[11] Thus, domestic courts are under constitutional obligation to directly apply the Convention.[12] Accordingly, the Constitutional Court's case law closely follows and implements the European Court's case law.

In recent years, the Constitutional Court's case law on the right to private life has had perhaps the most vibrant development of all rights protected under both the Constitution and the Convention. The likely reason is the notion of private life itself which is vague and includes various aspects of person's physical and social identity and follows or better yet, depends on, contemporary social and technical developments.

The paper will outline the scope of the notion "private life" protected under Article 35 of the Constitution.

Due to its limited scope, the paper will only briefly outline restrictions on the right to private life. As a rule, under the Constitutional Court's case law, restrictions of that right are allowed only in "*cases regulated*

10 Hereinafter: the Convention

11 As the Constitutional Court expressly stated back in 2000, lack of conformity of a law with the Convention equalled lack conformity with both the principle of the rule of law the principle of constitutionality and legality as well as the principle of legal monism of national and international law enshrined in Article 134 of the Constitution. See, decision no. U-I-745/1999 of 8 November 2000, available at: www.usud.hr.

12 Since the Republic of Croatia transferred part of its judicial jurisdiction to the European Court, legal standards developed by the European Court are accordingly applied in the proceedings before the Constitutional Court. Additionally, in order to ensure that the international obligations assumed by the Republic of Croatia when it ratified the Convention are properly executed, the Convention and the European Court's case law should be directly applied before national courts line with the principle of the subsidiarity. See *inter alia*, decisions nos. U-III-3304/2011 of 23 January 2013; U-III-5807/2010 of 30 April 2013 and U-III-2864/2016 of 23 May 2019, all available at: www.usud.hr.

by the Constitution and law which is in accordance with the principle of proportionality".[13] The law restricting the right to private life has to pursue specific legitimate aims and be necessary for their protection in a democratic society.[14]

For example, the Constitutional Court reviewed the constitutionality of the Suppression of Narcotics Act prescribing medical treatment for recreational drug users as a mandatory protective measure. It recognized that such measure constituted "*interference into their personal life and dignity, which are protected by Article 35 of the Constitutio*n". However, the Constitutional Court held that the purpose of the interference was of preventive nature as it provided assistance so that the persons concerned would not develop an actual addiction. Therefore, the interference was found proportionate to the legitimate aim identified as protection of people's life and health.[15]

In addition, while going over different aspects of the right to private life, the paper will also explain the State's positive and negative obligations under Article 35 of the Constitution. Broadly speaking, positive obligations are various "*activities or measures*" the State is obliged to undertake in order to protect right to private life, while negative obligations concern the State's duty to refrain from unlawful and disproportionate interference into one's private life. The circumstances of each case determine whether the case will be examined from the perspective of a negative or a positive obligation; in any case, the Constitutional Court is of the view that the State has certain margin of appreciation when deciding which activities and/or measures which are to be undertaken or refrained from in order to strike a fair balance between the competing interests of an individual and the community as a whole and safeguard one's right to private life.[16]

Aspects of private life

As the European Court has stated many times, private life is a broad concept incapable of exhaustive definition. However, in the

13 See *inter alia*, decisions nos U-III-1380/2014 of 20 May 2015; U-III-4536/2012 of 14 January 2016; U-III-4531/2012 of 30 March 2016 and U-III-2404/2016 of 20 February 2019, all available at: www.usud.hr.

14 See ruling no. U-I-60/1991 *et al* of 21 February 2017, § 44.1, available at: www.usud.hr.

15 See ruling no. U-I-2938/2018 of 18 June 2019, available at: www.usud.hr.

16 See *inter alia*, decision no U-III-2404/2016 of 20 February 2019, available at: www.usud.hr.

Constitutional Court's case law three major categories have emerged. Those categories are a person's physical, psychological or moral integrity, his / her privacy and his / her identity and autonomy. These categories may not always be so clearly defined and may overlap.

The paper will now outline the most important and most interesting cases of the Constitutional Court regarding each of these categories.

1) Physical, psychological or moral integrity

Physical, psychological or moral integrity involves cases of various forms of violence, medical malpractice and deprivation or limitation of legal capacity due to mental health.

Victims of violence, including sexual abuse

Concept of private life covers physical, psychological and moral integrity of a person, and the State is obliged to protect from other individuals in cases of an attack.[17]

The Constitutional Court has found Article 35 to be applicable in cases concerning physical and/or verbal assault of various degrees and consequences, but always of less serious nature than actual torture or inhumane treatment or degradation which are prohibited under Article 23 of the Constitution and Article 3 of the Convention.[18] These include assault[19] including sexual assault[20] and serious threats in workplace[21] which all activated the positive obligations of the State not only to maintain, but adequately apply legal framework capable of securing protection. That implies relevant proceedings capable of determining all facts and when relevant, adequate punishment with a sufficient deterrent effect. For example, the Constitutional Court found that a guilty verdict in misdemeanour proceedings for disturbing public order and peace carrying approximately 100,00 euro fine could not represent an adequate punishment for an assailant who inflicted bodily harm to another individual.[22]

17 See *inter alia*, decisions nos. U-IIIBi-2808/2021 of 12 April 2022, U-IIIBi-5910/2021 of 12 April 2022, U-IIIBi-5910/2021 of 12 April 2022, U-IIIBi-1732/2019 of 14 July 2020, U-III-1534/2017 of 19 May 2020, all available at: www.usud.hr.

18 See decisions U-IIIBi-2808/2021 and U-III-1534/2017, cited above.

19 See U-III-1534/2017, cited above.

20 See decision U-IIIBi-5910/2021, cited above.

21 See decision U-IIIBi-1732/2019, cited above.

22 See U-III-1534/2017, cited above.

In the context of the State's positive obligations, the requirement of promptness and reasonable urgency is of key importance, especially in cases involving vulnerable victims such as children. Accordingly, the Constitutional Court found that the State failed in its positive obligation to protect children from sexual abuse because the criminal proceedings instituted against the father lasted more than 6 years due to many inexcusable delays.[23] Likewise, the Constitutional Court found that the State failed in its positive obligation to protect a victim of an assault because misdemeanour proceedings against an alleged assailant who verbally and physically attacked her have not been concluded after more than 4 years and many delays.[24]

However, it should be noted that an attack on one's integrity has to attain certain level of severity to attract protection guaranteed under Article 35. The Court found that level of severity was not reached in a case of an applicant who was shouted at by the policeman who was not on active duty at the time he had stopped the applicant's car and uttered few words while intoxicated.[25]

Health treatment

Unlike the Convention, the right to health care in accordance with law is expressly guaranteed by Article 58 of the Constitution. Therefore, it is the constitutional obligation of all healthcare institutions to apply special care in protection of people's health. Health care as a fundamental human right comprises all forms of medical assistance aimed at achieving health.[26] The constitutional right to health care is not realized directly on the basis of the Constitution as it is further elaborated by relevant legislation[27] prescribing relevant procedure necessary for its realization.[28]

In addition, the Constitutional Court has accepted the European Court's standards in this respect requiring both public and private healthcare institutions to firstly adopt appropriate measures to protect

23 See U-IIIBi-5910/2021, cited above.
24 See decision no. U-IIIBi-2808/2021 of 12 April 2022, cited above.
25 See decision no. U-III-1325/2017 of 13 July 2021, available at: www.usud.hr.
26 See decision no. U-I-222/1995 of 9 November 1998, available at: www.usud.hr.
27 See U-I-222/1995, cited above as well decisions nos. U-II-427/1996 of 9 November 1996 and U-I-4892/2004 et al. of 12 March 2008, all available at: www.usud.hr.
28 See decision no. U -III-336/1992 of 20 October 1993, available at: www.usud.hr.

the physical integrity of their patients, and secondly, to provide victims of medical negligence with a procedure capable of providing them, if need be, with compensation for damage. To this end, relevant proceedings must be effective and capable in establishing whether the cause of an alleged injury and health impairment has indeed been medical negligence. In most cases, this can only be determined only by an impartial medical expert.

Applying these standards, the Constitutional Court found no violation in a case of a patient who was not awarded damages for an alleged medical negligence during urgent gallbladder surgery (resulting in health deterioration which required further operations and prolonged and very difficult recovery), because medical experts concluded that the subsequent health deterioration had not resulted from the original operation.[29]

Deprivation or limitation of legal capacity due to mental health

The deprivation or limitation of a legal capacity is used as a means of protection of persons who, due to their mental health status, are unable to protect their own interests and rights.

The Constitutional Court invoked the relevant case law of the European Court most notably in cases against Croatia[30] and held that deprivation of legal capacity constitutes an extremely serious measure which prevents an individual from managing his / her life independently. Therefore, the proceedings for deprivation of legal capacity must meet the requirements of a fair trial, which include adversary proceedings and active participation of an appointed guardian. Further, it is the duty of the court to decide whether such extreme measure is "*necessary or whether a more lenient measure would be sufficient*".[31]

Accordingly, the Constitutional Court held that the court's decision to deprive the applicant of legal capacity violated his right to private

29 See decision no. U-III-4817/2017 of 19 May 2020, available at: www.usud.hr.

30 See judgments in the case of *X and Y. vs Croatia*, no. 11223/04, judgment of 17 July 2008 and the case *Ivinović vs Croatia*, no. 13006/13, judgment of 18 September 2014.

31 See inter alia, decisions nos. U-III-1380/2014 of 20 May 2015, U-III-4536/2012 of 14 January 2016, U-III-4531/2012 of 30 March 2016, U-III-361/2014 of 21 November 2017, U-III-2404/2016 of 20 February 2019 and U-III-2922/2019 of 25 May 2022.

life because it failed to determine that the applicant was not capable of taking care of his personal needs, rights and interests or that he endangered the rights and interests of other persons; moreover the applicant's mother who was also his guardian had been against that decision.[32] A violation of Article 35 of the Constitution was also found in a case in which the court failed to provide adequate reasoning for not hearing the applicant during the proceedings[33] and in the case in which an appointed guardian was passive during the proceedings.[34]

2) Privacy

The concept of privacy is very broad and to a large extent intertwined not only with two other categories falling under the concept of private life, most notably right to individual's identity and autonomy, but also with other rights protected by the Constitution.

So far, the Constitutional Court has mostly dealt with cases concerning an individual's right to reputation, mostly in defamation cases and right to privacy in the context of police surveillance. The reproductive rights fall under Article 35 of the Constitution, but have so far been decided on only in case of abstract control.

Protection of reputation

Reputation of an individual is protected under Article 35. Thus, the State is under positive obligation to ensure that this right is respected, even between private parties.

The State was found a violation of that obligation in a criminal defamation case because the criminal court dismissed the charge brought on by the applicant against another individual erroneously finding that the statute of limitation had expired.[35]

Defamation of another person’s reputation may not "cloaked" by another person’s constitutional right to free expression as that right itself may be limited; plus, in case of conflict between these two rights, courts are required to strike a fair balance.[36] Thus, the Court found a

32 See U-III-1380/2014 of 20 May 2015, available at: www.usud.hr.
33 See U-III-2404/2016 of 20 February 2019, available at: www.usud.hr.
34 See U-III-2822/2010 of 17 December 2013, available at: www.usud.hr.
35 See decision no. U-III-6853/2021 of 12 July 2022, available at: www.usud.hr.
36 See *inter alia*, decision no. U-III-2157/2019 of 3 November 2020, available at: www.usud.hr

violation of the applicants' right to privacy in a case involving two lawyers who had their photo printed in national newspapers along with the headline "*Lawyers seek their clients in jail among paedophiles*".[37]

Police surveillance

Relying on the relevant European Court's case law, most notably *Dragojević vs Croatia*[38], the Constitutional Court has held that telephone calls are covered by the notion of the right to a private life under Article 35 (as well as the right of freedom and secrecy of correspondence under Article 36 of the Constitution); thus, surveillance over telephone calls constitutes an interference with those rights. As such, the interference has to be legal and pursue a legitimate aim.

However, in some cases the legality requirement was not fulfilled because courts' orders for surveillance had not been adequately reasoned as prescribed in the Criminal Procedure Act. It should be noted, however, that violation of the applicants' right to private life in such cases does not automatically render evidence obtained by such surveillance illegal. Accordingly, the Constitutional Court found that the applicants' right to fair trial had not been violated.[39]

Reproductive rights

The Constitutional Court has not dealt with an individual case regarding the right of a woman to make a decision regarding her pregnancy.

However, when deciding on the constitutionality of the law regulating lawful termination of pregnancy, the Constitutional Court stated that a woman's right to privacy contains the right to her own spiritual and physical integrity which also includes the decision whether she will conceive a child and how her pregnancy would develop. The right of a woman to make a decision regarding conception and pregnancy is an inherent part of her right to have freedom of decision and self-determination.

37 See decision no. U-III-1876/2018, U-III-1898/2018 of 14 November 2019, available at: www.usud.hr

38 See *inter alia*, judgments in the cases of *Dragojević vs Croatia,* no. 68955/11, judgment of 15 January 2015 and the case of *Bašić vs Croatia,* 22251/13, judgment of 25 October 2016.

39 See decisions nos. U-III-3509/2016 of 18 December 2018, U-III-1129/2017 of 17 January 2019, U-III-1360/2014 of 10 December 2019, all available at: www.usud.hr.

By becoming pregnant (regardless whether the pregnancy has been planned or not or voluntary or a consequence of violence), a woman does not waive her right to self-determination. Her decision should be a result of an autonomous self-realisation, thus, any limitation imposed on it, including whether she wants to remain pregnant until the natural completion of the pregnancy, represents interference with her constitutional right to privacy. Such interference has to be prescribed by law and in accordance with legitimate aims. In addition, the right to life of a foetus is not protected in a way that it has priority over a woman's right to privacy nor is afforded a larger protection compared to a woman's right to privacy.[40]

3) Identity and autonomy

Identity and autonomy of individuals are protected so that they are able to freely pursue development and fulfilment of their personality in relationship with other individuals and business activities. Accordingly, the Constitutional Court has found Article 35 applicable in cases involving individual's identity as a person and citizen, activities of professional nature and emotional relationships with others.

Gender identity / right to documents

The Constitutional Court held that the refusal of relevant authorities to change gender and name on a person's degree after that person had irreversible gender affirmation surgery and had obtained change of other identification documents falls within the scope of Article 35 of the Constitution. The applicant's request to be issued with a new degree corresponding with their new identity was refused on grounds that no official records had been kept on subsequent changes on the applicant's status as graduate. However, the Constitutional Court found that the authorities approach amounted to excessive formalism, neglecting relevant policies and principles of the national legal system.[41]

Citizenship

Article 35 of the Constitution does not guarantee the right to acquire a certain citizenship. However, arbitrary denial of citizenship may in

40 See ruling no. U-I-60/1991 *et al* of 21 February 2017, available at: www.usud.hr.
41 See decision no. U-III-361/2014 of 21 November 2017, available at: www.usud.hr.

certain circumstances raise the issue of violation of Article 35, due to the impact it has on the personal life of an individual.

Still, the Constitutional Court requires that such impact exists at the time the relevant authorities decide on an individual's request for citizenship. Accordingly, the Court found no violation of the right to private life in a case of an applicant, who had citizenship of Bosnia and Herzegovina, has been living in Germany for more than 20 years and had no personal and family connections with Croatia.[42]

Same sex marriage and related issues

As of 2014, following the referendum, the Constitution defines a marriage as a living union of a man and a woman.

However, the Constitutional Court highlighted that the Constitution safeguards the rights of all persons, regardless of their sex and gender. This is considered as a "*lasting value*" in the constitutional jurisprudence. Therefore, even the amendments to the Constitution defining marriage a living union of a woman and a man cannot have any impact on the further development of the legislative framework of extramarital and same-sex unions, all in accordance with the constitutional requirement that each person's private and family life as well as their human dignity are protected under Article 35 of the Constitution.[43]

The Court reiterated these considerations in 2020 while reviewing the Foster Act which omitted persons living in same sex unions from fostering children. Noting that these persons were not expressly forbidden from fostering children, but rather omitted by the Foster Act, the Court highlighted their right to privacy and dignity and concluded that sexual orientation could not be a decisive factor for fostering children.[44]

Parent-child relationship

Most of the cases regarding parent child relationship are examined under the right to family life which is also guaranteed under Article 35. These cases mostly involve the right of both a parent and a child to enjoy each other company and positive obligations of the State to ensure it.

42 See decision no. U-III-5234/2019 of 25 June 2020, available at: www.usud.hr.
43 See notification no. SuS-1/2013 of 14 November 2013, § 7.2., available at: www.usud.hr.
44 See decision no. U-I-144/2019 *et al*, of 29 January 2020, available at: www.usud.hr.

However, in a case of a father complaining that his ex-wife has been given sole right to represent their children in proceedings he initiated in order to have the children' surname changed so that his surname was added to the mother's surname, the Constitutional Court found that the applicant's right to private life was not violated. Such conclusion was reached because the children never had the applicant's surname, but only that of the mother, to which the applicant himself expressly agreed at the time of their birth, plus for a number of years the father had basically no contact with children.[45]

Activities of professional or business nature

Unlike the Convention, the Croatian Constitution guarantees the right to work under Article 54. Thus, the cases involving work disputes are not examined under Article 35 of the Constitution.

The notable exception is a case of a religion teacher who had a divorce and then civil remarriage. These acts are considered contrary to the Catholic doctrine, thus his canonical mandate to teach in school was not renewed by Catholic authorities. As a result, he was dismissed because under the 1997 Concordat between the Holy See and Croatia, religion teachers, whether they teach in a public or private school, must have a mandate from their bishop, otherwise they cannot teach Catholic religion. The Constitutional Court held that the dismissal did not violate his right to private life as the consequences of the revocation of the canonical mandate could have been predicted, but the revocation itself did not prevent him from teaching other subjects in accordance with legislation regarding secondary education.[46] The European Court endorsed these findings in the *Travaš vs. Croatia* judgment.[47]

Furthermore, the Constitutional Court found that an applicant whose dismissal and thus inability to provide for a child was apparently a consequence of his detention in criminal proceedings may not invoke the right to work under Article 35 of the Convention. The Court held that Article 35 may not be interpreted in a way so as to prevent the imposition of a justified pre-trial detention.[48]

45 See decision no. U-III-1039/2020 of 9 June 2022, available at: www.usud.hr.
46 See decision no. U-III-702/2009 of 22 May 2013, available at: www.usud.hr.
47 See the judgment in the case of *Travaš vs Croatia*, no. 75581/1; judgment of 4 October 2016.
48 See decision no. U-III-732/2020 of 5 March 2020, available at: www.usud.hr.

A ROLE OF THE CONSTITUTIONAL COURT OF GEORGIA IN THE FORMATION OF THE CRIMINAL PROCEDURE - FROM INQUISITORIAL TO ADVERSARIAL

Tamari Kiknadze
Iva Khavtasi

CONSTITUTIONAL COURT OF GEORGIA

A ROLE OF THE CONSTITUTIONAL COURT OF GEORGIA IN THE FORMATION OF THE CRIMINAL PROCEDURE - FROM INQUISITORIAL TO ADVERSARIAL

Tamari Kiknadze[*]
Iva Khavtasi[**]

I. INTRODUCTION

The history of the Georgian Criminal Procedure is a history of the transition from an inquisitorial to an adversarial system. For the purposes of this paper, the former shall be understood as judge-led inquiry proceedings in which state agencies proactively try to ascertain the objective truth regarding the committed crime while the adversarial system creates an equal and competitive environment for the parties (prosecution and defence) of proceeding through which a judge tries to act as a neutral and impartial moderator.[1]

After the collapse of the Soviet Union and the gaining of independence, Georgia managed to enact its criminal procedure legislation. In 1998, the Parliament of Georgia adopted the Code of Criminal Procedure, which was largely based on the model of inquisitorial proceeding consistent with the European Continental experience and more or less familiar with the former Soviet System[2] which also perceived the role of the Common Courts and the State agencies such as investigative and prosecutive authorities more proactive within the criminal justice system.

A discussion on the need to transform this model into an Anglo-American one began very shortly after 1998 and as a result, in 2009,

* Senior Legal Assistant to a Judge at the Secretariat of the Constitutional Court of Georgia.

** Legal Assistant to a Judge at the Secretariat of the Constitutional Court of Georgia.

1 See Richard Vogler, A World View of Criminal Justice, Routledge, 2016, 1-16.

2 See James W. Diehm, The Introduction of Jury Trials and Adversarial Elements into the former Soviet Union and other Inquisitorial countries, J. Transnational Law and Policy, Vol. 11:1 Fall, 2001, 19-26.

the Parliament of Georgia finally adopted a new Criminal Procedure Code. Nowadays, it is widely regarded that the criminal procedure of Georgia is based on an adversarial model of litigation.[3] However, the reform of 2009 was not an ultimate reconstruction either and this is evidenced by a number of judgements made by the Constitutional Court of Georgia since then,[4] which, on the one hand, tried to restrain the excessive power of the state as the accuser in the criminal justice system and, on the other hand, addressed various systemic flaws in the legislation including regarding the constitutional principle of equality of arms and the adversarial process which is stipulated in Article 62 (5) of the Georgian Constitution[5] and adversarial system of criminal procedure which has been developed by the abovementioned reform of 2009.

Accordingly, despite the fact that Georgia's independent history of Criminal Procedural Law is relatively short, during this period it has undergone diametric alternations. Thus, the modern Georgian Criminal Process is not a mere exact replica of any existing model, but a system with its own identity, which, among other things, implies unique features, problems and challenges. One such challenge is the need for precise demarcation between the inquisitorial and adversarial process so as not to harm the main goal of the criminal process which is to establish the objective truth in the specific case. In this regard, two judgments from the Georgian Constitutional Court are discussed in the following paper for the sake of demonstrating how the Georgian Constitutional Court sees and interprets the complex relationship between the constitutional principle of equality of arms in the adversarial process with the general aim of finding the objective truth and adversarial system of the criminal procedure itself.

3 See no. 07-2/218/6 explanatory note on the draft law of Georgia "Criminal Procedure Code of Georgia".

4 See, for example, Judgement no. 1/1/548 of the Constitutional Court of Georgia dated January 22, 2015 on the case of "Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia"; Judgement no. 3/2/646 of the Constitutional Court of Georgia dated September 15, 2015 on the case of "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia"; Judgement no. 2/13/1234, 1235 of the Constitutional Court of Georgia dated December 14, 2018 on the case "Citizens of Georgia – Roin Miqeladze and Giorgi Burjanadze v. the Parliament of Georgia"; Judgement no. 2/2/1276 of the Constitutional Court of Georgia dated December 25, 2020 on the case "Giorgi Qeburia v. the Parliament of Georgia".

5 See the Constitution of Georgia, Article 62, Paragraph 5, 1995, as amended to 2020, available at CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge)

II. ANALYSIS OF THE GEORGIAN CONSTITUTIONAL COURT'S CASE-LAW IN THE PROCESS OF TRANSITION FROM THE INQUISITORIAL TO THE ADVERSARIAL SYSTEM OF THE GEORGIAN CRIMINAL PROCEDURE

Judgement no. 3/1/608,609 of the Constitutional Court of Georgia dated September 29, 2015, on the case of "Constitutional Submission of the Supreme Court of Georgia on the constitutionality of the fourth section of article 306 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on the constitutionality of subparagraph "g" of article 297 of the Criminal Procedure Code of Georgia"[6]

Issue: (a) Constitutionality of precluding the possibility of the Common Court to adjudicate beyond the scope of the cassation claim in cases within which the law adopted after the commission of an act abrogates its criminalization. **(b)** Constitutionality of precluding the possibility of the Common Court to adjudicate beyond the scope of the appeal claim in cases within which there is a threat of double jeopardy.

The Facts: On September 17, 2014, two constitutional submissions were lodged to the Constitutional Court of Georgia by the Supreme Court of Georgia.[7] According to the disputed regulations of the Georgian Criminal Procedure Code, the scopes of review on cassation and appeal were limited by cassation or appeal claims and their counterclaims. The authors of the constitutional submissions considered that based on these disputed provisions the Courts of Appeals and the Court of Cassation were obliged to limit the scope of review of the case with the issues disputed in the appellate and cassation claims. They also claimed that the disputed provisions were of imperative nature and did not leave any opportunity for the court to take into consideration important legal or procedural breaches. Therefore, based on the disputed provision, the

6 Available at JUDICIAL ACTS (constcourt.ge)

7 According to the Georgian system of Constitutional Review, on the basis of a submission by a common court, the Constitutional Court of Georgia is able to review the constitutionality of a normative act to be applied by the common court when hearing a particular case, and which may be in conflict with the Constitution. In this respect, if during the hearing of a specific case in a common Court, the Court supposes that there is sufficient ground to consider an applicable legal norm to be fully or partially non-compliant with the Constitution, it shall suspend the hearing of the case and refer the issue to the Constitutional Court. The hearing shall be resumed after the Constitutional Court resolves the issue.

Courts of Appeals and the Court of Cassation could not exceed issues disputed in the claim even in a case when it might result in violation of constitutional principles such as the prohibition of conviction of innocent individuals and double jeopardy for the same offence. In this regard, the authors of the constitutional submissions mentioned the specific cases within which the abovementioned threats regarding the violation of the convicted persons' fundamental rights were present. Consequently, the authors of the constitutional submissions were arguing that the disputed provisions of the Criminal Procedure Code were unconstitutional because they did not ensure the preservation of the fair balance between the realization of the principle of adversariality and the protection of the fundamental rights of convicted persons.

Representatives of the Parliament of Georgia, the respondent in this case addressed the Constitutional Court with a written statement and considered that the disputed norms were the expression of the system of adversarial process between the parties and within this model judge served as an unbiased arbiter without any authority to overstep this balance based on the principle of adversariality. According to the position of the Parliament, the State was obliged to create equal possibilities for the parties before the Court and as a matter of fact, pursuant to the disputed regulations, the parties were equipped with the identical possibility to present and protect their opinions and a mere refusal of the party to exercise his/her right did not imply violation of the principle of equality of arms and adverseriality. In this regard, the Court had to stay within the boundaries of the appellate and cassation claims, otherwise, it could violate the balance based on the Constitutional principle of adversariality. Furthermore, this would turn the judge into the defence or prosecution party instead of the impartial and neutral arbiter.

For this case to resolve, the Constitutional Court of Georgia requested the Venice Commission to provide an Amicus Curiae brief regarding the rule of binding the court with the scope of appeal (*non-ultra petita*) which was delivered in due time. According to this brief, Venice Commission indicated that a number of European states, as well as the United States of America, Canada, Chile, South Africa and other states, recognise the rule binding the higher instance courts with the factual and legal issues posed by the parties. This rule is actively

represented in the countries of the continental legal system, including the countries where an inquisitorial model of a criminal proceeding is applied. Despite this it is frequent that in relevant countries the law or practice establishes exceptions from the mentioned rule, serving the protection of fundamental rights and interests of justice established by the constitutions or international human rights law. The amicus curiae underlined that in the majority of states, the courts are authorised in some instances are even obliged to protect such fundamental principles on their own initiative as are the principles of prohibition of double jeopardy, deciding any suspicion in favour of the defendant, prohibiting punishment without the law or using the less severe law.

The Judgement of the Constitutional Court of Georgia: Initially, the Constitutional Court of Georgia noted that the Constitution was one undivided document where the provisions and principles should be interpreted in reference to each other. Therefore, when analysing the constitutionality of the disputed provisions it was vital to determine what were the obligations of the State with regard to ensuring the principle of an adversarial process. That being the case, the Court interpreted paragraph 3 of Article 85 of the Constitution of Georgia (effective until 16 December 2018)[8] which stated that "legal proceedings shall be conducted on the basis of equality of parties and the adversarial process". The Court indicated that when reasoning on this provision, the adversarial model of criminal procedure had to be distinguished from the general principle of an adversarial process. The former is a model of legal proceedings established throughout history and the latter is one of the elements of the right to a fair trial.

The Court underlined that the adversarial model of criminal procedure was characterized by a specific system of conducting procedural actions and the separation of roles between participants of the procedure. The Court distinguished the adversarial model from the inquisitorial process where the Judge was equipped with the authority

8 The comprehensive constitutional reform of 2017 which entered into force on December 16, 2018, caused several significant changes regarding the Constitution of Georgia, including the general structure of the text itself. According to the currently effective edition of the Georgian Constitution, the identical provision is stipulated in Article 62, Paragraph 5 ("Legal proceedings shall be conducted on the basis of equality of parties and the adversarial process"), see the Constitution of Georgia 1995, as amended to 2020, available at CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge)

to explore the circumstances of the case while the adversarial process was based on the belief that parties provided the Court with sufficient information and arguments, furthermore, the parties decided what pieces of evidence and arguments had to be presented before the Court.

On the other hand, according to the Court's reasoning, the principle of the adversarial process is a component of the right to a fair trial and is a part of both, the inquisitorial and adversarial criminal process. This principle can be expressed in different guarantees of a fair trial like granting an oral hearing which envisages direct participation of the parties in consideration of the case. The main aim behind the principle of an adversarial process in criminal or other types of litigation is to ensure the party of the procedure with the possibility to familiarize, express opinion and refute all pieces of evidence and arguments on which the Court might base its reasoning, also convince the Court in the accuracy of his/her position, provide the court with relevant evidence and arguments, which should be responded by the Court in its reasoned judgment in the event of both upholding or denying the request of the party. The Constitutional Court upheld that derived from this aim it was clear that the principle of an adversarial process was also related to other guarantees of the right to a fair trial including but not limited to the right to receive information regarding the evidence of the opposing party, right to have sufficient time and the possibility to prepare a defence and the right of the defence party to interrogate witnesses, the right to obtain a reasoned court judgment, etc. The Constitutional Court further emphasized that all participant states of the European Convention on Human Rights were required to ensure the principle of the adversarial process as a principle protected by the Convention, regardless of their choice at the national level between the adversarial or inquisitorial model of criminal procedure.

The Court pointed out that the aim of Article 85 and its paragraph 3 of the Georgian Constitution (effective until 16 December 2018) was to ensure that the parties were treated equally compared to each other, i.e they were not in disadvantaged condition and were given the right of expressing a position on all important circumstances for deciding the case. The Constitutional Court concluded that this provision was not strictly demanding the establishment of an adversarial model of criminal procedure in Georgia.

Furthermore, it was baseless to argue that executing the constitutional principles, like releasing a person from double jeopardy by the own initiative of the court when the claimant did not demand such actions, *per se*, violated the adversarial principle stipulated in the Constitution itself. On the contrary, the legal duty binding the judge not to use the fundamental constitutional principle on the grounds that the parties did not refer to them contravened the aims of a fair trial.

On the other hand, the Court noted that limiting the initiative of the judge in the process of establishing facts and legal issues and bringing the requests of the parties forward is an inherent element of the adversarial model of the procedure and not the requirement of the adversarial principle. The Constitutional Court concluded that the adversarial principle does not in any way liberate the judge from the inherent duty to consider and correctly use the fundamental principles of law independently from the party's ability to duly defend its own interests and whether he/she indicates the court towards the necessity of using relevant rules and principles.

The Constitutional Court came to the conclusion that the requirement of paragraph 3 of Article 85 of the Constitution of Georgia (effective until 16 December 2018) regarding the equal and adversarial procedure did not require judges to be bound unexceptionally and in a blanket manner with the scope of the demands of the applicants, when the constitutional principle of using abrogating law or prohibiting double jeopardy might be violated.

Judgement no. 3/2/1478 of the Constitutional Court of Georgia dated December 28, 2021, on the case of "Constitutional Submission of Tetritskaro District Court on Constitutionality of the second sentence of paragraph 20 of Article 3, the third sentence of paragraph 2 of Article 25, paragraph 1 and 2, the first sentence of paragraph 5 and the first sentence of paragraph 7 of Article 48 of the Criminal Procedure Code of Georgia"[9]

Issue: Constitutionality of restricting the judge from asking questions during the course of criminal proceedings.

The Facts: In the case under consideration, the disputed provision of the Criminal Procedure Code of Georgia excluded the possibility

9 Available at JUDICIAL ACTS (constcourt.ge)

of the judge reviewing the criminal case to ask questions without prior consent from the parties of criminal proceedings. The author of the constitutional submission considered the contested regulation incompatible with the right to a fair trial (Article 31 of the Georgian Constitution). He indicated that the ultimate person responsible for the assessment and delivering the final decision regarding the criminal case is the judge, who determines and evaluates the appropriate and essential circumstances of the case. Respectively, the judge should be provisioned to ask clarifying questions, regardless of the parties' consent, which is necessary to dispel ambiguity, resolve specific issues before the court, and ask questions justified by the need to ensure the right to a fair trial.

The Judgement of the Constitutional Court of Georgia: The Constitutional Court declared the restriction of the judge's right to ask a question incompatible with the right to a fair trial. The court underlined that the purpose of criminal procedure was to establish the truth and to administer justice properly. Achieving these goals cannot be solely dependent on the will or competence of the parties involved in the proceedings. The rationale for limiting the judge's right to ask questions, such as keeping important circumstances/information for the case from being revealed during the hearing, not only constitutes a requirement of the right to a fair trial but also fundamentally contradicts the goals of the criminal proceedings in general. Furthermore, the right to a fair trial obliges the state to form a criminal process in such a manner that the judge is equipped with the appropriate procedural mechanisms to make an objective, fair and reasoned final decision on the case. Thus, equality of arms and adversarial principles should not be considered as a justification for unduly restricting the establishment of the truth in a criminal case.

According to the Constitutional Court's reasoning, the passivity of the Court and its undue limitations may lead to injustice – i.e either the conviction of an innocent person or the release of an offender from liability. It is necessary for the judge to be equipped with the opportunity to thoroughly and comprehensively evaluate and examine all important circumstances regarding the case at the hearing, which are necessary for the formation of inner conviction of the Judge and for

the due process and administering proper justice regarding the case. For these reasons, the Judge should be able to ask the questions when the corpus delicti is unclear, a testimony of the witness, expert or other participants in the criminal proceedings is obscure, confusing and/or contradictory or when the urgency of asking a question is conditioned by the need for the judge to determine the sequence of the events and identify the factual circumstances of the case, etc.

Simultaneously, the Constitutional Court of Georgia noted that the Criminal Judge should not interfere with the impartial process based on the principles of adversariality and equality of the parties and should not assume the role of a party. The questioning from the Judge should not be conducted in such a language and terminology, tone, gestures, behaviour, manner and intensity as to give a basis for a reasonable suspicion of bias. The judge should not interfere with the parties' ability to properly examine the evidence or invalidate the evidence of the other party.

Accordingly, the Court concluded that asking a question by the judge was an integral part of a fair trial, the purpose of which was to completely investigate the case and determine the truth. Furthermore, it did not infringe on the principles of equality of arms or the impartiality of the court. The Constitutional Court emphasized that the disputed provision prohibited the judge from asking a question even when doing so would not contradict the judge's impartiality or the principle of equality of arms. Therefore, the Court indicated that the restriction provided in the disputed provision had no specific purpose and was incompatible with the interests of justice.

III. CONCLUSION

As the analysis of above-mentioned decisions reveals, the Constitutional Court of Georgia plays a significant role in the process of establishing the criminal justice system in compliance with the constitutional standards. According to the Constitutional Court’s case law, the adversarial model of criminal procedure obliges the legislators while enacting criminal legislation to protect the constitutional principle of adversariality between the parties, which is one of the main elements of the right to a fair trial irrespective of their choice at

the national level between the adversarial and inquisitorial model of criminal procedure. This approach tries to make sure that the judge is not a passive arbiter and ultimately represents an effective means, a tool for ensuring a "correct and fair decision".

The role of the Constitutional Court in establishing criminal justice system, following the constitutional standards, is also indicated by the fact that the Constitution of Georgia directly and explicitly (unlike other fundamental rights, the nature of which are more abstract) provides a number of the procedural guarantees used in the criminal procedure, including, but not limited to, the legal status of the convicted person.[10] Therefore, the standards by which the judge should be guided are defined by the supreme law of the country itself. At the same time, the Constitutional Court of Georgia acknowledges that the accused who is confronted by the public (represented by the prosecutor) with its vast resources is in a vulnerable position. Therefore, throught its existence, the Constitutional Court of Georgia has always been particularly involved and interested in the development of standards of protection of the accused's and convicted persons' rights.[11] In this process of gradual development, the Court tried to find an optimal balance between individual rights and increased public interest regarding the effective enforcement of crimianl policy.

10 See the Constitution of Georgia, Article 31, 1995, as amended to 2020, available at CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge)

11 The statistical analysis of the Case-Law reveals that a large part of the Court's jurisprudence is related to the legal status of the accused and convicted person.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Altin Nika

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Altin Nika[*]

I. INTRODUCTION

Human rights are not a recent invention. Throughout history, concepts of justice and human dignity have been important in the development of human societies. Ideas about justice were prominent in the thinking of philosophers in the Middle Ages, the Renaissance and the Enlightenment. An important strand in this thinking was that there was a *'natural law'* that stood above the law of rulers. This meant that individuals had certain rights simply because they were human beings.

According to the philosophical concept regarding the fundamental human rights and freedoms, which is based on the theory of natural law, all people have inherent rights and system of right or justice held to be common to all humans.

With the adoption of the United Nations Charter and other acts in the field of human rights, a big step was taken in the direction of removing human rights from the domestic sphere and bringing them under national and international protection. In order to accomplish this task, countries should take the responsibility to protect human rights through institutionalizing constitutional interpretation.

As the world approaches the 74th Anniversary of the Universal Declaration of Human Rights, we see that there has been significant progress in the recognition and protection of human rights, both at an international level and within the borders of sovereign states.

Meanwhile, that the world is going through a period of instability, the rapid social changes that are taking place, the recent economic

[*] Constitutional Legal Adviser at the Constitutional Court of the Republic of Kosovo.

crisis and various conflicts in the world prove that the formal provision of human rights in national and international instruments is not all encompassing for the effective protection of human rights.

My topic addresses and is built around issues of "**the interpretation of the Constitution of Kosovo, in protecting the human rights and freedoms: the legal framework and practice of the constitutional court".**

II. Historical Developments

Kosovo is a young nation. It was part of the former Communist Yugoslavia until its dissolution in 1992. Between 1992-1999 Kosovo underwent a heavy repression and a widespread abuses of human rights and fundamental freedoms of its majority population. During 1998-1999, a violent armed conflict between the Kosovo Liberation Army, known by its Albanian acronym *"UÇK"*, and the Serbian military, paramilitary and police forces took place. It eventually ended as a result of the 78 days NATO-led military intervention. Following this, an international administration under the auspices of the UN was installed. It lasted until 17 February 2008 when Kosovo declared its independence from Serbia. The independence was declared by a constituent Assembly of the elected representatives of the people of Kosovo. It is recognized by more than half of the members of the United Nations.

In terms of human rights and fundamental freedoms, basic challenges that faced Kosovo after June 10, 1999, when the UN administration was installed (known as the UNMIK, an acronym standing for *the "United Nation Interim Administration Mission in Kosovo*"), had to do with the lack of basic local human rights culture. Kosovo belongs to the former Communist society having no staunch cultural fabric in the field of human rights and fundamental freedoms. In addition to this, violent repression by the Milosevic regime and the war of 1998-1999 established a communal and ethnic hatred which surpassed all previous periods of the history of Kosovo. This is as far as the material structure of the human rights culture of Kosovo is concerned.

As for the legal infrastructure, the UN Security Council Resolution 1244 of 10 June 1999, which served as the basic legal framework for

the UN administration in Kosovo spoke just of the respect for human rights and their promotion as one of its goals, without no effective mechanism as to how this should be put in place. The same situation prevailed with the 2001 Constitutional Framework for the Self-Government of Kosovo, a local *"constitutional text"* enacted by the UN administration in Kosovo. It had two chapters dealing with human and minority rights and an elaborate web of international and regional instruments in the field of human rights and fundamental freedoms meant to be applicable in the territory of Kosovo. Their application, however, was a different story as Kosovo was not part of any regional or international mechanisms supervising the implementation of these international and regional instruments and other documents

Following the declaration of independence of Kosovo on 17 February 2008, Kosovo undertook some serious commitments in the field of the human rights and fundamental freedoms. Among them were as follows:

First, in its Declaration of Independence, Kosovo pledged to be a guarantor and promoted of human rights and fundamental freedoms and a home to all of its citizens without any discrimination based on ethnicity, religion, language, gender, social status, and any other basis. This meant that new State of Kosovo was pledging a break from the bitter and violent past.

Second, it undertook to directly apply all international and regional standards and instruments in the field of human rights and fundamental freedoms, starting from the Universal Declaration to the European Convention on Human Rights. Other instruments, such as the two famous 1966 International Covenants, are also part of Kosovo's constitutional and legal order, alongside other European and international instruments dealing with minority rights, women and children's rights, torture and inhuman treatment, discrimination and the like.

III. Foundations and the Nature of the Newly Established Constitution of the Republic of Kosovo

The Republic of Kosovo enacted a Constitution on mid-April 2008, which entered into force on mid-June that year. Therefore, Kosovo is a very young constitutional democracy. In fact, it is the youngest in

Europe at present as it gained its independence from Serbia only on 17 February 2008. Until then, it had lived under a UN administration, installed after the defeat of the Serb forces in Kosovo on 10 June 1999. In the previous period following the collapse of Communism in 1990 Kosovo experienced the harshest repression by the Serbian installed-regime under Slobodan Milosevic. During Spring 1998 - June 999, Kosovo experienced war and violence of the scale seen elsewhere in the territories of former Yugoslavia**.**

New Constitution of Kosovo is very much different from previous legal texts. UN Security Council Resolution 1244 (1999) did not foresee for any legal infrastructure to be applied in Kosovo. First text that foresaw such thing was the March 1999 Rambouillet Peace Accords which were never applied since Serbian regime did not accept them. These accords were drafted within the Peace Conference held in Rambouillet (France) during February – March 1999. This conference failed as a result of the Serb opposition to its final text. The Accords, nevertheless, should be considered as the first serious text guaranteeing fundamental rights and freedoms of all living in Kosovo.

Following its spirit, the 2011 Constitutional Framework foresaw similar legal infrastructure in the field of human rights and fundamental freedoms, but the mechanisms for their implementation were not in place.

It was the 2008 Constitution of the independent Kosovo, however, it foresaw a very elaborate mechanism for the promotion and respect of human rights and fundamental freedoms. First, it has two chapter on human rights and fundamental freedoms. Firs chapter deals with classical human rights and fundamental freedoms while the second is devoted to the rights and freedoms of the Kosovo communities and their members. This is novelty not only in Kosovo but beyond it as it foresees a very elaborate web of provisions and mechanisms guaranteeing the rights and freedoms of the Kosovo communities. In the first place, within each of the central authorities of Kosovo there is a body entrusted for the protection and promotion of the rights of the communities living in Kosovo. Further to this, no law or amendment to the Constitution can take place in the field that might affect the rights and freedoms of the Kosovo communities.

Second, no law in Kosovo can be drafted or adopted if it is not screened by special bodies formed within each ministry and the Assembly of Kosovo with the aim of drafting the laws of Kosovo along the EU *acquis communotaires*. Incorporation of the European standards into the legislation of the new Kosovo is a very important step in the field of human rights and fundamental freedoms. The reason for this is that constitutional principles on gender equality, equality before law, the rule of law and the like are taken care of. This was not the case ever before in its recent history.

Finally, the greatest achievement of Kosovo has been the establishment of its Constitutional Court in June 2009**.** This Court has the widest jurisdiction possible among its peers in Europe. In the field of human rights, it has a jurisdiction to undertake constitutional review of any act of any public authority, including the acts of the regular judiciary of Kosovo. This is foreseen in Article 113.7 [Jurisdiction and Authorized Parties] of the 2008 Constitution of Kosovo.

The right to constitutional complaint, according to this article, can be exercised by all physical and legal persons provided that they have previously exhausted all effective legal remedies provided for within the legal system of Kosovo. The work load of the Court, well beyond 90 per cent, has been dealing with individual constitutional complaints. They deal with various issues, such as the right to property, right to free and fair trial, the right to life even (in one case, known as the case of Diana Kastrati, a lady who was murdered as a result of the domestic violence), and so on. Most of the complaints are about the alleged violation of the right to free and fair trial from Article 31 [Right to Free and Fair Trial] of the 2008 Constitution of Kosovo in connection with Article 6 [Rights to a Fair Trial] of the European Convention on Human Rights. Why we stress the European Convention? It is because according to Article 53 [Interpretation of Human Rights] of the Constitution, all public authorities in Kosovo have to directly apply the Convention in accordance with the case law of the European Court of Human Rights. This is a unique provision in the constitutions of Europe, and Kosovo's Constitutional Court since its inception has been a devout applier of this provision of the Constitution. In fact, the Constitutional Court has

served as a leader for other public institutions of Kosovo leading by example.

In April of this year, Kosovo marked the 14th anniversary of the adoption of its Constitution. That is a new, modern and advanced constitution. Only with the Constitution of the independent Kosovo, enacted in mid-April 2008, and entered into force in Mid-June of that year, citizens of the country have seen a new opportunity to develop constitutional democracy of the type seen elsewhere in former Communist societies of Europe.

The Constitution of Kosovo is turning a new page in its history leaving behind an incredible legacy, and a tinted reputation that was grounded in the notorious period of conflict and authoritarian regime and is turning towards a new practice built on principles of modern democracy that respect and applies values ingrained in Western constitutionalism.

IV. Constitutional Guarantees in Protecting Fundamental Human Rights and Freedoms

Fundamental human rights and freedoms are undoubtedly constitutional categories and constitute the most important group of rights guaranteed by the Constitution of the Republic of Kosovo.

The constitution of the Republic of Kosovo provides that human rights and fundamental freedoms are *"indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo."*[1]

The fundamental principles reflected in the Constitution of Kosovo express the goals and create the constitutional basis for the effective protection of fundamental human rights and freedoms, by respecting the most advanced human rights standards in the world through incorporation of a huge number of international agreements, declarations, conventions and instruments as well.

V. International Agreements and Instruments directly applicable in Kosovo

The Constitution of Kosovo opened doors to a new perspective, created entirely according to the principles that emerge from the most

1 See Article 21 (1) of the Constitution of the Republic of Kosovo.

well-known international instruments for the protection of human rights.

The Constitution of Kosovo has included in its text a list of eight (8) international legal agreements and instruments, giving them the value of the constitutional category and priority over provisions of laws and acts of public institutions. In this constitutional provision, a special place had been given to the European Convention on Human Rights and Fundamental Freedoms and its Protocols.[2]

Human rights and freedoms which are embodied by relevant international agreements and instruments are guaranteed by this Constitution and are directly applicable in the territory of the Republic of Kosovo.

It should be emphasized that these agreements are not derived from a standard ratification process, but Kosovo has voluntarily embraced them, including them in Article 22 of the Constitution. Therefore, when Kosovo adopted the Constitution, all the rights defined in these international instruments became constitutional rights within the legal order of the Republic of Kosovo. In addition to the European Convention on Human Rights and the other seven instruments being directly applicable in the legal system of Kosovo, they also, in case of conflict, have priority over provision of laws in and other acts of the public institution.

In addition to Article 22, the Constitution of the Republic of Kosovo owns another unique feature, which is the constitutional obligation according to Article 53 for the interpretation of human rights and fundamental freedoms in accordance with the court decisions of the European Court of Human Rights; otherwise known as the Strasbourg Court.

As a result of this constitutional obligation, the Constitutional Court as a final authority for interpretation of human rights and freedoms interprets them in accordance with the court decisions of the European Court of Human Rights.

Taking into account that Kosovo is not a party to the European Convention on Human Rights, the constitution of Kosovo holds the

2 See Article 22, *ibid*.

European Convention on Human Rights in high standard within its legal system, and uses it as basis for the implementation of human rights, by giving the chance to all citizens and institutions of Kosovo to invoke the practice and decisions of the Strasbourg Court.

So far, the ECHR has played an important role through its consolidated practice in improving Kosovar legislation and bringing it closer to European standards.

VI. The influence of the Constitutional Court in protecting Human Rights and Freedoms: Case Law

The Constitution of the Republic of Kosovo highlights the universality and indivisibility of civil and political rights, alongside economic and social rights.

The Constitution of Kosovo not only foresees fundamental human rights and freedoms but also created legal means for their protection. The Constitution primarily guarantees protection before the constitutional court as the most important remedy of protection of human rights in domestic law.4[3] 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.

Constitutional guarantees for human rights in Kosovo serve to protect human dignity, freedom and equality, the right to a fair and impartial trail, the right to privacy, freedom of expression and many other human rights that are expressly guaranteed by the Constitution.[4]

Constitutional systems are familiar with the doctrine that innately accepts the fact that the interpretation of Constitution (especially in the countries that have a constitutional Court) can bring significant changes in the understanding of constitutional norms in cases where circumstances and conditions imply such an understanding.

Therefore, for the effective protection of human rights and freedoms, it's not sufficient only the procedural protection but also the substantive one.

3 See Article 113 (7) of the Constitution of the Republic of Kosovo.
4 See Chapter II of the Constitution of the Republic of Kosovo.

In this regard, I would like to refer to a specific case KI56/18, which the Constitutional Court of Kosovo found substantial violation of the right to privacy guaranteed by Article 36 of the Constitution and Article 8 of European Convention on Human Rights.

The circumstances of the present case relate to the applicant's request for registration of his deceased son I.F. in the list of the deceased persons (LDP) in Pristina. The applicant's deceased son had travelled to Sweden for the purpose of recovering from a serious illness. During his stay in Sweden, the applicant's son applied for asylum, but using another name, namely the name A.H. The Swedish authorities issued him a card certifying that the applicant's son was an asylum seeker, namely the LMA-card in the name under which he had applied, namely A.H. The applicant's son died at a health institution in Sweden. The medical report regarding his death was issued on behalf of A.H. After his death, the Embassy of the Republic of Kosovo in Sweden issued the submission by which (i) clarified that it informed the authorities of the Republic of Kosovo about the death of the citizen I.F; (ii) confirmed that there was no impediment to the repatriation of the deceased I.F. in the Republic of Kosovo; and (iii) requested the company responsible for funeral services at Linkoping to enable transportation to Kosovo for the deceased I.F. The latter was buried in Prishtina on June 16, 2013.

In the documentation issued by Sweden regarding this death, the applicant's son is marked with the name A.H., while in the documentation of the Republic of Kosovo, the applicant's son is marked with a different name I.F.

This discrepancy in the relevant death documentation prevented the applicant from registering his son in the list of the deceased persons in Prishtina.

The applicant addressed the Municipality of Prishtina, with a request that his deceased son I.F., be registered in the LDP based on Law on Civil Status. The Municipality of Prishtina by Decision [No. 01-203-194645] of 16 October 2013 rejected the applicant's request, inter alia, on the grounds that the documents issued by the Swedish health institutions did not coincide with those issued in the Republic of Kosovo, because the former coincided with the person A.H., while the

latter with the person I.F. The applicant challenged the abovementioned Decision, without success, in the Civil Registration Agency of the Ministry of Internal Affairs, in the Basic Court in Prishtina, the Court of Appeals and the Supreme Court. The Civil Registration Agency and the regular courts of all three instances upheld: (i) Decision [No. 01-203-194645] of 16 October 2013 of the Municipality of Prishtina; and (ii) rejected the applicant's application for registration of his deceased son I.F. in the list of the deceased persons with the reasoning that the documents issued by the Swedish health institutions did not coincide with those issued in the Republic of Kosovo.

To be exact, Basic Court, the Court of Appeals and the Supreme Court rejected the claim of the applicant reasoning that based on the documentation provided by the applicant, the registration of the subsequent death of the son, namely I.F., in the list of the deceased persons, was contrary to Article 15 of the Administrative Instruction on the criteria for the subsequent registration of deaths in the list of deceased persons because the documentation issued by the Swedish health institutions did not correspond to those issued in the Republic of Kosovo.

The Applicant challenged the findings of the regular courts before the Court, alleging that the Decisions of the public authorities were issued in violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution and the European Convention on Human Rights (hereinafter: the ECHR). In the circumstances of the present case, the Court decided to hold a hearing in order to clarify the issues of fact and law, and at the same time, the Municipality of Prishtina, the Civil Registration Agency and the Ministry of Foreign Affairs clarified that **the lack of medical report under the name of the I.F., has prevented the registration of I.F. in the PDR, while the applicant clarified that the public authorities have not taken into account the facts and specifics of his case and moreover, as a result of the abovementioned non-registration, the wife and minor son of the deceased have also remained with unresolved civil status**.

Whereas, in examining the merits of the case, the Court initially clarified that the circumstances of the present case, which were related to the refusal of the public authorities to register the deceased son of the applicant in the LDP , include issues related to the right to privacy of the applicant and his right to judicial protection of rights and effective remedy, as guaranteed by Articles 36 [Right to Privacy] and 54 of the Constitution and 8 [Right to respect for private and family life] and 13 [The right to an effective remedy] of the ECHR.

With regard to matters relating to the right to privacy, the Court, applying the case law of the ECtHR insofar as it is relevant to the circumstances of the case, has clarified **(i)** the state's obligations to protect privacy as guaranteed by the Constitution and the ECHR; **(ii)** the distinction between the negative and positive obligations of the State with regard to the protection of this right; **(iii)** the fact that in the circumstances of the present case, the State did not *necessarily "interfere"* with the rights of the applicant, but failed to act to protect the latter, resulting in an assessment of the circumstances of this case from the point of view of positive obligations of the state; **(iv)** that the positive obligations of the State require, inter alia, that public authorities consider the specifics of a case and take measures to ensure the effective protection of the right to privacy, or by providing a legal framework that protects the rights of individuals or by determining the application of special measures appropriate to the circumstances of a case; and **(v)** that in such cases, the public authorities are obliged to consider the balance between the interests of the individual, including the nature of the allegations and whether they relate to *"essential aspects"* of private life and the obligations of the State, including whether they relate to "narrow and precise" or "broad and indefinite" obligations and the potential burden they impose on the state.

The court noted that the Civil Registration Agency and the regular courts have substantiated that the registration of the deceased I.F. in the LDP, would be contrary to Article 15 of the Administrative Instruction[5]

5 *Article 15 "Criteria for late registrations of deaths in the register of the dead. 1. Upon application for late registration of deaths in the register of the dead, the following criteria must be met: 1.1. death certificate from the health care institution, if the death has occurred in a public or private heath care institution; 1.2. birth certificate; 1.3. marriage certificate for those who have been married; 1.4. photocopy of identity document or travel document of the person to whom the certificate is required; 1.5. the testimony of two witnesses that have seen the dead or have identified the body without any doubt*

regarding the subsequent registration of deaths and the relevant provisions of the Law on Civil Status, because the documentation on death issued by the health institution, namely the Swedish health institution, does not match the documentation issued by the Republic of Kosovo.

The court noted that it was not disputed that the existence of a medical report for the subsequent registration of death in the PDR is a criterion and requirement of the relevant Administrative Instruction, the Court noted that the extremely formal interpretation and application of applicable law in the circumstances of the present case, notwithstanding the applicant's special circumstances and the consequences of refusing to register his deceased son in LPD, public authorities, including the regular courts, have not reflected *"due diligence"* in respecting private and family life of the applicant guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR and the relevant case law of the ECtHR. The Court clarified that the examination of such a balance, would result in the finding that the applicant's allegations and claim were "narrow and clear" and did not result in disproportionate obligations to the State. Moreover, through such a refusal in the absence of a medical report, without taking into account any of the circumstances and specifics of the present case, the decisions of public authorities resulted in only *"theoretical and illusory*" constitutional rights for the applicant, and not *"practical and effective"* constitutional rights, as required by the Constitution and the ECHR. Consequently, the Court found that the proceedings followed by the administrative and judicial system, contrary to the positive obligations of the State, did not result in the exercise of the applicant's right to respect for his private life, contrary to paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

In this regard, the court noted that that beyond the extremely formal interpretation and application of the applicable law, the public authorities have not taken into account either the particular circumstances of the applicant or the consequences of their decision-making on the applicant's right to private and family life. This is

whether the death occurred outside the health care institution; 1.6. international death certificate, or equivalent (similar) issued from the state where the death occurred; 1.7. payment receipt that proves the paid fine as determined in Article 63 of the Law on Civil Status.

because, despite the fact that it is not disputed that in the circumstances of the present case there is no medical report on behalf of I.F., it is also not disputed that I.F. died and that his non-registration as such in the LPD, has serious consequences for the wife and minor son of the deceased I.F., leaving the former, with unresolved civil status and also without any opportunity to resolve the latter in the future.

In addition to this, the Court noted that while the public authorities rejected to register the deceased I.F. in the LDP, on the grounds that the medical report in his name was missing, they did not take into account (i) the fact that the public authorities of the Republic of Kosovo have confirmed the death and facilitated the return of the deceased I.F. from Sweden to Kosovo; (ii) the possibility of using international legal cooperation in this matter, in order to clarify the circumstances related to the medical report and, consequently, to enable the registration of the deceased in the PDR; and (iii) the possibility that the declaration of the deceased as dead and the relevant registration in the civil registers, be made based on the relevant provisions of the out contentious procedure.

Consequently, the Court considered that the extremely formal approach of the administrative ad judicial institutions, in the interpretation and application of the relevant provisions of the Law on Civil Status and Administrative Instruction, in the complex and specific circumstances of the present case, without regard to the legal effects that would produce their decisions regarding the civil status of the spouse and son of the deceased I.F., has prevented the "practical and effective" exercise of the applicant's fundamental rights and freedoms guaranteed by the Constitution. Such an approach runs counter to the obligation of public authorities under Article 8 of the ECHR to have "due diligence" that the rights relating to a private life must be respected both through the negative obligations or self-restraint of public authorities, as well as through positive obligations. In both cases, the action must be justified and be proportionate to the individual circumstances of the case.[6]

Therefore, and finally, the Court found that the refusal of the public authorities to register the deceased I.F. in the PDR, in the circumstances

6 See ECtHR case, Płoski v. Poland, Judgment of 12 November 2002, paragraphs 35-39; and Nada v. Switzerland, cited above, paragraph 182.

of the present case, did not strike a fair balance between private and public interest, thus resulting in a violation of the applicant's rights guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. Consequently, the Court also concluded that the public authorities, including the regular courts, failed to fulfil their positive obligations to provide the applicant with the rights to his private life, thus resulting in a violation of Article 8 of the ECHR.[7]

With regard to Article 54 of the Constitution in conjunction with Article 13 of the ECHR, the Court stated that taking into account the abovementioned finding, the applicant's allegations of a violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, are clearly arguable", as established in the case law of the Court and the ECtHR. Further, the Court noted that contrary to the requirements of the abovementioned articles and relevant case law, **the legal remedies in the circumstances of the present case, did not result in the review of the substance of the applicant's allegations, nor did they enable proper redress**. **The Court reiterated that the limited and extremely formal review of the applicant's allegations, in isolation from the specifics of the case and the relevant consequences, had also resulted in a lack of practical and effective protection of judicial rights and that of the applicant's effective remedy, contrary to Article 54 of the Constitution in conjunction with Article 13 of the ECHR.**

Therefore, the Court found that the abovementioned Judgments of the regular courts and the abovementioned decisions of the Civil Registration Agency and the Municipality of Prishtina, were not in compliance with the fundamental rights and freedoms of the applicant guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, and Article 54 of the Constitution in conjunction with Article 13 of the ECHR, and consequently the latter must be declared invalid. The Court also, through this Judgment, ordered the Civil Registration Agency to register by 30 October 2020 the death of I.F., namely the son of the applicant, in the LDP.

7 (See, despite the difference in the factual circumstances of the case, the similar assessment of the ECtHR in case R. R. v. Poland, cited above, paragraph 214).

VII. Conclusions

In conclusion, I would like to emphasize that

- The Constitutional Court of Kosovo has created a sufficient basis and has established high standards for the effective protection of human rights, not only procedural protection but also the substantive one;

- The Constitutional Court within its competencies, has issued decisions that embody the constitutional obligations in compliance with international instruments, respectively the European Convention on Human Rights and strives to enforce their implementation in the practices of all Kosovo institutions down to the smallest units of administrative bodies;

- The Constitutional Court has become an indispensable body for regular courts and other judicial public institutions and a leader in overseeing, enhancing and ensuring a thorough implementation of laws, especially those ingrained within the European Convention on Human rights;

- The decision-making process through the constitutional interpretation of human rights should result in the exercise of *"practical and effective"* rights for the parties, and not merely "*theoretical or illusory*"

In closing this presentation, I want to emphasize that the power of the interpretation of Constitution lies in its efforts to inform, enlighten and empower the citizens to demand the application of the rights that are already guaranteed by the Constitution.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Manira Mohd Nor
Wan Aima Nadzıhah

FEDERAL COURT OF MALAYSIA

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Manira Mohd Nor[*]
Wan Aima Nadzıhah[**]

INTRODUCTION

1. The Malaysian Judiciary is the third organ of the Government, the other two being the Legislature and the Executive. The Judiciary's role as the guardian of the Constitution is crucial in the functioning of a democratic system of Government.

2. The Malaysian Constitution is based upon the Westminster model of democratic government[1], and grounded upon the concept of separation of powers between the Legislature, Executive and Judiciary. As an independent institution, the Judiciary is thus "*entrusted with the duty of upholding and interpreting provisions of the Constitution.*" (JC Fong, *Constitutional Federalism in Malaysia*, 2nd ed., (Malaysia: Sweet & Maxwell, 2016), at 175).

3. As enunciated by the 6th Lord President of Malaysia, Tun Salleh Abas on the role of courts vis-à-vis the Constitution:

> *"The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and that does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between*

[*] Director, Strategic Planning and Training Division, Office of the Chief Registrar, Federal Court of Malaysia.
[**] Research Officer, Research Division, Office of the Chief Justice, Federal Court of Malaysia.
1 *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 (FC), para. [149].

the individual and the State and between individuals inter se, and in performing their constitutional role they must be of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law." (Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383 (SC)).

4. It is pertinent to emphasize that Malaysia upholds the doctrine of constitutional supremacy and the Court may struck down any law that is inconsistent with the Constitution as enunciated in Article 4(1) of the Constitution. The 4th Lord President of Malaysia Tun Suffian propounded in *Ah Thian v. Goverment of Malaysia* [1976] 2 MLJ 112 that, *"The doctrine of the supremacy of Parliament does not apply in Malaysia. Here, we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please"*.

5. When interpreting the Constitution, the Court has a duty to interpret it in light of its historical and philosophical context, as well as its fundamental underlying principles. In the case of *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285 (Federal Court), it was held as follows:

"Principles Applicable to the Interpretation of a Constitution

[24] *The answers to the questions posed to us turn essentially on the construction to be accorded to the relevant provisions of the State Constitution. We have been reminded by learned counsel for the parties as to the principles to be adopted in the interpretation of the Constitution.* ***Basically, a Constitution being the supreme law of a State or Federation, it has to be interpreted differently from ordinary statute.*** *The Privy Council in Hinds & Ors v The Queen Director of Public Prosecutions v Jackson Attorney General of Jamaica (intervener) [1976] 1 All ER 353 said:*

To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would … be misleading.

(See also Liyanage & Ors v Regina [1966] 1 All ER 650).

[25] *In Minister of Home Affairs v Fisher [1979] 3 All ER 21, the Privy Council was faced with interpreting the fundamental rights provisions of the Bermuda Constitution. It concluded by saying that* ***these provisions 'call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom'*** *(see also Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50) and this court in Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 at p 709 stated:*

Secondly, as the judicial committee of the Privy Council held in Minister of Home Affairs v Fisher, ***a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.***

In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia:

The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

[26] *NS Bindra's Interpretation of Statutes, (10th Ed) at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred.* ***'The organic method requires us to see the present social conditions and interpret***

the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.

[27] *One other important guide in interpretation of Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. An elementary rule of construction is that, if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous'.*

(See Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257).".

6. Provisions on the fundamental rights/liberties are housed in Part II of the Constitution; liberty of the person (Article 5), prohibition of slavery and forced labour (Article 6), protection against retrospective criminal laws and repeated trials (Article 7), equality (Article 8), prohibition of banishment and freedom of movement (Article 9), freedom of speech, assembly and association (Article 10), freedom of religion (Article 11), rights in respect of education (Article 12), and rights to property (Article 13).

7. While some of the fundamental rights are absolute, some of them are qualified by the constitutional provisions under Part II of the Constitution (Tunku Sofiah Jewa, et al., ed., *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia*, 3rd ed., (Malaysia: Pacifica Publications, 2007), at 248). For example, rights to freedom of speech, assembly and association (Article 10(2)) may be restricted through law made by Parliament.

8. It is against the above backdrop that case laws will be discussed on the interpretation of the Constitution in the protection of

fundamental rights and freedoms which is the theme for the Summer School Programme.

CASE ANALYSIS

Dato Menteri Othman Baginda v Dato Ombi Syed Ali [1981] 1 MLJ 29 (FC)

9. The issue in this case is in relation to the appointment of the appellants as the new *'Undang'* (Ruling Chief) for the *luak* (territory) of Jelebu in Negeri Sembilan. The respondent applied to the court for a declaration that the appointment of the appellants was contrary to the *adat*, custom, and constitution of the *luak* of Jelebu. The appellants, in turn, filed an application to strike out the respondent's application on the ground that the court had no jurisdiction because the dispute involved a question of *adat* and custom of the Malays in the *luak* and on the further ground (in the case of the second appellant) that under the Constitution of Negeri Sembilan he, as the Ruling Chief, enjoyed legal immunity in his personal capacity. The High Court dismissed the application of the appellants, holding that the court had jurisdiction to entertain the action and that the second appellant did not enjoy legal immunity. The appellant appealed to Federal Court.

10. The Federal Court in this case held that the Federal Constitution was a constitutional instrument *sui generis* and therefore to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. The Federal Court held as follows:

> *"In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see Minister of Home Affairs v Fisher [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is*

a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, 136."

Lee Kwan Woh v PP [2009] 5 MLJ 301 (FC)

11. This case is in regard to the right to a fair hearing. The accused was charged with trafficking dangerous drugs, an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952. After the prosecution closed their case at the end of the prosecution case, the learned trial judge ruled that he did not wish to hear any submissions from the accused as he was satisfied that the prosecution had made out a prima facie case. Thereafter, the accused was convicted by the High Court and sentenced to death. The accused then appealed to the Court of Appeal which affirmed the High Court's decision.

12. At the Federal Court, the accused's counsel argued that the constitutionally guaranteed right for an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case.

13. The Federal Court reversed the High Court and Court of Appeal decisions and held that:

"[19] … In our judgment, a trial court must, at the close of the prosecution case, invite submissions from an accused. It is then open to the accused to say that he or she does not wish to make a submission. But if he or she does not make that election, he or she must be heard. It is however open to the court, after it has heard those submissions to reject them and call for the defence without

affording the prosecution a right to reply. This course does no harm to the prosecution. But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him or her of the opportunity to make a submission of no case."

14. In arriving at this decision, the Federal Court discussed the approach to constitutional interpretation *vis a vis* fundamental right. It was held as follows:

[8] In the second place, the Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1). There are several authorities in support of this view. We will refer to some of them. And we begin at home with the case of Dato Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, where Raja Azlan Shah Ag LP (as His Royal Highness then was) said:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way 'with less rigidity and more generosity than other Acts' (see Minister of Home Affairs v Fisher) [1973] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable

to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in Attorney-General of St Christopher, Navis and Anguilla v Reynolds [1979] 3 All ER 129 at p 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[9] The next case is Boyce v The Queen [2004] UKPC 32, where Lord Hoffmann said:

Parts of the Constitution, and in particular the fundamental rights provisions of chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.

[10] The courts of Hong Kong have adopted a similar approach when interpreting their basic law. In Leung Kwok Hung v the Hong Kong Special Administrative Region [2005] 887 HKCU 1, Li CJ when delivering the unanimous judgment of the Court of Final Appeal said:

It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. Ng Ka Ling v Director of Immigration [1999] 2 HKCFAR 4 at p 28–9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. Gurung Kesh Bahadur v Director of Immigration [2002] 5 HKCFAR 480 at para 24. Plainly, the burden is on the government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.

[11] We return home to end our citation of the authorities. In the recent case of Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, this court in the judgment of Hashim Yusoff FCJ approved, inter alia, the following passage in the judgment of the Court of Appeal in Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213:

The long and short of it is that our Constitution especially those articles in it that confer on our citizens the most cherished of human rights must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

More importantly, the majority of this court in Badan Peguam Malaysia also accepted the omnipresence of art 8(1) of the Constitution when interpreting its other provisions. And that brings us to the next principle of interpretation.

[12] The third principle is this. A court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly 'the humanising and all pervading provisions of art 8(1)' (see Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors [2000] 4 MLJ 107). That article reads: 'All persons are equal before the law and entitled to the equal protection of the law'. In Badan Peguam Malaysia this court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia:

When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of State action (see Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261).

The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (Executive, Legislative or Judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed (see Om Kumar v Union of India AIR 2000 SC 3689).

[13] The fourth principle of constitutional interpretation is this. Whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively. As Lord Nicholls of Birkenhead and Lord Hope of Craighead in the Privy Council case of Prince Pinder v The Queen [2002] UKPC 46 said in their joint dissent:

It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provision

derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions' (see the State v Petrus [1985] LRC (Const) 699) at p 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by Their Lordships' Board in R v Hughess [2002] 2 AC 259 at p 277 part 35.

This passage was quoted with approval by the majority of this court in the Badan Peguam Malaysia case. So much for the interpretive principles.".

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285 (FC)

15. In this case, *Badan Peguam Malaysia* (Bar Council) filed an originating summons at the High Court and prayed for a declaration that the appointment of Dr. Badariah Sahamid as a judicial commissioner of the High Court of Malaya was null and void and of no effect on the ground that the appointment was in contravention of Article 122AB read together with Article 123 of the Federal Constitution. The High Court, in turn on 27 August 2007, i.e. one day before the matter was scheduled to be mentioned before the learned judge of the High Court, the Government of Malaysia ('defendant') referred the following constitutional questions to the Federal Court:

a) Whether the words 'advocates of those courts' appearing in Article 123 of the Federal Constitution require an advocate to have been in practice for a period of 10 years preceding his/her appointment as a judicial commissioner under art 122AB of the Federal Constitution?

b) If the answer to question (i) is in the negative, is the appointment of Dr. Badariah Sahamid as a judicial commissioner of the High Court of Malaya with effect from 1 Mac 2007 valid?

16. In the instant case, the Federal Court held that Article 8 of the Federal Constitution has an 'all-pervading' influence on the interpretation of the rest of the Federal Constitution's provisions. The Federal Court in dealing with this matter, held as follows:

"[86] It is my respectful view that when interpreting our Federal Constitution one must bear in mind the all pervading provisions of art 8(1) (see Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia)' To read into art 123 of the Federal Constitution the words 'a practising' before the word 'advocate' is to deprive the respondent of equality before law, a fundamental liberty under our Constitution. Article 8(1) does not declare that all persons must be treated alike but that persons in like circumstances must be treated alike. In Public Prosecutor v Khong Teng Khen & Anor [1976] 1 LNS 100; [1976] 2 MLJ 166, p 170, Suffian LP said for the Federal Court: 'The principle underlying art 8 is that a law must operate alike on all persons under the circumstances, not that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons… for the purpose of legislation'… the law may classify persons… the law may classify offences into different categories…;… fiscal law may divide a town into different areas… All that art 8 guarantees is that a person in the same class should be treated the same as another person in the same class…".

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333 (FC)

17. In this case, the appellant who is an advocate and solicitor and a member of Parliament wished to stand for and, if elected, serve on the Bar Council which is the governing body of the Malaysian Bar. However, section 46A(1) of the Legal Profession Act 1976 ('LPA') disqualified amongst others a member of Parliament from being a member of the Bar Council or a Bar Committee.

18. The appellant then challenged the constitutionality of section 46A (1) of the LPA to the High Court and argued that section 46A(1) of the LPA infringes his fundamental rights guaranteed under Articles 5(1), 8(1), and 10(1)*(c)* of the Federal Constitution. His challenge, however, failed before the High Court and the Court of Appeal.

19. The appellant then appealed to the Federal Court. The Federal Court held that section 46A(1) of the LPA does not violate Articles 5(1), 8(1), and 10(1)*(c)* of the Federal Constitution. The Federal Court held

that section 46A (1) of the LPA is a valid law and eventually dismissed the appellant's appeal.

20. The Federal Court in arriving at its decision address its mind to the methodology of interpretation of the guaranteed rights under the Federal Constitution. The Federal Court held as follows:

> *"[3] Before discussing the specific areas of challenge there are three preliminary observations that must be made. The first has to do with the methodology of interpretation of the guaranteed rights. In three recent decisions this court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; [2009] 1 LNS 778 and Shamim Reza bin Abdul Samad v Public Prosecutor [2009] 2 MLJ 506; [2009] 6 CLJ 93. The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept.*
>
> *[4] Article 5(1) may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. That article proscribes the deprivation of life or personal liberty, save in accordance with law. 'Law' wherever mentioned in Part II of the Constitution includes — by statutory direction — the common law of England (see art 160(2) read with s 66 of the Interpretation Acts 1948 and 1967). It is now well-settled that by the common law of England the right of access to justice is a basic or a constitutional right. See Raymond v Honey [1983] 1 AC 1 at p 13; R v Secretary of State for the Home Department, ex parte Leech [1993] 4 All ER 539. In Thai Trading Co (a firm) v Taylor & Anor [1998] 3 All ER 65 at p 69, Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the 'law' to which art 5(1) refers. In other words, a law that seeks to deprive life or personal*

liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.

[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose … (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors [1992] 1 MLJ 343; [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[6] The second observation has to do with the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, as per the following extract from the headnote to the report:

In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.

[7] The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure. A frontal attack was launched on the following observation of the former Federal Court in Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 :

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in Vacher & Sons Ltd v London Society of Compositors [1913] AC 107 at p 118:

Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction — per Roskill LJ in Henry v Geopresco International Ltd [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

[8] It was submitted during argument that reliance on the Vacher's case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in Ah Thian v Government of Malaysia [1976] 2 MLJ 112:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

This earlier view was obviously overlooked by the former Federal Court when it followed Vacher's case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art 8(1). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See Keshavananda Bharati v State of Kerala AIR 1973 SC 1461.".

Nik Nazmi bin Nik Ahmad v Public Prosecutor [2014] 4 MLJ 157 (COA)

21. This case concerns the interpretation of section 9(5) of the Peaceful Assembly Act 2012. In the Sessions Court, the appellant was charged for organising an indoor public assembly without notifying the officer-in-charge of the Police District (OCPD) ten days before the event, as required by section 9(1) of the Peaceful Assembly Act 2012. The appellant subsequently applied to the High Court to declare sections 9(1) and (5) of the Peaceful Assembly Act 2012 as void and unconstitutional, and for the charge against him to be struck out.

22. The High Court dismissed his application. He appealed to the Court of Appeal. At the Court of Appeal, the appellant argued that

both sections 9(1) and (5) of the Peaceful Assembly Act 2012 should be struck down as they were *ultra vires* the Federal Constitution as the requirement for a 10-day notice, for having totally prohibited a spontaneous or immediate assembly, was an unreasonable restriction on the constitutionally guaranteed right of citizens to assemble peaceably; and that even if the restriction under section 9(1) of the Peaceful Assembly Act 2012 was reasonable, it was legally and constitutionally wrong to criminalise its breach under section 9(5) of the Peaceful Assembly Act 2012.

23. The Court of Appeal held as follows on the rule of construction of the Federal Constitution in the following words:

> *"[16] Given the structure of our Constitution, all citizens of Malaysia have the right to assemble peaceably and without arms (art 10(1)(b)), but this right is made subject to cl (2)(b) of the same article. By this provision, Parliament may by law impose restrictions on the right of assembly in the interest of the security of the Federation or public order. The restrictions are referred to as such restrictions as it deems necessary or expedient for these purposes.*
>
> *[17] Drawing on the latest pronouncements of our courts on constitutional interpretation in relation to fundamental rights (Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333; [2010] 3 CLJ 507 (FC); Dr Mohd Nasir Hashim v Menteri Dalam Negeri [2006] 6 MLJ 213; [2007] 1 CLJ 19 (CA); Public Prosecutor v Cheah Beng Poh, Louis & Ors & Anor [1984] 2 MLJ 225; [1984] 2 CLJ (Rep) 383 (HC); Shamim Reza Abdul Samad v Public Prosecutor [2011] 1 MLJ 471; [2009] 6 CLJ 93; Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC); Darma Suria bin Risman Salleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307; [2010] 1 CLJ 300; Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507; and most recently, Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor [2013] 6 MLJ 660; [2013] 1 LNS 584 (CA)), I am mindful of the general principles on constitutional interpretation that the constitution is a sui generis document whose provisions should be read broadly and*

purposively in a way as to advance the protection of fundamental rights, and limit only to the extent necessary, legislative and executive qualifications or encroachments on these rights. The ultimate goal is to prevent arbitrary legislative and executive action, to preserve the rule of law and maintain and preserve the principle of constitutionalism or limited government in a democratic system of government.

[18] As for the case authorities on general principles of interpretation, there is general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity. The earlier case authority of Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed AIwi bin Syed Idrus [1981] 1 MLJ 29 remains very relevant in laying down the first principles of constitutional interpretation. I refer in particular to the following passage in the judgment:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way with less rigidity and more generosity than other Acts (see Minister of Home Affairs v Fisher [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms. The principle of interpreting constitutions with less rigidity

and more generosity was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, at p 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[19] See also similar principles being repeated by the Federal Court in Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333; [2010] 3 CLJ 507:

In three recent decisions this court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; [2009] 1 LNS 778 and Shamim bin Reza v Public Prosecutor [2011] 1 MLJ 471; [2009] 6 CLJ 93. The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept, (per Gopal Sri Ram FCJ at p 514).

[20] This ambulatory or prismatic approach to a broad constitutional interpretation when applied in the context of art 10 of the Constitution, allowed the Court of Appeal in Dr Mohd Nasir Hashim v Menteri Dalam Negeri, to interpret art 10(2) as interposing the word reasonable before the word restrictions. See eg the passage reading:

the restrictions which art 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word reasonable must be read into the sub-clauses of art 10 (1) (per Gopal Sri Ram JCA (as His Lordship then was) at p 29 of the report)

[21] These accepted principles were analysed in depth by the Federal Court in Lee Kwan Woh, and the following passage in the judgment bears repeating:

In the first place, the Federal Constitution is the supreme law of the Federation. Though by definition it is a written law (see s 66 of the Consolidated Interpretation Acts of 1948 and 1967) it is not an ordinary statute. Hence, it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes. Indeed, it would be misleading to do so. As Lord Diplock said in Hinds v The Queen [1976] 1 All ER 353 at p 359:

To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in Their Lordships view, be misleading.

In the second place, the Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution.

In the recent case of Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, this court in the judgment of Hashim Yusoff FCJ approved, inter alia, the following passage in the judgment of the Court of Appeal in Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213:

The long and short of it is that our Constitution especially those articles in it that confer on our citizens the most cherished of human rights must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become. (at pp 638641 of the report)

[22] The timely reminder by Hashim Yusof FCJ not to read the Constitution as a last will and testament resonates with the views expressed by the Honourable Justice Michael Kirby of the High

Court of Australia in his Hamlyn lectures (55th Series), Judicial Activism: Authority, Principle and Policy in the Judicial Method. It will be useful to consider the legal learning here, and I quote:

This is an approach to the task of constitutional interpretation identical to my own. It derives from the essential function which a written constitution is expected to fulfil. Construing a constitution with a catchcry about legalism, with nothing more than judicial case books and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it as their basic law, is a contemptible idea. As one anonymous sage once put it: if you construe a constitution like a last will and testament, that is what it will become. Nevertheless, legal reasoning, unlike political activism, must always remain attached to legal authority

The reference to legal reasoning having to remain attached to legal authority is a pertinent comment on the limits of judicial review.

Public Prosecutor v Azmi bin Sharom [2015] 6 MLJ 751 (FC)

24. In this case, the defendant was charged in the Sessions Court under sections 4(1)(b) and (c) of the Sedition Act 1948 for allegedly making two seditious statements. The defendant later applied to the High Court to determine the constitutionality of the Sedition Act 1948. The High Court, in turn, referred the following two constitutional questions to the Federal Court for its determination:

a) whether section 4(1) of the Sedition Act 1948 contravenes Article 10(2) of the Federal Constitution and is therefore void under Article 4(1) of the Federal Constitution; and

b) whether the Sedition Act 1948 is a valid and enforceable Act under the Federal Constitution.

25. The Federal Court in answering these two constitutional questions observed that while the fundamental rights provisions in Federal Constitutional are to be read generously, derogations upon these fundamental rights are to be read down, that is, they should be read narrowly and restrictively. This is achieved by applying to such derogations the doctrine of proportionality that is housed in the

second limb of Article 8(1) of the Federal Constitution. This has been laid down by the Federal Court in the following words:

> *"[41] This court in Sivarasa Rasiah also alluded to the proportionality test in determining whether a given law is consistent with the Constitution. This test emanates from the equality clause housed in art 8(1). The learned judge in Sivarasa Rasiah considered the statement of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, the leading authority on the matter, which was approved by the Privy Council in Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Ors [1998] UKPC 30. In that case Lord Clyde stated:*
>
> *In determining whether a limitation is arbitrary or excessive he (Gubbay CJ) said that the court would ask itself:*
>
> *whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*
>
> *Their Lordships accept and adopt this threefold analysis of the relevant criteria.*
>
> *[42] The proportionality principle/test was explained by the Court of Appeal in Dr Mohd Nasir Hashim in the passage we earlier quoted at para 33. In short, the learned judge said that the legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved.*
>
> *[43] In this regard, we agree with the learned judge in Sivarasa Rasiah, that the restriction that may be imposed by the Legislature under art 10(2) is not without limit. This means to say that the law promulgated under art 10(2) must pass the proportionality test in order to be valid.".*

Public Prosecutor v Gan Boon Aun [2017] 3 MLJ 12 (FC)

26. In this case, the High Court referred to the Federal Court for its determination, *inter alia*, of the question of whether section 122(1) of

the Securities Industry Act 1983 (since repealed by the Capital Markets and Services Act 2007) violated Articles 5(1) and 8(1) of the Federal Constitution because it abrogated the right of an accused person to be presumed innocent until proven guilty and have a criminal charge against him/her proven by the prosecution beyond a reasonable doubt.

27. Section 122(1) of the Securities Industry Act 1983 essentially provides that: (a) there was a presumption that an offence against this Act or any regulation made thereunder committed by a body corporate is committed by any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity; and (b) a reverse onus clause which imposed on that person the onus to prove that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.".

28. In determining the constitutionality of section 122(1) of the Securities Industry Act 1983, the Federal Court adopted the generous and liberal construction in interpreting fundamental rights under Federal Constitution. The Federal Court held as follows:

> *"[9] … But fundamental rights must be interpreted generously and liberally. The approach to interpretation taken in Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, where the Civil Law Act 1956 was the statute of reference, is wrong. The rule of literal interpretation does not apply to the Constitution. …*
>
> *…*
>
> *[13] Consonant with the generous and liberal construction conferred the Federal Constitution, it was held that the phrase 'in accordance with law' in art 5(1) 'is wide enough to cover procedure as well' (Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977]*

2 MLJ 108) and which procedure must not be arbitrary or unfair (Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & anor [1996] 1 MLJ 261), implies a fair trial (Shamim Reza bin Abdul Samad v Public Prosecutor [2011] 1 MLJ 471) in both procedure and substance (Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; see also Deputy Chief Officer, Perak & Anor v Ramesh a/l Thangaraju [2001] 1 MLJ 161), within a reasonable time by an impartial court established by law (Public Prosecutor v Choo Chuan Wang [1992] 2 CLJ 1242), and, accords a fundamental right of access to justice (Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333). It was also enunciated that art 5(1) 'guarantees that neither life nor personal liberty may be deprived save in accordance with law' (Shamim Reza bin Abdul Samad v Public Prosecutor [2011] 1 MLJ 471 per Gopal Sri Ram FCJ, delivering the judgment of the court), and that art 5(1) 'stipulates that no person shall be deprived of his life or personal liberty save in accordance with law … this right to personal liberty is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'. Hence, no person (including the respondent) can be arrested, detained or imprisoned unless authorised by law (see An Introduction to the Constitution of Malaysia by Tun Mohamed Suffian bin Hashim, (2nd Ed), at p 207) … It is important therefore to consider the phrase 'save in accordance with law'. In Re Mohamad Ezam bin Mohd Nor [2001] 3 MLJ 372, it was held that the phrase 'save in accordance with law' in art 5(1) requires that there must be specific and explicit law that actually provides for it. The Federal Court in the case of Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113 adopted the meaning of the word 'law' in the phrase 'save in accordance with law' in art 5(1) given by the Privy Council in the Singapore case of Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor [1981] 1 MLJ 64, where it was held that the term 'law' in the phrase refers to: … a system of law which incorporates those fundamental rules of natural justice that had formed part of the common law of England and was in operation in Singapore at the commencement of the Constitution. It would have been taken

for granted by the makers of the Constitution that 'law' which citizens could have for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules' (Public Prosecutor v Bird Dominic Jude [2013] 6 MLJ 785 per Azahar Mohamed JCA, as he then was, delivering the judgment of the court).".

Alma Nudo Atenza v Public Prosecutor and another appeal [2019] 4 MLJ 1 (FC)

29. In *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (FC), the Federal Court was faced with the issue of constitutionality of section 37A of the Dangerous Drugs Act 1952 in relation to Articles 5 and 8 of the Constitution, where the Federal Court acknowledged that in interpreting constitutional provisions such as Articles 5 and 8 of the Constitution "*certain principles must be borne in mind*":

> *(a) firstly, it is trite that a constitution is sui generis, governed by interpretive principles of its own;*
>
> *(b) secondly, in the forefront of these interpretive principles is the principle that its constitutional provisions should be interpreted generously and liberally, not rigidly or pedantically (see Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29); and*
>
> *(c) thirdly, it is the duty of the courts to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the FC, in order to reveal the spectrum of constituent rights submerged in each article (see Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301 at para 8).*" (at para. [96]).

30. Moving further, the Federal Court also held that the doctrine of proportionality and the all-pervading nature of Article 8 of the Constitution form part of the common law of Malaysia were developed by our Courts based on a prismatic interpretation of the Constitution without recourse to case law (at para. [126]). This would necessarily mean that "*when any state action is challenged as violating a fundamental right, such as the right to life or personal liberty under arts 5(1) and 8(1) will at once be engaged such that the action must meet the test of proportionality*" (at para. [119]).

31. The Federal Court further held that when interpreting other provisions in the Federal Constitution, the courts must do so in light of the 'humanising' and all-pervading provision of article 8 of the Federal Constitution. The Federal Court on this point held as follows:

> *"[117] When interpreting other provisions in the FC the courts must do so in light of the humanising and all-pervading provision of art 8(1) (see Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213 at para 8, approved in Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285 at para 86; Lee Kwan Woh at para 12). Article 8(1) guarantees fairness in all forms of state action (see Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261). The essence of the article was aptly summarised in Lee Kwan Who at para 12:*
>
> *The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.".*

Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203 (FC)

32. In this case, the appellants were detained under the Prevention of Crime Act 1959 ("POCA") "*in relation to 'the organisation and implementation of online gambling'*" (at para. [2]) though the relevant period of detention had expired. One of the issues to be determined by the Federal Court was whether online gambling simpliciter falls within the scope of the POCA. It was held that the recital in the POCA did not extend to online gambling simpliciter as there must be a factual basis that involved organised crime as envisaged in Article 149(1)(a) of the Constitution (at para. [10]).

> The Federal Court held that even though Article 149 of the Constitution permits the POCA for preventive detention which is the exception to Article 5(1) of the Constitution, such an exception cannot be used to override Article 5(1)

of the Constitution without sufficient basis, based upon the reasoning that constitutional provisions which limit or derogate from the fundamental liberties in Part II of the Constitution must be read restrictively, to ensure that the fundamental liberty enshrined in Article 5(1) of the Constitution "*is not trampled upon without adequate basis*":

[174] Prior to the delivery of decision, we gave consideration to both the majority and minority decisions in Zaidi bin Kanapiah, and determined that

the minority decision delivered by the Chief Justice, with respect, reflects the correct approach to be adopted when determining whether online gambling simpliciter falls within the purview of para 5 of Part I of the First Schedule to POCA. We concluded that online gambling simpliciter does not fall within the purview or ambit of POCA as there is no nexus between the online gambling and organised violence as envisaged under POCA.

…

[180] The fact that illegal gaming may in some, or even many instances result in violence, does not warrant the conclusion, reasonably or coherently, that online gambling simpliciter must include organised violence per se. Such an interpretation, with respect, does violence to the purpose and intent of POCA and fails to comply with the express and narrow provision set out in art 149(1)(a) of the FC.

[181] As explained at the outset and as expressly stipulated in the minority

judgment of the Chief Justice:

a) the inclusion of the art 149 of the FC recitals in emergency laws such as POCA 'serves as a constitutional safeguard ensuring that any such law is properly enacted for the purposes envisaged by that article';

b) constitutional provisions that limit or derogate from the fundamental liberties in Part II of the FC must be read restrictively (see Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301 at para 13);

c) as stated in Selva Vinayagam a/l Sures vTimbalanMenteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2020] 1 LNS 1707 ('Selva Vinayagam') by Vernon Ong FCJ:

[34]…Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference of the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore, strict compliance with the letter of the rule of law is the essence of the matter;

d) the role of the Judiciary in interpreting the law does not mean that reliance is placed excessively or solely on Hansard or the stated purpose of the Bill when it was introduced. Parliament's intention must be drawn from an objective assessment of the words utilised in the legislation and not from statements by the promoters of the Act, as explained fully in Zaidi bin Kanapiah by the Chief Justice. Most importantly statutory construction particularly constitutional is a matter falling within the purview of the Judiciary;

e) as stated at the outset in relation to the approach to be adopted in interpreting restrictive laws in relation to liberty of the person, it is important to adopt a restrictive approach which ensures that the fundamental liberty enshrined in art 5(1) of the FC is not trampled upon without adequate basis. It must be borne in mind that art 149 of the FC and hence POCA which permits preventive detention is an exception to art 5(1) of the FC. This is expressly recognised in the FC itself. To that end, while art 149 of the FC permits such legislation in the specific circumstances prescribed there, it must be borne in mind that it is indeed an exception that cannot be utilised to override art

5(1) of the FC without sufficient basis. In this aspect we are unable to concur with the reasoning of the majority in Zaidi bin Kanapiah on this aspect of the decision, namely that in construing legislation restrictive of fundamental liberties, like POCA and other preventive detention, the approach to be taken is a liberal and broad approach, without regard to technicalities. The reverse is in point of fact, true. When a person is preventively detained it is the preventive legislation itself, ie POCA, art 149 of the FC and art 5(1) of the FC which are attracted. And in construing whether a particular act, series of acts or omissions fall within the purview of POCA or art 149(1) of the FC, it is the duty of the courts to ensure that the facts and circumstances brought before it directly and imminently leads to harm, danger or alarm amongst the citizens of the nation or the general public at large.".

CONCLUSION

The Malaysian Courts have a constitutional function to perform by being an institution to protect the citizen's constitutional rights and aimed as a form of a mutual check and balance upon each other in the branches of power to control the abuse of government and maintain rule of law (*Bato Bagi & Ors v. State of Sarawak and another appeal [2011] 6 MLJ 297*).

The Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun Tuan Mat during Her Ladyship's Opening of the Legal Year 2020 speech had eloquently stated as follows:

> *"In a plural society such as Malaysia with its cultural and religious diversity, justice and the law are of paramount significance.* ***Our social architecture is founded and governed by our Federal Constitution, which is the supreme arbiter and guide for the institutional pillars of the nation as well as every citizen of our country."***

PROTECTING FUNDAMENTAL RIGHTS AND FREEDOMS THROUGH THE INTERPRETATION OF THE CONSTITUTION

Erdenebayar Batbold
Bayarjargal Battulga

CONSTITUTIONAL COURT OF MONGOLIA

PROTECTING FUNDAMENTAL RIGHTS AND FREEDOMS THROUGH THE INTERPRETATION OF THE CONSTITUTION

Erdenebayar Batbold[*]
Bayarjargal Battulga[**]

In connection with the transition to a new democratic system, Mongolia adopted a new constitution in 1992, laying down the foundations of a democratic state that respects human rights and is the basis for the formation of a state governed by the rule of law. The Constitution has allowed Mongolia to cultivate the values that a democratic state should have.

Guaranteeing human rights and freedoms by the Constitution is one of the most important values of democracy, and it is the main power of the independence and sovereignty of the country. Also, protecting the human rights, freedoms, and dignity of every person and guaranteeing equal rights by the Constitution will create peace, development, and democracy in the society, and justice will be ensured.

The next significant advanced step was the establishment of the globally acknowledged constitutional review institution, the "Constitutional Court (hereinafter referred to as 'Constitutional Tsets') of Mongolia" by the 1992 Constitution, and its powers were legislated.

The main purpose of establishing a constitutional review institution in the world is to guarantee the unwavering implementation of the Constitution, and thus ensure that the Constitution is the highest legal act for the country. The universality of the Constitution, which is the guarantee of the rights and freedoms of citizens, and the fact that it works based on the factual necessity to limit the state's arbitrariness, makes it even more clear that this institution is the main guarantee of the rights and freedoms of citizens.

[*] Senior officer at the Constitutional Court of Mongolia.
[**] Senior officer at the Constitutional Court of Mongolia.

Therefore, in this speech, we intend to present the methods and procedures that protect "fundamental rights" within the supervision of the Constitutional Tsets, which exercises the supreme supervision of the Constitution in Mongolia.

INTRODUCTION

The issue of exercising state power within certain limits was strongly discussed in the XVII-XVIII centuries, and at the same time, the modern concept of fundamental rights was formed. In this way, the idea that fundamental rights are the foundation of the state and that the power of the state should be limited to fundamental rights has become the core of the new concept.

With this concept, the state has assumed the responsibility of guaranteeing the standards of human rights to its citizens under international law. This is regulated in the Charter of the United Nations and the Universal Declaration of Human Rights[1] adopted later. Logically, international and national standards mutually condition and complement each other.

The equal enjoyment of any right by individuals is a significant value of a democratic society, so the principle of equal rights is the basis of all human rights documents. By implementing the principle of equality, it is possible to ensure fair implementation of human rights.

MAIN SECTION

Fundamental rights and the State's functions to protect fundamental rights

Natural rights are protected by the Constitution, so they are called "fundamental rights".

In the science of constitutional law, many terms related to rights and freedoms have entered, among them, let's consider the concepts of human rights, civil rights, and fundamental rights.

Everyone is born free, and equal in dignity and rights, and these rights are called "human rights" or "natural rights". These rights do not have positive or state-determined features and are not caused by

1 This Declaration is non-binding, does not apply to customary law, and is not a type of international treaty, but the United Nations and countries, as well as international judicial bodies, consider it as a minimum standard of human rights when making decisions.

laws, but are related to human nature. Therefore, human rights cannot be determined or granted by the state, nor can they be limited by time and space. It can be considered that all fundamental rights are based on human rights because human rights are recognized and not determined by constitutional law.

The term "civil rights" was created following the concept of human rights or rights that belong to everyone. This includes the rights that a person with citizenship in a given country can enjoy upon reaching a certain age.

Furthermore, as a result of human rights and civil rights being reflected in the positive law, or this case, the Constitution, they became mandatory and the concept of "fundamental rights" originated.

Fundamental rights have become global values and goals that are not limited to a specific country, region, or continent. In line with world standards, Mongolia has clearly stated inalienable human rights, political, social, and economic rights and freedoms in its Constitution.

Specifically, "Human rights and freedoms" are set forth from Article Fourteen to Article Nineteen of Chapter Two in the Constitution of Mongolia, and stated that 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.

Therefore, the Constitutional Tsets was created in the state system by the Constitution, which is responsible for protecting fundamental rights and freedoms, and monitoring whether state institutions are working within their powers.

The Constitutional Tsets of Mongolia shall be the competent organ with powers to exercise supreme supervision over the enforcement of the Constitution, to make a conclusion on the breach of its provisions, and decide constitutional disputes, and is the guarantor for strict observance of the Constitution. On the other hand, the Constitutional Court is the immunity of the Mongolian state in protecting human rights and freedoms, Mongolian state institutions, and social values guaranteed by the Constitution.

According to the law, Tsets shall institute proceedings of examining and resolving disputes only on the basis of petitions, notifications and requests. If citizens' fundamental rights are breached, they shall submit a petition, but when public interests are breached, citizen shall submit a notification. In other word, one of the distinction of the Tsets is that the citizen shall submit notification on behalf of the public interest.

The Constitutional Tsets has a right to interpret the Constitution

"THE CONSTITUTION IS THE BASIC LAW OF THE STATE AND THE HIGHEST LEGAL DOCUMENT."

Some provisions of the Constitution are broad or open-ended. For this reason, there is a demand to explain it in detail. For example, the "fundamental rights" guaranteed by the Constitution **do not only express the content**, but at the same time, **they provide a lot of space for interpretation and entail the requirement to clarify the norms depending on the historical and specific circumstances.**

The Constitutional Tsets has the full authority to protect constitutionalism in accordance with the basic concepts and basic structure of the Constitution, and exercise supreme supervision over the enforcement of the Constitution of Mongolia. As the only institution that uses the Constitution to resolve disputes, it is appropriate to enjoy the right to officially interpret the Constitution.

Confirming this right, the Constitutional Tsets decided on certain disputes in 2001. Specifically, the Constitutional Tsets reviewed the resolution issued by the State Great Hural (Parliament) of Mongolia "On the Interpretation of Certain Provisions of the Constitution" and decided that it violated the provisions of the power of the Parliament and the regulation of the constitutionality of the decisions of government institutions, as stipulated in the Constitution of Mongolia.

From the above decision of the Constitutional Tsets, it is effortless to figure out the concept and meaning of the Constitution about who can and cannot do the official interpretation of the Constitution, so it can be considered that this decision contains the interpretation of the Constitution. In other words, it can be considered that the Constitutional Tsets is interpreting the Constitution itself by making a decision based on the articles, clauses, ideas, and content of the Constitution.

Protecting fundamental rights and freedoms through the interpretation of the Constitution

Legal interpretation can only be implemented during the application of the law, so the Constitution is interpreted through the decision of an independent and neutral judicial authority, the Constitutional Court. On the other hand, when the organization applying the law makes an individual act-decision, it is very essential to make a doctrinal or theoretical explanation in the relevant part. In this way, there will be an opportunity to determine whether the dispute depends on the hypotheses of the relevant articles and provisions of the Constitution and whether it has been violated.

In the process of interpretation, it is appropriate to determine the content of the words and sentences of the law in the sense used by the first legislator of the Constitution when the Constitution was approved. But if the significance of legal terms is not defined in any way, then it is correct to explain and use them in the context that is widely used in legal practice and jurisprudence.

Since the decision of the Constitutional Tsets contains the characteristics of interpretation of the Constitution and resolves disputes, its conclusions and resolutions are subject to "casual" interpretation from the point of view of general legal theory.

The Constitutional Tsets uses general and special methods to interpret the Constitution, including ethical, sociological, linguistic, and historical methods.

To mention the decision of the Constitutional Tsets, which interpreted the Constitution using the above methods:

The decision of the Constitutional Tsets-1:

05.06.2020, Conclusion No. 03:

The Constitutional Court reviewed and discussed the regulation that prohibits candidacy if the court finds that corruption or official crime has been committed by the Law on Elections of the Parliament of Mongolia, approved by the Parliament on December 20, 2019. After reviewing the dispute, the Tsets decided that the Constitution was not violated because the regulation was approved within the framework

of the provisions of the Constitution of Mongolia and the international treaties to which Mongolia is a party, the obligations assumed by it, the relevant legal regulations, and the policy of ensuring the rule of law without corruption.

It was an important decision for being in pursuance of the citizens' right to vote, meeting the moral requirements of a democratic society, keeping the public government free from corruption, and ensuring the implementation of international agreements signed by Mongolia.

In adopting the decision, the following textual interpretation was explained in the Reasoning section: **The right to vote and be elected guaranteed by the Constitution is a basic component of political rights, and the right to vote is to be enjoyed by all citizens of Mongolia who have the legal capacity and the right to vote, but special conditions and criteria can be established by law for the exercise of the right to be elected, taking into account the specifics of the position. This is a generally accepted limitation in the constitution and electoral law, and it is considered to be recognized within the framework of the Constitution of Mongolia.**

Since the right to vote is not an absolute right, setting criteria, and conditions for election candidates or citizens exercising their right to vote is aimed at guaranteeing the right to vote. In this way, it can be defined by law within the framework of Article Nineteen of the Constitution of Mongolia according to the principle of "not exceeding the scope" of constitutional law, which is consistent with the legal goal of protecting constitutional and democratic values.

The decision of the Constitutional Court Tsets-2:

01.20.2021, Conclusion No. 01:

According to the relevant provisions of the Law on Allowances for Single Mothers and Mother with Multiple Children, approved by the Parliament of Mongolia on June 30, 2017, it is legal to provide child care allowances only to women who take care of their children aged 0-3. The Constitutional Tsets reviewed the disputed regulation and deemed that the regulation limited the possibility of receiving the benefits for fathers/men taking care of their children under the same conditions, creating a gender-based difference between the fathers

and mothers taking care of their children. It was concluded that the provisions on the equal participation of men and women in social life and family relations guaranteed by the Constitution and the principle of equality before the law and non-discrimination of people based on gender were violated.

Also, as reflected in the decision, taking care of a child as a parent is a relationship that does not always depend on the natural and unchangeable gender differences between men and women defined within the framework of family and social relationships. That it is not a legal condition to define a person depending on whether they are male or female, and that this regulation will indirectly cause negative consequences such as placing more responsibilities on the mother in childcare relationships, and restricting the opportunity for parents to make free choices and take care of their children with equal rights.

The Parliament accepted the above decision on January 29 of the same year /issued Resolution No. 20/ and amended the relevant regulations on May 6, 2021, and starting from July 1 of the same year, fathers who take care of their children benefits have been granted.

Researchers have concluded that this decision of the Constitutional Court (Tsets) became a historic decision that established a precedent for gender equality, and it was appreciated by the public and created a positive influence and attitude towards future policies.

The decision of the Constitutional Tsets-3:

10.20.2021, Conclusion No. 07:

The Criminal Procedure Law approved in 2017 stated that if the first instance court decides to return the criminal case to the prosecutor, the defendant or the accused has the right to file a complaint, but the victim, who is an equal party to the proceedings, does not have the right to file a complaint. After reviewing the dispute related to this regulation, the Tsets made conclusion and found that the Constitution was violated. With this conclusion, the equality of the parties to the proceedings was ensured, and it was a significant decision that improved the legal status of the participants in the preliminary discussion stage of the criminal proceedings and fulfilled the principle of equality stipulated in the Constitution.

The Parliament of Mongolia issued Resolution on October 28, 2021, with the recognition of the Constitutional Court's conclusion. Thus, on December 3rd of the same year, the relevant law was amended to allow the victim to file a complaint.

With the above conclusion, it was confirmed that "the scope of the "right to a fair trial" provided in the 14th clause of Article Sixteen of the Constitution is a broad concept equivalent to the content of the "right to a fair trial" recognized in international law." Thus, the expanded interpretation of the concept of human rights also became a decision that set a new approach and precedent.

Lastly, not only the decision that non-conformity with the Constitution but also the decision of the Constitutional Court, which finds that confirm with the Constitution, is great importance not only in social cognition but also in the understanding and application of the law. In this sense, it can be understood that the Constitutional Tsets reviews the decisions made by the legislative and executive bodies, while on the other hand, it interprets their decisions on behalf of the Constitution.

CONCLUSION

The demand to clarify the norms of the Constitution in accordance with the evolving historical and specific circumstances always arises, which creates the necessary conditions for interpretation of the Constitution. In addition, the decision of the Constitutional Tsets interpreting the Constitution is not only important to resolving disputes, but also to set precedents in basic social relations and prevent violations, but also to protect and promote human rights and freedoms. Furthermore, it has the importance of having a real impact on the formation of Constitutionalism.

Human rights and freedoms are guaranteed by the Constitution and their fulfilment is protected by the Constitutional Court, which is the greatest achievement of the democratic system and the goal of the legal state.

Within the framework of this goal, we are pleased to mention that the Constitutional Tsets of Mongolia is contributing to the interpretation of fundamental rights and freedoms by issuing numerous interpretations of the Constitution.

CONSTITUTIONAL INTERPRETATION IN PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN MYANMAR

Cho Mar Htay
Ei Ei Soe

CONSTITUTIONAL TRIBUNAL OF THE REPUBLIC OF THE UNION OF MYANMAR

CONSTITUTIONAL INTERPRETATION IN PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN MYANMAR

Cho Mar Htay[*]
Ei Ei Soe[**]

1. Historical Background of Legal System in Myanmar

Myanmar was a sovereign State having sovereign power and was standing on its own laws and its own legal system ever since thousands of years ago. After the annexation of Upper Myanmar by the British, Myanmar was one of the provinces of India until before the enforcement of the Government of Burma Act, 1935. As a result of pervading the British's laws and justice, the Common Law Legal System was introduced and enforced in Myanmar's Judiciary. Even though the statute laws of Myanmar Kings were being gradually faded, the Myanmar Customary Law have been still remained and exercised to the present day. After Independence, the British Legal System based on the conception of "Equity, justice and good conscience" has been rooted as a basic of Myanmar Legal System. Therefore, the legal practice of constitutional interpretation of Myanmar is definitely preferred the fundamental principles on Interpretation of Constitution in Common Law countries. Myanmar Legal System is Common Law System, but sometimes in few cases, Myanmar adopted and applied the appropriate features and concepts of Civil Law System.

2. Application of Laws for Constitutional Interpretation in Myanmar

On looking back to the Myanmar's legal history, the very first Constitution of Myanmar after Independence, the 1947 Constitution which was defunct in 1962, impliedly conferred the power of constitutional interpretation to the Supreme Court of the Union. According to the section 222 (3) of the 1947 Constitution, the Supreme

[*] Deputy Director at the Constitutional Tribunal of the Republic of the Union of Myanmar.
[**] Assistant Director at the Constitutional Tribunal of the Republic of the Union of Myanmar.

Court followed the Burma General Clauses Act of 1898 for the interpretation and application of Constitution. This law had been modified two times in 1961 and 1965 respectively. This aforesaid General Clauses Act had been also applied for more than 75 years until it was repealed in 1973.

The second Constitution of Myanmar called the Constitution of Socialist Republic of the Union of Myanmar was enforced on 3rd January, 1974. Under section 200 (a) of the 1974 Constitution, the interpretation of Constitution must be quoted the Interpretation Law, 1973. Under the 1974 Constitution, the power of constitutional interpretation was granted to the Pyithu Hluttaw (the People's Parliament).

In the current trend, the power of constitutional interpretation is bestowed to the Constitutional Tribunal of the Union of Myanmar under section 322(a) of the 2008 Constitution. Section 453 of the 2008 Constitution gives the Tribunal a clear mandate to follow the Interpretation Law, 1973 in interpreting the Constitution as well. As long as the progressive developments of the Constitution, such law also was modified five times in 1988, 1989, 1997, 2011 and 2021. According to section 3 (a) and (b) of such law, the main guidelines for interpreting the provisions of any law, including the 2008 Constitution, shall be as follows: -

> (a) Expressions contained in any provision of law shall be construed in their ordinary and daily context; provided that an expression which requires a specific interpretation according to the context shall be interpreted in a specific manner;
>
> (b) Any provision of law shall be interpreted in conformity with the intention of the legislative authority which enacted the said law.

3. General Rules for Constitutional Interpretation in Myanmar

The concepts and practices of constitutional interpretation are different in nature and origin from one legal system to another. Among the various principles of the interpretation of the Constitution in common law countries, basically, there are two fundamental principles of constitutional interpretation which are usually applied in Myanmar's common law legal practice. It can be noted as follows;

(1) The literal or grammatical interpretation and

(2) The golden rule.

The literal or grammatical interpretation means that the words of an enactment are to be given their ordinary and natural meaning according to the rules of grammar. The golden rule is a modification of the principle of grammatical interpretation. It says that ordinarily the court must find out the intention of the legislature from the words by giving them their natural meaning but if this leads to absurdity, repugnance, inconvenience, hardship, injustice or evasion, the Court must modify the meaning to such an extent and no further as would prevent such a consequence.

This principle is also known as the rule of purposive constitution. It is the method of interpretation of law based on the intention of the legislators on such provisions of the text.

The Constitution is a fundamental law of the country. It should not be interpreted in a narrow and pedantic sense. The Constitution should be interpreted in a broad and liberal spirit. The language of Constitution should be constructed as a living organism capable of growth and development. It should be properly assumed that a Constitution is intended to meet and be applied to new conditions and circumstances as they may arise in the course of the progress of the Community. If the Constitution expresses one thing, this means that express mention of one thing implies the exclusion of another. The Constitution must be considered as a whole in order to meet the purpose of the Legislature and to ascertain the true intent and meaning of any particular provision.

4. Constitutional Interpretation in Protection of Fundamental Rights and Freedoms in Myanmar

The Constitution should be interpreted not only to avoid absurdity or inconsistency, but also to make it most beneficial to the widest possible amplitude of its powers. Basically, the Constitution of a State set outs the framework and functions of the government of a state as the body polity, declares the relations between the government and the citizens of the state, enshrines and guarantees the legitimacy of the fundamental rights of citizens. The Constitution is the paramount law

and is unlike other ordinary statutes which can be altered, modified or repealed at any time.

In Myanmar, writs such as Writ of Habeas Corpus, Writ of Mandamus, Writ of Prohibition, Writ of Quo Warranto, Writ of Certiorari are issued by the Supreme Court under section 296 of the 2008 Constitution in order to protect the fundamental rights of people. According to Section 377 of the 2008 Constitution, every citizen of Union of Myanmar shall have the right to apply writs for the protection of their fundamental rights given by the Constitution to the Union Supreme Court. Section 323 of the Constitution prescribes that the Court may submit the case to the Constitutional Tribunal if there arises a constitutional dispute in trial.

The Courts and the Constitutional Tribunal, having been constituted by the Constitution, are the protectors and guardians of the rights of the individuals. There was a landmark decision of the Constitutional Tribunal in which the Tribunal safeguards and protects the rights of national races with the adherence of section 348 of the Constitution which stipulates that "The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth."

In such case, **Dr. Aye Maung, Member of Amyotha Hluttaw and 22 others vs. the Republic of the Union of Myanmar**[1] 23 members of Amyotha Hllttaw (the National Parliament) including Dr. Aye Maung presented the submission questioning whether the term "Minister of the National Races Affairs" under Section 5 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States and the exclusion of "Minister of the National Races Affairs" among the "Minister of the Regions or States" are in conformity with the Constitution of the Republic of the Union of Myanmar.

The main issues of that case are whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Regions or States concerned and whether they are entitled to the emoluments, allowances and insignia of office as the Ministers of the Regions or States.

1 2011, M.L.R. (Constitutional Tribunal). p.37.

According to Section 48 of the Constitution, the Basic Principles of the Union shall be the guidance in enacting laws by legislature and in interpreting the provisions of the Constitution and other laws.

Under the Constitution, representatives of the national races are entitled to participate in the legislation of the Region or State concerned. Similarly, representatives of the national races may participate in the administration of Region or State concerned to manage national races affairs.

The president of the Union assigns duties, to the Ministers of the National Races Affairs of the Regions or States as having equal status to Ministers of the Regions of States concerned.

Therefore, it was decided and interpreted by the Tribunal that since the Ministers of National Races Affairs of the Regions or States are Ministers of the Regions of States concerned and they are the persons defined by Section 4(c) of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States and, Sections 5 and 17 of the said Law are of unconstitutionality. In such case, it is obvious that the Minister of the National Races Affairs and the other Ministers of the Region or State have an equal status without any discrimination.

Moreover, the Constitutional Tribunal put a great emphasis on the protection of fundamental rights and freedoms of the people, which are enshrined in the Constitution. Tribunal also maintains and safeguards the independent adjudication of Judiciary.

In the case of **Brigadier General Maung Maung, Member of Pyithu Hluttaw and 49 others vs. the Pyidaungsu Hluttaw[2],** the applicants submitted the preliminary submission to the Tribunal in order to adjudicate any actionable order upon the author who wrote an article about the status of special commissions established by the Union Parliament. Under the contempt of Courts Law, the acts verbally written or with a symbol or either in a prominent image or deliberate disclosure or writing as news, publication or publication means on any point to be decided by the court before any decision has been made are covered the criminal contempt.

2 2017, M.L.R. (Constitutional Tribunal). p.42.

In this regard, the Tribunal viewed that all citizens have the right to express and publish their convictions and opinions freely but on the other hand, it is needed that such a right of freedom do not amount to the substantial interference with the due administration of justice.

The Tribunal answered and held, in this case, that the expressions and statements in the article are not amount to the influence over the trail and the substantial interference with the due administration of justice of the Tribunal.

Besides, another famous case is **the Petition submitted by Dr. Aye Maung, Member of Amyotha Hluttaw and 23 others**[3] also known as "the White Card case", of the Tribunal in which the Constitutional Tribunal protects the constitutional right to vote of the citizens enshrined in the Constitution.

In such Petition, Dr. Aye Maung and 23 MPs from Amyotha (National) Parliament brought the submission to the Tribunal, requesting to check the constitutionality of the Law on the Referendum for the Approval of the Bill Amending the Constitution of the Republic of the Union of Myanmar (2008). They questioned one of the provisions of the Referendum Law most specifically Section 11(a) that provided the holders of Temporary Identity Cards, shall have the right to vote in the Referendum.

The main issue of the case is to interpret the constitutionality of Section 11 (a) of the Referendum Law for amending the Constitution, which allows the right to vote to the holders of Temporary Identity Cards.

The Tribunal notes the importance of the Constitution which determines the State policy, framework structure and functions of three Branches, namely, the Legislative power, Executive power and Judicial power. The Constitution is the Guardian of Laws or Fundamental Law or Basic Law, which expressly declares the Basic Principles that are needed to be bound among three Branches or relationship between these three Branches and the people. The Constitution also establishes the State Policy structure which indicates strong sovereign power.

3 2015, M.L.R. (Constitutional Tribunal). p.49.

In light of all these characteristics of the Constitution, it is obvious that the amending process of the Constitution is very important and vital, in exercising State Sovereignty. The Tribunal also takes into account of the provisions relating to the right to vote particularly Section 4, Section 38 (a) and Section 391 (a) and (b) of the Constitution.

Section 4 says that the sovereign power of the Union is derived from the citizens and is in force in the entire country. Section 38(a) states that every citizen shall have the right to elect and to be elected in accordance with the law. If we look into Section 391 (a) and (b), it provides that;

(a) every citizen who has attained 18 years of age on the day on which the election commences, who is not disqualified by law, who is eligible to vote, and person who has the right to vote under the law, shall have the right to vote;

(b) Every citizen who is eligible to vote and who has the right to vote under the law shall cast a vote only for each Hluttaw at a constituency in an election;

Pursuant to all these provisions, the Tribunal views that the expression "constitutional right to vote" includes every citizen who has attained 18 years of age on the day which the election commences and person who get this right by Law.

However, in the case of those persons who have the right to vote enacted by Law, it is imperative that this Law must be in accord with the Basic Principles enshrined in the Constitution. The Tribunal has given further consideration to a notable point that although priority shall be given to required qualifications prescribed for citizens, close attention shall also be given to other required stipulations if the right to vote is prescribed by the Law. In this connection, reference is made to the 1982 Union Citizenship Law. This Citizenship Law provides the authority, the process and steps to become Associated Citizen and Naturalized Citizen.

After given attention to all these facts, it is to be noted that persons holding Temporary Identity Cards referred in the Referendum Law are meant, to be the holders of the Temporary Identity Cards (White Cards) under 1951 Residents of Burma Registration Rules, Rule 2 (e).

Under 1951 Rules, holding of this Temporary Identity Card is only allowed for the fixed period of time and is issued in lieu of the National Identity Cards. The Immigration and Manpower Ministry presented that under 1951 Residents of Burma Registration Rules, the Temporary Identity Cards are issued to (a) those who reside in the territory of the Republic of the Union of Myanmar without any identification or Identity Card (b) those who remain to be scrutinized as citizens by law (c) those who remain to be scrutinized as citizens due to lack of holding of any supportive or relevant documents (d) those who are not entitled to hold Foreigner Registration Cards under 1948 Foreigners Registration Rules.

These Temporary Identity Cards are issued solely to certify that they resided in the territory of the Union of Myanmar. By notification on 11 February 2015, the President has issued the order on the expiration of Temporary Identity Cards.

According to that notification, Temporary Identity Cards issued to those who resided in Myanmar under the 1948 Residents of Burma Registration Act would be expired on 31 March 2015. Therefore, holders of the Temporary Identity Cards were obliged to surrender the Cards by 31st May 2015 for further review.

Therefore, it is noteworthy that under the Presidential Notification, validity of the Temporary Identity Cards, which are meant to be issued on temporary basis, are expired and they have no legal validity or no legal force.

The Tribunal is of the view that the holders of the Temporary Identity Cards are persons who remain to be scrutinized in accordance with the law and the legal status of those persons have not been clarified or confirmed.

For all these reasons, if the holders of the Temporary Identity Cards are allowed to cast votes under the Referendum Law, it is not in align with the Constitution, particularly with regard to Section 38 (a), Section 391(a) and Section 391(b). Therefore, the Tribunal ordered that Section 11 (a) of the Referendum Law for amending the Constitution (2008) which permits holders of the Temporary Identity Cards is not in accordance with the Constitution.

As can be seen in the above White Card case, we take a view that the constitutional right to vote of the citizens shall be well protected from all possible infringements by executive authorities or State institutions. The infringement of the right to vote is the biggest obstacle to democratic reform and it is also the disregard of State's Sovereignty. In the same way, it, sometimes, leads to the taking over the sovereignty of the State by wrongful forcible means. Although the Constitutional Tribunal protected the right to vote of citizens in the above White Card case, unfortunately, there occurred mismanagement and electoral malpractice in 2020 General Election and it caused the today's political crisis in Myanmar.

We are of the opinion that the individual right of complaint serves to prevent not only the unconstitutional action of the executive and legislative sectors but to maintain one's domestic values and rights. The Constitutional Tribunal is usually endeavouring and seeking for further considerations in the matters of individual rights protection under the Constitution in order to serve the direct and comprehensive protection for the people's rights.

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS- CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

Tatjana Janjic – Todorova

CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS- CASE-LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

Tatjana Janjic – Todorova[*]

Basic facts about the CC of the Republic of North Macedonia

The CC of Türkiye this year celebrated its 60th years of its existence and I congratulate our colleagues for this important anniversary. The CC of the Republic of North Macedonia will be celebrating its 60th anniversary in 2024, so we are almost an equally old institution. The constitutional judiciary in Macedonia was established for the first time by the Constitution of the Socialist Republic of Macedonia of 1963, in the time when Macedonia was part of the former SFRY. The Constitutional Court became operational in 1964. The existing Constitution was adopted in 1991 after the dissolution of former Yugoslavia when Republic of Macedonia gained its independence. The Constitution of 1991 established the Constitutional Court as a body of the Republic in pursuance of the constitutionality and legality and fundamental human rights and freedoms.

According to its constitutional position the Constitutional Court is not included in the system of organization of state powers. It is a separate constitutional body with its status, composition, organization and competences specifically defined by the Constitution itself. In the Republic of North Macedonia there is no specific law on the Constitutional Court, but the way of work and procedure before the Constitutional Court, under the Constitution, are regulated by the Court with its act - Rules of the Constitutional Court.

[*] Legal adviser for International Co-operation at the Constitutional Court of the Republic of North Macedonia.

The CC has two main competences: constitutional review i.e. control of constitutionality of laws and constitutionality and legality of by-laws and direct protection of human rights by so called request for protection of human rights which is one form of constitutional complaint. However, it is limited in scope since the CC does not protect all human rights guaranteed by the Constitution, but only those expressly referred to in Article 110 and which include the following: protection of the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.

The majority of cases the Court is working on are cases of abstract constitutional review, where as the number of cases for direct protection of citizens' rights is still very low (between 10 and 20 cases per year). The abstract control of the constitutionality of laws, that is, the constitutionality and legality of other regulations is dominant in the work of the Constitutional Court and it, basically, absorbs the other competences of the Court. The control of the constitutionality and legality is realized as abstract and *a posteriori*, that is, it is possible only on valid acts. In case when the Constitutional Court finds that an act is contrary to the Constitution, it will annul or repeal it with a decision, which is final and enforceable and not subject to control by another state body.

Interpretation of the Constitution in protecting human rights and freedoms

The Republic of North Macedonia is a party to the European Convention on Human Rights to which the CC regularly refers to when deciding cases involving human rights issues. The constitutional basis for the application of international law by the courts is Article 8 of the Constitution which establishes the fundamental values of the constitutional order of the Republic, in which, *inter alia*, *basic freedoms and rights of the individual and citizen recognised in international law and set down in the Constitution* and *respect for the generally accepted norms of international law* are defined as the fundamental values; then Amendment XXV to the Constitution relating to the judiciary which

stipulates that: "*Courts shall be autonomous and independent. Courts judge on the basis of the Constitution and laws and international treaties ratified in accordance with the Constitution*"; and Article 118 of the Constitution which provides that "*International treaties ratified in accordance with the Constitution are part of the internal legal order and may not be changed by law*."

These provisions actually mean that the international treaties are an integral part of the domestic legal order, they can be applied directly by the courts, and have priority over other legislation, since they are superior than domestic laws, but subordinate to the Constitution of the Republic of North Macedonia.

The application of the human rights treaties and especially the European Convention on Human Rights is very important in the practice of our Court. As I said earlier, the CC in the proceedings for the protection of human rights, as well as in the cases of abstract constitutional review of norms, interprets the constitutional provisions by reference to the ECHR and the case law of the ECtHR, since according to the jurisprudence of the CC, the European Convention is a criteria for full interpretation of the constitutional provisions: "According to the Court, the catalogue of "Basic freedoms and rights of man and citizen" contained in Articles 9 - 60 of the Constitution of the Republic of Macedonia are an expression of the democratic character of the constitutional order of the Republic and the basis of all other provisions of the Constitution that contain direct guarantees for protection of the freedoms and rights of man and citizen. The Convention for the Protection of Human Rights and Fundamental Freedoms, together with the recognized freedoms and rights is part of the internal legal order of the Republic of Macedonia, is also a criterion for the full interpretation of the constitutional norms (Decision No. 104/2008 of 20.11.2008).

What does it mean exactly? It means that in the interpretation of the provisions of the Constitution, especially those that are drafted in general and abstract terms, or are vague and undefined, the Constitutional Court refers to the positions of the European Court for determining the content and scope of certain constitutional rights or the circumstances under which they can be limited.

Case law example: In the case U.no.31/2006, the Constitutional Court reviewed the constitutionality of the provision of the Law on Public Assemblies that regulated the exercise of the right to peaceful assembly. This right is guaranteed under Article 21 of the Constitution according to which citizens have the right to assemble peacefully and to express public protest without prior announcement or a special license. Under paragraph 2 of this article, the exercise of this right may be restricted only during a state of emergency or war.

As we can see, the Constitution does not say anything as to the possibility for restriction of this right in ordinary, peaceful circumstances. In the interpretation of this constitutional right and its limitation, the CC departed from the following: "The absence of an explicit constitutional provision regarding the possibility of restricting the exercise of the right to assemble peacefully in regular, that is peacetime conditions, in the opinion of the Court, should not be interpreted in the sense that the right to assemble peacefully in regular circumstances is an absolute right that is exercised without any limits whatsoever and without any respect for the freedoms and rights of others. Such principle of absolute exclusivity exists neither in the European nor in international context, and the Court holds that it may not be established under the Constitution of the Republic of Macedonia either."

And in order to fill in this constitutional lacunae, the CC invoked Article 8 par. 1 of the Constitution, and said the following: "From Article 8 paragraph 1 line 1 of the Constitution, under which one of the fundamental values of the constitutional order are the basic freedoms and rights of the individual and citizen recognized in international law and defined by the Constitution, taking into consideration the importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms not only as part of the internal legal order of the Republic of Macedonia, but because of the general principles on which it lies and which it promotes, the Court decided that the interpretation of Article 21 of the Constitution should be based on those legal principles.

Hence, according to the Court, the freedom to assemble peacefully should be observed in the context of the other fundamental human

freedoms and rights and protected public interest. This especially for the fact that interference in the exercise of the freedom of assembly may jeopardize the constitutionally guaranteed freedom of conviction and expression, but also the manner of realization of the right to assemble peacefully may obstruct or restrict the exercise of other constitutionally guaranteed rights. Such interrelation of the rights demonstrates that very often the line of division between what is necessary restriction of the right to public assembly in the function of protecting the other human rights, and what is a violation of the right to public assembly and expression is very subtle and thin.

Because of these very reasons, in the opinion of the Court, each restriction of the exercise of the freedom of public assembly must pass the test of proportionality, there must be a fair balance reached between the right of citizens exercising the freedom to assemble peacefully and the rights and interests of other citizens, that is, the other values and protected public interest as a legitimate goal of the restriction.

After the balancing exercise, the Court found that: "the challenged provision may easily be the basis for the competent authority to identify a restriction of the freedom of movement in terms of the traffic regulations even for the smallest obstruction of the traffic, exactly because this norm does not contain a qualitative criterion about the necessity for restricting the assembly, and thereby a clear indicator that the aim of the law is for the assembly to succeed, and not to be disabled. Accordingly, while the contested provision at first sight appears to be only a description about what an assembly should look like, in the opinion of the Court this provision in the second part contains too general grounds for its restriction to which the authorities can easily call upon. These grounds for restriction of assembly, in the absence of balancing criteria present the right of assembly as a dangerous matter, which, according to the Court, may not be justified by anything."

So, the proportionality test is a very useful tool that is used by the CC in the interpretation of the norms of the Constitution when it comes to limitation of human rights and freedoms and has been applied many times by the Constitutional Court not only in cases of human rights

protection, but also in proceedings for abstract constitutional review of norms.

Another case when the CC applied the proportionality test was the case U.br.189/2012 (Decision of 25 June 2014) regarding the right to leave your own country guaranteed by Article 27 of the Constitution. The Court repealed a provision of the Law on Travel Documents that provided withdrawal of passport if the person is forcibly returned or expelled from another country for having violated that country's regulations for entry and stay.

Article 27 of the Constitution guarantees to every citizen of Republic of Macedonia the right to freedom of movement and the right freely to choose one's residence on the territory of the Republic of Macedonia, as well as the right to leave and to return to the territory of the Republic. The enjoyment of this right can be restricted by law, only in cases where it is necessary for the protection of the security of the Republic, for conduct of criminal proceedings or for protection of public health.

The Court concluded that "the measure by itself is disproportionate and that it imposes excessive restriction on the freedom of movement of the person, namely on the right to travel abroad. This is for the reason that the persons affected by the disputed measure have been already deported i.e. forcibly returned in the Republic of Macedonia, which means that those persons already bear certain consequences, so it would be logical to ban re-entry into the state or states whose regulations for entry and stay they have violated, but by those states, and not by their own state. Instead, with the disputed measure which comprises revocation of the person's passport for a period of one year, these persons are entirely deprived of their right to leave their country and to travel to another foreign country, and that measure is applied by their own country. To automatically impose a ban on these persons to travel anywhere abroad is precisely what makes the measure disputable in relation to the principle of proportionality, as well as in relation to the principle of the rule of law. In the Court's opinion, a state can restrict the right i.e. the freedom to leave one's country to its own national who holds a valid travel document, under serious and exceptional circumstances, such as are those listed under Article 27 of

the Constitution. The disputed limitation, although envisaged by the Law, is excessive and disproportionate and is not considered as part of the permissible restrictions of this right under Article 27 paragraph 3 of the Constitution of the Republic of Macedonia".

Another method of interpretation that is used by the Constitutional Court in the process of appraisal of the constitutionality of laws is the so-called systemic interpretation. This tool is usually used not for the interpretation of the constitutional norms, but more for the interpretation of the provisions of laws that are subject to constitutional review, since it explores where the contested law stands within the whole system of laws that regulate certain issue. When deciding on cases by using the systemic interpretation, the CC usually elaborates on the principle of legality or the rule *lex specialis derogat legi generali*.

Although in its jurisprudence the Constitutional Court has clearly indicated that it is not competent to assess the mutual conformity of laws (such as regulations of the same rank), it has often abolished provisions of special laws in cases where they deviated to a large extent from the general law. This situation violates the principle of the rule of law, which requires the existence of a stable, coherent and internally harmonized system of legal norms.

As an example, I would mention the case U.no.169/2016, (Decision of 16.11.2017) by which the CC repealed the Law on the Determination of the Type and the Severity of Penalties. The Court found that the law is not in accordance with the constitutional principles of the rule of law, separation of powers and the independence of the judiciary, because it establishes rules and criteria for sentencing that reduce the role of the judge in sentencing to performing simple mathematical operations and does not allow for the individualization of punishment on the basis of the facts and circumstances of each individual case. The Constitutional Court found that the rules regarding the penalties in the Law depart from the system of penalties determined in the Criminal Code. This situation leaves room for arbitrariness in sentencing, which violates the principles of the rule of law and legal certainty of citizens. The Court underlined that, while the legislator's aim in adopting the Law could not, *per se*, be regarded as contrary to the Constitution, the Law as an instrument for achieving that aim is not constitutional in

terms of the established fundamental constitutional values of the rule of law and the independence of the courts, as well as the basic legal principles underlying modern penal law.

Another case-law example is Decision 191/2005 (12.04.2006), by which the Court repealed several articles of the Law on Representatives (MPs): "With the very fact that the legislator has determined first of all a very low minimum number of period of insurance and age for the acquisition of a more favorable old-age pension for the representatives vis-à-vis the ones established in the general law for pension and disability insurance for all citizens, the determination of the amount of the old-age pension on more favorable grounds than the existing ones, the Court finds that…..there are no justified reasons for that, and that the disputed provisions deviate from the general principles on the pension and disability insurance which violates the constitutional principle of equality and prohibition of discrimination…."

Conclusion

Interpretation of the legal norms is a complex activity in which the CC engages every day when deciding on constitutional cases brought before it. Searching for the meaning of the legal texts by interpretation, is necessary considering that everywhere in the world the Constitutions are short and concise acts, whose norms are too general, abstract, often vague and ambiguous. It is often said that no other act except the Constitution contains so few words to regulate so many relationships in society and the state. That is why the constitutional courts, in addition to the traditional methods of interpretation (such as the textual interpretation, systemic interpretation, teleological interpretation) increasingly apply other means and tools. Among these methods I mentioned the ECHR's three-part test or the proportionality test applied in interpreting the criteria for limitations of human rights.

The importance of the ECHR and the jurisprudence of the ECtHR in its interpretation, have undoubtedly influenced the work of the CC in its interpretation of the national constitution and has opened the door for the internationalization in the interpretation of our Constitution. This has been considered as a positive development that has to

continue in future not only by the CC but also by ordinary courts. The CCs with some of its decision has given a clear guidance to other national courts that the application of the ECHR presupposes the use of the jurisprudence of the Court in Strasbourg, and all with a view to efficient protection of human rights by domestic courts according to European standards.

INTERPRETATION OF THE CONSTITUTIONAL PROVISIONS ON RIGHTS AND FREEDOMS: THE ROLE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Nikita Igumnov
Pavel Ulturgashev

CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

INTERPRETATION OF THE CONSTITUTIONAL PROVISIONS ON RIGHTS AND FREEDOMS: THE ROLE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION[1]

Nikita Igumnov[*]
Pavel Ulturgashev[**]

1. In abstracto and in concreto review in the case-law of the Constitutional Court of the Russian Federation

Constitutional rights and freedoms are the cornerstone of the Russian legal system. Their protection is one of the key goals of constitutional justice. The Constitutional Court of the Russian Federation (the Constitutional Court), as any other public authority, is guided in this regard by the Constitution of the Russian Federation (the Constitution) stating that Russia is a democratic state under the rule of law (Article 1, Part 1) where rights and freedoms are recognized as highest value (Article 2), while determining the activities of public authorities and being ensured by justice (Article 18). After the constitutional reform of 2020, the Constitution made even more emphasis on the protection of human rights by the Constitutional Court. Presently, the Constitution explicitly states that the Constitutional Court is the highest judicial body of constitutional control in the Russian Federation exercising judicial power through constitutional judicial proceedings, particular aims of which include protection of fundamental rights and the freedoms.

Concise constitutional provisions forming the catalogue of rights and freedoms are gathered in in Chapter 2 of the Constitution. This Chapter is its «unchangeable» part along with chapters 1 and 9, meaning that it cannot be amended by way of adoption of a Law on Amendment to the Constitution. Since there is no possibility for textual

1 Prepared on the basis of materials and data as of 20 September 2022.

* Senior Consultant at the Constitutional Court of the Russian Federation.
** Leading Counsellor at the Constitutional Court of the Russian Federation.

changes, the specification of the content of human rights and freedoms and their adaptation (expansion) to changing conditions implies active constitutional interpretation. Therefore, provisions of the Constitution are to be detailed ultimately in the rulings of the Constitutional Court. In protecting constitutional rights, the Court enriches constitutional principles and values with substantive content. The power to interpret the provisions of the Constitution makes it possible to adjudicate on the content of constitutional norms by strictly legal (non-political) methods.

According to Part 5 of Article 125 of the Constitution, the Constitutional Court interprets the Constitution of the Russian Federation *in abstracto* at the request of the President, the Federation Council, the State Duma, the Government, legislative authorities of the constituent entities of the Russian Federation. Interpretation of the Constitution in this procedure is in order where there is uncertainty in understanding the norms of the Constitution. The result of such interpretation is binding for everybody, and its legal force is equal to the Constitution of the Russian Federation itself. In the practice of the Constitutional Court, this procedure was in demand during the early period after enactment (popular approval) of the Constitution. It was mainly associated with organization of public power rather than disputes about rights and freedoms.

But the most commonly exercised power of the Constitutional Court is the interpretation of the Constitution *in concreto*. It is carried out in the constitutional complaint procedure, or in the procedure for examination of court requests for verification of constitutionality of laws. Despite the lack of constitutional provisions directly prescribing such interpretation, its possibility flows from the very nature of the Constitutional Court. It is impossible to assess constitutionality of a legislative regulation without interpreting the relevant norms of the Constitution of the Russian Federation. Significance of this type of interpretation was emphasized by the Constitutional Court itself. The Court noted that the legal force of such interpretation shall be higher than interpretation performed by any other body (Judgment № 25-P of November 8, 2012).

Over the years, the Constitutional Court has examined virtually all constitutional provisions, leaving almost no provisions on rights and

freedoms that have not been affected in one way or another by the constitutional interpretation.

Since an exhaustive review of all interpretations given by the Constitutional Court is not possible within this paper, it seems appropriate to focus on some recent issues reflected in the practice of the Constitutional Court.

2. Interpretation of provisions on human rights and freedoms: International human rights law and the Constitution of Russia

Since the Russian Federation is not a member to the Council of Europe anymore, the issue of correlation of the rights and freedoms guaranteed by the Constitution with international-law human rights standards has attracted increased attention and even urgency.

The Constitution prescribes that the universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system (Article 15, Part 4). Moreover, Part 1 of Article 17 of the Constitution establishes that human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and the Constitution. These provisions are among the basics of the constitutional system of Russia. In conjunction with the Preamble to the Constitution and its Article 79, they open up the possibility of implementation of international legal standards into the Russian legal system and essentially imply agreement of the Russian Federation with such standards insofar as this does not entail restrictions on human and civil rights and freedoms and does not conflict with the basic principles of the constitutional order of the Russian Federation.

At the same time, it should be taken into account that consideration of the international human rights standards in the interpretation of constitutional rights and freedoms cannot lead to undermining the principle of supremacy of the Constitution, since only the Russian Constitution determines the limits of the influence of the principles and norms of international law on the content of constitutional rights and freedoms.

The practical expression of these limits is the concept of constitutional identity, which was developed in the course of the interaction of the Russian legal system and the practice of the European Court of Human Rights (the ECtHR). This concept enables identification of the most significant provisions of the Constitution that bar any intrusion thereto on the part of decisions of international bodies. Thus, it protects the key norms, the core of the national legal order including the provisions on rights and freedoms as defined by the Constitution of the Russian Federation, as well as the basis of the constitutional system.

In this regard, the current Constitution explicitly provides that decisions of international bodies taken on the basis of the provisions of international treaties of the Russian Federation in their interpretation that contradicts the Constitution shall not be executed in the Russian Federation (Article 79). This provision is connected with paragraph «b» of Part 5.1 of Article 125 of the Constitution of the Russian Federation according to which the Constitutional Court shall resolve the issue of the possibility to execute decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation contrary to the Constitution, as well as the possibility to execute decision of a foreign or interstate court or arbitration court, imposing obligations on the Russian Federation, in the event if this decision contradicts the basis of public order of the Russian Federation.

The abovementioned mechanism is based on the fact that the participation in interstate associations does not mean that the Russian Federation renounces state sovereignty, which relates to the foundations of the constitutional system and presupposes supremacy and independence of state power (Judgment of the Constitutional Court of the Russian Federation of July 14, 2015 № 21-P). Consequently, if principles and norms of the Constitution are affected by a decision of an interstate body, Russia may exceptionally withdraw from fulfilling the obligations imposed on it, when such a withdrawal is the only possible way to avoid violating the fundamental principles and norms of the Constitution, i.e. its constitutional identity.

For example, there was the Judgment of the European Court of Human Rights of July 4, 2013 in the case of *Anchugov and Gladkov v.*

Russia, which implied the need to abandon the absolute restriction in the voting rights of all citizens who were kept in places of imprisonment under a court sentence. The Constitutional Court found it impossible to undertake general measures for execution of this Judgment referring to the concept of constitutional identity, since the ECtHR judgment contradicted with the literal meaning of Part 3 of Article 32 of the Constitution of the Russian Federation (Judgment of the Constitutional Court of the Russian Federation of April 19, 2016 № 12-P). Nevertheless, it found a balanced way of its execution.

Overall, there are only two Judgments (the second one is the Judgment of the Constitutional Court of 19 January 2017 № 1-P on the impossibility of executing the ruling of the European Court of Human Rights of 31 July 2014 in the case of *OAO YUKOS Oil Company v. Russia*) recognizing that relevant decisions of an interstate body were impossible to be implemented. These judgments were essentially exceptional as compared to the long-term experience of constructive interaction and mutually respectful dialogue with the European Court of Human Rights supported by the activities of the Constitutional Court on the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms and case-law of the ECtHR in the Russian legal system.

It follows from the above that despite the ceased membership to the Council of Europe, the Constitution still assumes that universally recognized principles and norms of international law shall be taken into account within the scope of interpretation of constitutional rights and freedoms. It is especially important since the multinational people as the only source of power in the Russian Federation recognizes itself to be a part of the world community, as follows from the Preamble of the Constitution. The practice of the Constitutional Court clearly demonstrates that many provisions of the Constitution have been interpreted in the spirit of international legal standards of human rights. In particular, even in its most recent rulings the Constitutional Court noted that constitutional norms on human rights are consistent with the provisions of the Universal Declaration of Human Rights (Judgment of 28 December 2021 № 55-P), the International Covenants on Civil and Political Rights (Judgment of 19 April 2022 № 16-P) and

on Economic, Social and cultural Rights (Judgment of 7 April 2022 № 14-P), Conventions of the International Labour Organization (Judgment of 15 July 2022 № 32-P), etc.

3. *New trends in the interpretation of particular rights and freedoms in the case-law of the Constitutional Court of the Russian Federation*

Under this sub-heading it seems justified, firstly, to note the interpretation of rights and freedoms enshrined in the Constitution of the Russian Federation, that despite extensive case-law of the Constitutional Court have not fallen within the scope of constitutional interpretation until recently. In this regard, recently the Constitutional Court of the Russian Federation interpreted the constitutional norms guaranteeing the rights of indigenous minorities, which was a new development in the practice of constitutional interpretation. Secondly, due to the ongoing scientific and technological progress and the development of new technologies, «classical» rights and freedoms have acquired a new meaning. In particular, digitalization, affecting all spheres of modern society, has seriously influenced the interpretation of such traditional rights as privacy and freedom of information. These aspects deserve additional consideration.

3.1. In accordance with the Constitution the rights of indigenous small peoples are guaranteed by the state; in addition, the state protects cultural identity of all the nations and ethnic communities of the Russian Federation, guarantees preservation of ethnic-cultural and language variety (Article 69).

Among the «aboriginal» rights that the legislation provides for indigenous small peoples is, the right to traditional hunting, ensuring the conduct of a traditional way of living. In the Judgment of 28 May 2019 № 21-P the Constitutional Court stressed that the right to use objects of wildlife (including the right to traditional hunting) is the basis of traditional life support within the traditional way of living of indigenous small peoples and belongs to all persons related to a particular indigenous group. Relying on this interpretation, the Constitutional Court subsequently pointed out that the special guarantees of the rights of indigenous small peoples provided for by legislation within the meaning of the Constitution are aimed

at maintenance of their traditional way of living, their culture and traditions (Judgment of 5 July 2021 № 32-P). At the same time, it follows from the position expressed in this Judgment that saving traditional way of life does not mean its preservation in a conservative way. Such an interpretation is especially significant since for objective reasons some representatives of indigenous small peoples may gradually move away from traditional life, e.g. moving to the city, but still have internal need for self-identification, for holding on to the customs of their ancestors and for passing them to future generations. As the Court puts it, such processes determining the evolution of the status of indigenous peoples should be taken into account and respected by the State.

The interpretation of constitutional guarantees of the rights of indigenous minorities by the Constitutional Court allowed, on the one hand, to uphold the positive aspects of legislation on guarantees of the rights of indigenous minorities and, on the other hand, to set constitutionally significant guidelines (treatment of natural resources with care, the importance of taking into account the connection of a person with the territory of settlement of his ancestors, and of importance of community organization of indigenous minorities peoples, etc.) for further improvement of legal regulation.

3.2. Another example refers to interpretation of the right to privacy and freedom of information in the information society. Here, it should be noted that they are usually interpreted in the context of determining the limits of state interference in private life. The constitutional interpretation generally concerned, for example, gathering information within law enforcement investigation activities, collection of various of data (for example, criminal record), restrictions on the freedom to search for information in the interests of protecting state secrets, etc.

However, with the widespread of the Internet, it became obvious that the problem of collecting and storing information exists not only in connection with the activities of the state. The relations in the information society relate to circulation of information about the personal life, and often include a conflict of rights of private entities. Taking this into account, the Constitutional Court formulated the

position according to which the right to respect for personal and family life and the right to express one's opinion freely, including freedom to receive and disseminate information, protect equally significant interests. On the one hand there is an interest of a private person in maintaining privacy. On the other hand, there is an equal interest of general public in access to information. These rights do not have absolute priority over each other and cannot be subordinated. The indicated clash of two equally valuable rights manifested itself starkly in the case on the acceptability of posting information about doctors on a special Internet forum and the comments about them (Judgment of the Constitutional Court of the Russian Federation of May 25, 2021 № 22-P).

Recognizing the role of the Internet in the context of development of the information society, the Constitutional Court noted that appearance of publications containing personal data of a citizen about whom negative judgments were expressed, among other things, can be attributed to the inevitable costs of freedom of information in a democratic society. The posting of personal data of doctors on the Internet is due to a special public interest in information about persons professionally engaged in providing medical care. Therefore, as the Constitutional Court pointed out, an online publication of information about a medical worker that was previously disclosed on the basis of the law does not violate his rights and freedoms. At the same time, within the meaning of the Constitution, this is possible only if the information about the doctor is true and relevant, and if the online patient comments and reviews about the doctor are subjected to a preliminary or subsequent control.

Thus, the spread of the Internet has significantly influenced interpretation of the right to privacy and freedom of information taking into account increasing importance of constitutional disputes in which the conflict between those two equivalent rights is resolved. That conflict cannot be completely excluded, but it must be taken into account both in the legislative development and constitutional review of the relevant regulation.

4. *Human Rights and COVID-19*

The interpretation of constitutional rights in the face of threats caused by the spread of COVID-19 forms a separate important segment of the case-law of the Constitutional Court.

Russia, like other states, faced the need to impose restrictions on rights and freedoms in order to counter the spread of COVID-19. In the Judgment of 25 December 2020 № 49-P the Constitutional Court of the Russian Federation resolved the issue of the constitutionality of restrictions on freedom of movement (isolation and self-isolation of citizens commonly referred to as lockdown) in connection with the spread of coronavirus. In this Judgment, the Constitutional Court emphasized that human life and health are of highest value, and without them many other goods and values lose their significance. In essence, the State was not just entitled, but even obliged within the meaning of the Constitution to impose temporary and proportionate restrictions to protect the most significant rights and freedoms.

The Court noted that the restrictions imposed by the legislator on leaving the place of residence were due to the objective need for a prompt response to the unprecedented threat of the spread of coronavirus infection. That was a matter of exceptional nature that pursued the constitutionally enshrined goals of protecting the life and health of all persons, including, first of all, the citizens themselves who were temporarily isolated. The proportionality of this restriction was ensured by reasonable and non-discriminatory exceptions to the general rule on the prohibition of leaving one's place of residence (for example, to seek emergency or urgent medical care, to satisfy basic household needs, to walk pets, etc.).

The legal positions expressed in Judgment of 25 December 2020 № 49-P have become the basis for assessment of other restrictions arising from the need to fight COVID-19. Thus, the Court formulated the position that the requirement to protect the respiratory organs with masks pursues publicly significant goals, is aimed at protecting the rights of citizens and does not violate them (Ruling of 20 July 2021 № 1668-O). At the same time, the Constitutional Court has consistently guided the public authorities applying administrative

liability measures (including for violations of restrictions related to COVID-19) urging them avoid formal approach in resolving the issue of bringing to administrative responsibility and to take into account all circumstances relevant to the case.

The Constitutional Court of the Russian Federation also addressed the issue of introducing bans on public events in connection with the spread of coronavirus. The Constitutional Court recognized that such a ban is associated with the need to introduce anti-epidemic measures in a certain territory, has an exceptional character and pursues constitutionally fixed goals of protecting the life and health of citizens (Ruling of 20 July 2021 №1680-O). At the same time, the Constitutional Court has noted that proportionality and necessity of such restrictions were confirmed statistically with reference to steady spread of infection, thereby requiring the State to take the necessary measures.

In conclusion to the above, it can be said that the interpretation of the Constitution of the Russian Federation carried out by an independent judicial body – the Constitutional Court of the Russian Federation creates conditions for identifying the actual meaning of the norms of the Constitution of the Russian Federation. This ensures the realization of the rights and freedoms provided for by the Constitution of the Russian Federation in accordance with the current challenges that the national legal system faces and are taken into account by the Constitutional Court of the Russian Federation when interpreting the Basic Law.

ОСОБЕННОСТИ ТОЛКОВАНИЯ КОНСТИТУЦИИ В ЗАЩИТЕ ОСНОВНЫХ ПРАВ И СВОБОД ЧЕЛОВЕКА И ГРАЖДАНИНА

Usmonova Manizha Abdulmuminovna

CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN

особенности Толкования Конституции в защите основных прав и свобод человека и гражданина

Усмонова Манижа[*]

Необходимость толкования нормативных актов государственными органами и должностными лицами возникает в целях их единообразного применения. Толкование или интерпретация – это деятельность по установлению точного содержания правового акта для его практической реализации.

Общие принципы и подходы к этой сфере деятельности определены в Конституции и Законе Республики Таджикистан от 30 мая 2017 г. , № 1414 «О нормативных правовых актах»[1], согласно которой в случае обнаружения неясностей и разночтения нормативного правового акта, противоречивой практики его применения, орган (должностное лицо), принявший соответствующий нормативный правовой акт, дает необходимое толкование его норм в акте толкования, имеющем официальный и обязательный характер.

Толкование актов можно классифицировать по различным признакам.

Толкование различают по его юридической обязательности:

а) официальное (несет властный характер, оно обязательно для исполнения);

б) неофициальное (не имеет обязательной юридической силы). Официальный и неофициальный характер толкования зависит от субъекта, дающего толкование.

---

[*] Chief Specialist on Appeals of Individuals and Legal Entities at the Constitutional Court of the Republic of Tajikistan.

1 Ахбори Маджлиси Оли Республики Таджикистан, 2017 год, №5, ч1, ст.271; 2019 год, №7, ст.465; Закон Республики Таджикистан от 23 декабря 2021 года. №1810.

Официальное толкование — это разъяснение истинного смысла норм права, даваемого уполномоченными на то государственными органами.

Официальное толкование подразделяется на нормативное и казуальное. Нормативное толкование имеет общий характер, т.е. оно обязательно для определённого вида общественных отношений (категории дел); казуальное — обязательно для конкретной ситуации (данного дела).

Некоторые ученые, в том числе Алексеев С.С., выделяют правоприменительное, нормативное толкование — это разъяснение, даваемое юрисдикционными органами[2] (Верховным Судом, Высшим Хозяйственным Судом, Генеральным прокурором). Любой акт нормативного толкования, принятый указанными юрисдикционными органами, является, как отмечает А.С. Пиголкин[3], нормативным в том смысле, что он носит общий характер и является частью толкуемого нормативного акта.

При этом согласно Закону Республики Таджикистан «О нормативных правовых актах» под актом официального толкования понимается официальный документ уполномоченного органа, в котором разъясняется содержание нормативного правового акта или его нормативные положения.

В соответствии со статьёй 82 данного Закона акт официального толкования принимается:

- конституционным законом для Конституции Республики Таджикистан;

- законом для законов, принятых путём всенародного референдума;

- совместным постановлением Маджлиси милли и Маджлиси намояндагон Маджлиси Оли Республики Таджикистан для их совместных постановлений;

- указом Президента Республики Таджикистан для нормативных правовых актов Президента Республики Таджикистан и т.д.

2 Алексеев С.С. Общая теория права. М., 1982. Том II. С. 310.
3 Пиголкин А.С. Толкование нормативных актов в СССР. М., 1962. С. 134.

Пленум Верховного Суда Республики Таджикистан и Пленум Высшего экономического суда Республики Таджикистан, обобщая судебную практику по применению законодательства, дают руководящие разъяснения, которые являются обязательными для судов, других органов, должностных лиц, применяющих закон, по которому дано разъяснение.

При толковании нормативного правового акта не допускается внесение в него изменений и дополнений.

Нормативное толкование — это разъяснение, даваемое с целью устранения ошибок в понимании акта и обеспечения его единообразного применения. Нормативное толкование имеет несколько видов: аутентическое и легальное (делегированное) толкование.

Аутентическое толкование представляет собой разъяснение нормативного акта органом, его принявшим. ("Аутентический" означает "подлинный", "основанный на первоисточнике"). Правом аутентического толкования обладают все нормотворческие органы.

Легальное или делегированное толкование предполагает дачу разъяснения нормативного акта иным уполномоченным на то органом, который не принимал акт, подлежащий толкованию.

В построении теоретико-правовых концепций современности юридическая наука и практика достигла колоссальных успехов. В осмыслении теорий толкования с помощью одних традиционных и общеизвестных понятий, конструкций невозможно или затруднительно объяснить формирование и развитие социально-правовых новаций. Как альтернативный способ разрешения таких познавательных проблем, в научной литературе постепенно выдвигаются на первый план межсистемные (над системные) правовые образования, задача которых – выявить, аргументировать природу и ориентировать на решение практических задач феномены, не укладывающиеся в рамки прежних концептуальных подходов[4].

Рассматривая причины, содержание, пределы и степень конституционности конституционных поправок, среди прочего,

4 См.: Гаврилов Д.А. Конституционно-правовое толкование: понятие и содержание / Проблемы теории и истории государства и права // Вестник Волгоградского гос. ун-та. Сер. 5, Юриспруд. 2011. № 2 (15). С.35-41.

в юридической литературе дискутируется возможность органа конституционной юстиции контролировать конституционность поправок[5]. Однако до сих пор, как утверждают специалисты, не ставился вопрос о возможности органа конституционной юстиции быть автором фактических конституционных поправок.

Вопрос о целесообразности института официального толкования Конституции, полномочие органа конституционной юстиции толковать конституцию во многих государствах или отсутствует, или ограничено. Например, в Основном законе ФРГ, который допускает толкование Федеральным конституционным судом лишь «в связи со спорами об объеме прав и обязанностей высшего федерального органа или других сторон, наделенных собственными правами…»[6] (ст. 93).

Согласно ч.5 ст.125 Конституции Российской Федерации[7] Конституционный Суд Российской Федерации по запросам Президента Российской Федерации, Совета Федерации, Государственной Думы, Правительства Российской Федерации, органов законодательной власти субъектов Российской Федерации дает толкование Конституции Российской Федерации. Указанная прерогатива некоторыми исследователями считается вполне уместной и даже полезной. Например, Кряжков В. А. утверждает,

5 См., например: Краснов М. Толкования Конституции как ее фактические поправки // Сравнительное конституционное обозрение. 2016. №1 (110). С.77-91; Медушевский А. Конституция России: пределы гибкости и возможные интерпретации в будущем // Сравнительное конституционное обозрение. 2008. №2 (63). С. 11–21; Хованская А.В., Гончаров Д.В. Аверсия: опыт российского конституционного правосудия // Общественные науки и современность. 2013. №3. С.57–69; Смук П. Конституционные изменения и конституционная реальность в Венгрии // Сравнительное конституционное обозрение. 2013. №5(96). С.32–43; Гарлицкий Л., Гарлицкая З.А. Неконституционные поправки к конституции: существует ли проблема и найдется ли решение? // Сравнительное конституционное обозрение. 2014. №1 (98). С. 86–99; Барабаш Ю. Опыт конституционного реформирования в Украине: в поисках европейского идеала // Сравнительное конституционное обозрение. 2014. №1 (98). С. 22–33; Загретдинов В. Конституционное орудие политической борьбы // Сравнительное конституционное обозрение. 2015. №5 (108). С. 104–119; Кряжков В.А. Поправки к Конституции Российской Федерации: правовые основы, пределы и их обеспечение // Государство и право. 2016. №1. С.5–12.

6 См.: Основной закон Федеративной Республики Германии, 23 мая 1949 г.URL: https://www.1000dokumente.de/index. html?c=dokument_ de& dokument= 0014_gru&object=translation&trefferanzeige= &suchmodus=&suchbegriff=&t=&l=ru (Дата обращения: 14 декабря 2021).

7 См.: Конституция Российской Федерации. URL. http://www.constitution.ru. (Дата обращения: 14 декабря 2021).

что «судебное толкование Конституции становится средством, обеспечивающим единообразное ее применение, оперативное устранение противоречий и пробелов и в целом создающим предпосылки конституционной стабильности, поскольку через толкование происходит актуализация конституционных положений, образно говоря, без хирургического вмешательства в эти положения»[8].

Безусловно, в любой конституции есть положения, которые при их реализации могут восприниматься (трактоваться) каждым органом власти по-разному. В таких случаях, действительно, необходима «третейская» инстанция, которая, основываясь на предположении о замысле конституционного законодателя, исходя из семантики, принципов права, правовой логики, духа данной конституции и т.п., способна выявить единственный смысл той или иной нормы.

Но нужно ли выявление смысла конституционной нормы осуществлять посредством специальной процедуры – рассмотрения дела о толковании? Ведь он вполне может быть выявлен в рамках абстрактного или конкретного нормоконтроля, разрешения спора о компетенции, даже конституционной жалобы. Собственно, это и происходит при рассмотрении такого рода дел. Дела же о толковании открывают перед Конституционным Судом гораздо более широкие возможности для такой интерпретации.

И при этом Конституционный Суд является последней инстанцией, мнение которой можно нейтрализовать, только изменив соответствующие конституционные нормы. При этом презумпция высшей юридической квалификации и полной объективности судей мало основана на реальной жизни. Судейский актинизм – явление, ставшее обычным для современной правовой практики. Но это не значит, что нужно оправдывать его расширение, ибо это представляет опасность для самой судебной власти.

8 См: Краснов М. Толкования Конституции как ее фактические поправки // Сравнительное конституционное обозрение. 2016. №1 (110). С. 77, Комментарий к Федеральному конституционному закону «О Конституционном Суде Российской Федерации» / под ред. Г.А. Гаджиева. М. : Норма : ИНФРАМ, 2012. С.587.

Принятая 6 ноября 1994 года Конституция Республики Таджикистан является по своему исконному назначению конституцией правового государства. В ней нашли полное отражение все необходимые компоненты правовой государственности: признание человека и его права высшей ценностью, верховенство права и закона, разделение и взаимодействие властей, судебный конституционный надзор.

Конституция – это правовой акт, обладающий высшей юридической силой и регулирующий основы организации государства и общества, а также основы взаимоотношений государства и гражданина. В этом определении отчетливо выделена юридическая сущность конституции, которая проявляется, во-первых, в том, что её нормы имеют приоритет над нормами законов и подзаконных актов. Во-вторых, законы и иные акты принимаются предусмотренными конституцией органами и в установленном ею порядке. Таким образом, можно рассматривать конституцию как главный источник права и основу правовой системы, нормативно-юридического регулирования общественных отношений в стране[9].

Конституция Республики Таджикистан 1994 года принята с согласия народа Таджикистана, осознавшего себя частью мирового сообщества. Этим самым народ дал понять, что готов признать общечеловеческие ценности, жить по принципам и нормам права международного сообщества. В этом плане Конституция Таджикистана является новой вехой в процессе взаимопроникновения культур, основой расширения рамок цивилизации.

В основу Конституции Республики Таджикистан положены международные стандарты в области прав и свобод человека. Так, международно-правовые акты, признанные республикой, являются составной частью правовой системы Таджикистана (ч. 3 ст. 10). Установлен приоритет международно-правовых актов над внутригосударственным законодательством. В статье 10

9 Махмудзода М. Конституционный контроль - важнейший способ обеспечения верховенства Конституции // Правовая политика и демократическое государство (сборник статей и докладов (на тадж.языке)). Душанбе: «ЭР-граф», 2017. С.84 .

указывается, что «в случае несоответствия законов республики признанным международно-правовым актам применяются нормы международно-правовых актов».

Конституционные положения о правах и свободах человека и гражданина (Глава II. Конституции Республики Таджикистан) относятся к числу несомненных достоинств Конституции Республики Таджикистан. Она признаёт человека высшей ценностью, подчёркивает прирождённый и неотчуждаемый (естественный) характер его прав и свобод, указывает на антиэтатистскую их природу (они лишь признаются государством) и индивидуальность (ст.5), а также констатирует, что права и свободы - исходное правовое начало, смысл деятельности властных структур (ст.14). Существенное значение имеет положение Конституции о том, что права и свобода являются непосредственно действующими. Это предполагает, что они более не нуждаются в принятии конкретизирующего акта и могут непосредственно составлять основу решения юридического дела. Помимо естественно-правовой конструкции Республика Таджикистан впервые применила также общепризнанную категорию «человек и гражданин», чтобы подчеркнуть разный правовой статус личности в зависимости от принадлежности к государству или к гражданскому обществу.

Конституция Республики Таджикистан закрепляет важнейшее требование правового закона. Согласно статье 14 Конституции права и свободы определяют смысл, содержание и применение законов деятельностью законодательной, исполнительной и местной власти, местного самоуправления и обеспечиваются судебной властью.

Основные положения Конституции Республики Таджикистан, касающиеся прав и свобод человека и гражданина, исходят из таких международно-правовых актов, как Всеобщая декларация прав человека (1948 г.), Европейская конвенция о защите прав человека и основных свобод (1950 г.), Международный пакт о гражданских и политических правах (1966 г.), Заключительный акт Совещания по безопасности и сотрудничеству в Европе (Хельсинки, 1975 г.) и других соответствующих документов.

Таким образом, в целом нормы Конституции Республики Таджикистан, касающиеся прав и обязанностей граждан, воплощают в себе международные стандарты в этой области, приобщают всех нас к ценностям, принципам и нормам, выработанным мировой цивилизацией.

Конституция Таджикистана является ядром системы законодательства государства. На базе Конституции, начиная с 1994 года, началось качественное обновление всей системы законодательства. За последние двадцать восемь лет принято 17 конституционных законов, 21 кодекс и более 385 законов, столько нормативных актов не было принято за весь период нахождения республики в составе Советского союза. Такое масштабное правотворчество в Республике Таджикистан стало возможным благодаря огромному потенциалу Конституции.

В обществе, где обеспечены единство, взаимопонимание, мир, стабильность, соблюдение законности, общественный и правовой порядок, никогда не будут нарушаться права и свободы человека.

В целях защиты, обеспечения верховенства и непосредственного действия Конституции Республики Таджикистан, защиты прав и свобод человека и гражданина согласно Конституции Республики Таджикистан (1994 год) был учрежден независимый орган судебной власти - Конституционный суд Республики Таджикистан.

В сфере своей деятельности в области защиты прав и свобод человека и гражданина Конституционный суд Республики Таджикистан принимает решение (постановление).

Учреждение Конституционного суда в Таджикистане тесно связано с первой Конституцией независимого Таджикистана, принятой 6 ноября 1994 года путём всенародного референдума. На её основе в ноябре 1995 года был принят конституционный Закон «О Конституционном суде Республики Таджикистан» и избраны судьи Конституционного суда.

Конституционный суд в Таджикистане учрежден как специализированный орган конституционного контроля, который является независимым органом судебной власти и осуществляет свою деятельность в целях охраны и обеспечения верховенства и

непосредственного действия норм Конституции, а также защиты прав и свобод человека и гражданина[10].

Пройденный этап показал, что институт конституционного контроля отвечает целям и задачам нашего общества.

Но в то же время опыт нашей работы показал, что в целях повышения эффективности деятельности нуждается в совершенствовании само наше законодательство о Конституционном суде.

В связи с этим, осмыслив на основе изучения практики работы и законодательства, регламентирующего деятельность конституционных судов стран ближнего и дальнего зарубежья, всё то, что положительно зарекомендовало себя в других странах, учитывая особенности развития нашей государственности и состояние общества в 2014 году в новой редакции был принят конституционный Закон Республики Таджикистан «О Конституционном суде Республики Таджикистан» [11], который:

- во-первых, существенно расширил круг вопросов, входящих в компетенцию Конституционного суда Таджикистана;
- во-вторых, значительно расширил круг субъектов, имеющих право на обращение в Конституционный суд;
- в-третьих, существенно расширил их возможности по объектам обращений в Конституционный суд, т.е. значительно расширил круг нормативно-правовых актов, по которым субъекты обращений теперь могут обратиться в Конституционный суд.

Важное направление деятельности Конституционного суда как органа конституционного контроля, которое в последнее время приобретает весьма серьезное значение, это толкование

10 Махмудзода М. Конституционный контроль важнейший способ обеспечения верховенства Конституции // Правовая политика и демократическое государство (сборник статей и докладов (на тадж.языке)). Душанбе: «ЭР-граф», 2017. С.87 .

11 См.: Ахбори Маджлиси Оли Республики Таджикистан, 2014 год, №7 ч.1, ст.379; 2015 год, №3, ст.197; №7-9, ст.697; 2017 год, №5, ч.1, ст.266; Закон Республики Таджикистан от 23 декабря 2021 год. №1805; Закон Республики Таджикистан от 23 декабря 2021 года. №1806.

конституции. В научной доктрине существует мнение, согласно которому толкование Конституции должно осуществляться Конституционным судом, поскольку это является правом Конституционного суда, и следует отметить, что в практике конституционализма существует практика дачи толкования Конституции органами конституционного контроля.

Здесь речь идет об официальном толковании Основного закона страны, имеющего высшую юридическую силу, приоритет над другими нормативно – правовыми актами и обязательного для всех право применяющих субъектов, целью которого является юридически точное указание, как понимать норму Конституции, конкретизация конституционных положений или детальное урегулирование общественных отношений.

В Республике Таджикистан Конституционный суд не обладает таким правом. Но считаю целесообразным изучение вопроса об осуществление толкования Конституции особым образом, т.е. путем квалифицированной юридической экспертизы её норм со стороны органа конституционного контроля.

Также следует отметить, что институт конституционного контроля в нашей стране как важнейший демократический институт является относительно молодым, и расширение его полномочий и правильное его функционирование, конечно же, выступает гарантом обеспечения соблюдения норм Основного закона страны и его непосредственного действия. Состояние конституционной законности во многом зависит от деятельности органов конституционного контроля, имеющих особое значение в деле обеспечения верховенства Конституции и защиты прав и свобод человека и гражданина.

RIGHT AND FREEDOM OF PUBLIC ASSEMBLY: LEGAL NORMS AND CONTEXT IN THAILAND

Tanawoot Trisopon

CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

RIGHT AND FREEDOM OF PUBLIC ASSEMBLY: LEGAL NORMS AND CONTEXT IN THAILAND

Tanawoot Trisopon[*]

1. INTRODUCTION

"Freedom of Assembly" - the fundamental right that refers to a gathering of people to express their opinions on various issues related to them, with an objective to reflect problems toward the rulers or governors to realize that problem.

"Public Assembly" – the definition could be separated based on its characteristic. In terms of socio-economy, to express the problems and hardships their groups have suffered. While the political perspective, it is a tool used for gathering support and pressuring the government to act according to the group's political demands.

The International Agenda

The International Covenant on Civil and Human Rights (ICCPR) acted as a state's obligation on human rights regime under the UN Charter to promote and protect human rights.

*"***Section 21** *- The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."*

2. THAILAND AND FREEDOM OF ASSEMBLY

Constitution of the Kingdom of Thailand, B.E. 2560 (2017)

"Section 44 - *A person shall enjoy the freedom to assemble peacefully and without arms. The restriction of such freedom under paragraph one shall not*

[*] Academic Officer at the Constitutional Court of the Kingdom of Thailand.

be imposed except by the virtue of a provision of law enacted for the purpose of maintaining the security of the State, public safety, public order or good morals, or for protecting the rights of other person".

Public Assembly Act, B.E. 2558 (2015)

"The Act states specific requirements for organizing a public assembly"

- Public assembly shall be in a peaceful manner and without arms.

- It shall not obstruct the gateway of, impede the performance of duties of, or hinder access.

- Procedures for organizer to hold the public assembly.

- Duties of Organizer of public assembly and participant.

- Duties of officer in supervising the public assembly.

3. CONSTITUTIONAL COURT RULING

Thai Constitutional Court Ruling No. 10 – 13/2564 (2021)

The petitioner claimed that "Section 10 of the Public Assembly Act, B.E. 2558 (2015) determined the scope of the definition of the public assembly's organizer very broadly, and disregarded the person's true intentions for expressing their opinions or organizing an assembly."

Section 10, paragraph one reads as follows:

"Whoever wishes to organize a public assembly must notify the authority at least twenty-four hours before the commencement of the assembly."

The Ruling stated that "the above clause was not a licensing system, but rather as a measure to advance-notified the state officials to provide facilitation and manage an orderly assembly."

Section 10, paragraph two reads as follows:

"It shall be deemed that, the person who encourages or begs another by any means to attend the public assembly on a specific date, time, and place, as well as the applicant for the use of a public place or amplifier for public assembly, or who requests for official facilitation for public assembly is a person who desires to cause to have public assembly under paragraph one".

The Ruling stated that "the above clause aimed to clearly define the nature of person who wishes to organize the public assembly. For if not, a state official would be unable to know who to contact with".

Section 10, paragraph three reads as follows:

"The notification shall identify the objective of, and date, time and place for, public assembly in accordance with the procedure notified by the Minister. Such procedure shall be facilitative and made via information technology".

The Ruling stated that "the above clause was a provision related to the procedure of notifying the public assembly. Which, the legislature had authorized the administrator to enact subsidiary legislation, to determine more comprehensive and complete details of notification methods and procedures of the relevant officials".

The Constitutional Court of the Kingdom of Thailand held that the provision of section 10 of the Public Assembly Act, B.E. 2558 (2015) was neither contrary to nor inconsistent with the Constitution.

The limitation still complied with the condition of the Constitution, was not contrary to the rule of law, did not unreasonably increase the burden or restrict the freedom of a person, and did not detriment human dignity. Furthermore, the law was applied generally and not directed at any particular case or person.

4. Conclusion

Public Assembly is another channel that citizens could exercise rights and freedoms under a democratic regime, and represent their wills.

The international community has also recognized the importance of rights and freedoms of the people in such way as **"an expression of the people's free will"**, which is the right and freedom born together with human beings.

And, the state is unable to deny or forbid the assembly by using any other reason to refute. This is because the right and freedom of assembly are endorsed by the Constitution, which is a supreme law of the country.

PERSPECTIVE OF TRNC CONSTITUTION: FUNDAMENTAL RIGHTS AND FREEDOMS AND RESTRICTIONS

Ayşen Toroslu
Rauf Kürşad

SUPREME COURT OF THE TURKISH REPUBLIC OF NORTHERN CYPRUS

PERSPECTIVE OF TRNC CONSTITUTION: FUNDAMENTAL RIGHTS AND FREEDOMS AND RESTRICTIONS

Ayşen Toroslu[*]
Rauf Kürşad[**]

I-INTRODUCTION

The fundamental rights and freedoms are essential elements of democracies and enshrined in all proper democracies and legal systems.

As well-known definition, fundamental rights are rights of human beings simply because they comes from the birth and are needed lifelong to order to live humanly. Main of this rights are the right to live and corporal integrity, personal immunity, liberty and security of persons and also rights to continue human existence, such as privacy of life, inviolability of dwelling house, right to health, right to education and training, right to elect, to be elected and to participate in a public referendum ect.

The Fundamental Freedoms are freedoms that allow individuals and groups to express themselves, to believe and practice what they choose, and to exercise their right to vote. It is almost impossible to imagine how a democracy could work without the protection of these most basic rights and freedoms. We can ensample these freedoms, freedom of thought, speech and expression, freedom of religion, freedom of communication, freedom of movement and residence, freedom of science and art etc.

The fundamental rights and freedoms, when placed in to the scope of constitution, secure individuals for behaving or acting free in this

[*] Senior District Court Judge at the Supreme Court of the Turkish Republic of Northern Cyprus.
[**] Senior District Court Judge at the Supreme Court of the Turkish Republic of Northern Cyprus.

regulated issues and also become unrepealable. That's why, it is so precious that the fundamental rights and freedoms takes place in the content of Constitution.

II- THE CONSTITUTIONAL AND LEGAL FRAMEWORK IN THE TRNC

According to TRNC Constitution, Article 1, the Turkish Republic of Northern Cyprus is a secular republic based on the principles of democracy, social justice and the supremacy of law. Turkish Republic of Northern Cyprus is exactly a State of law and has the constitution as the highest legal statute. The TRNC Constitution is a democratic constitution that follows the modern legal norms, universal rights and freedoms. TRNC Constitution contains detailed regulations that secured fundamental rights and freedoms. The fundamental rights and freedoms are set in place by the constitution and the judgements of the Supreme Court.

According to the Constitution of the Turkish Republic of Northern Cyprus, Article 90, under the title of "The Ratification of International Agreements", the ratification of agreements to be entered into on behalf of the Turkish Republic of Northern Cyprus with foreign States or international organisations shall be subject to the approval of the Assembly of the Republic by enactment of a law. Hence, International treaties which have been duly put into operation shall have the force of law. There can be no recourse to the Supreme Court sitting as the Constitutional Court in respect of such treaties on the grounds of unconstitutionality.

Thereafter, besides of the other ratificated treaties, the European Convention on Human Rights is part of the domestic law of the TRNC, and the High Court has clearly emphasized this position in many cases before it.

TRNC Constitution is divided into eight parts. Part II, which is titled as "FUNDAMENTAL RIGHTS, LIBERTIES AND DUTIES", TRNC Constitution contains 66 Article, from Article 10 to Article 76, about fundamental rights, liberties and duties.

The Article 10 of the Constitution contains general provision about fundamental rights and liberties as follows[1];

1 http://www.mahkemeler.net/cgi-bin/anayasa/aing.doc

The Nature of Fundamental Rights and their Protection

Article 10

(1) Every person has, by virtue of his existence as an individual, personal fundamental rights and liberties which cannot be alienated, transferred or renounced.

(2) The State shall remove all political, economic and social obstacles which restrict the fundamental rights and liberties of the individual in a manner incompatible with the individual's security, social justice and the principles of the State being subject to the rule of law; it shall prepare the necessary conditions for the development of the individual's material and moral existence.

(3) The legislative, executive and judicial organs of the State, within the spheres of their authority, shall be responsible for ensuring that the provisions of this Part are implemented in full.

According to the Article 11 of the TRNC Constitution, the fundamental rights and freedoms can only be restricted by law without touching its essence for reasons such as public benefit, public order, general morality, social justice, national security, general health, ensuring the safety of life and property of individuals.

The Essence and Restriction of Fundamental Rights and Liberties

"Article 11

Fundamental rights and liberties can only be restricted by law, without affecting their essence, for reasons such as public interest, public order, public morals, social justice, national security, public health and for ensuring the security of life and property of persons."

The Article 12, "Fundamental Rights and Liberties and Powers not to be Misused", provides as follows;

"No provision of this Constitution shall be construed or interpreted as to give any physical or legal person, group or class of persons the right and authority to commit acts or to engage in activities aimed at changing the rights and status of the Turkish Republic of Northern Cyprus and of the Turkish Cypriot people guaranteed by this Constitution or at destroying the order established by this Constitution or at removing the fundamental rights and liberties recognised by this Constitution"

And this article says us; None of TRNC Constitution rules gives the right to any natural or legal person, group or class, to change the rights and status that Turkish Republic of Northern Cyprus guaranteed by the Constitution. No rule of the TRNC Constitution also gives the right to any natural or legal person, group or class to engage in actions aimed at the destruction of the order established by the Constitution or the abolition of the recognized fundamental rights and freedoms of the Turkish Cypriot citizens.

For foreigners, the rights and freedoms provided in the TRNC Constitution can be restricted by law in accordance with international law.

As mentioned above, TRNC Constution contains detailed regulations about fundemantal rights and freedoms and also as far as Counstitutional Court concerned, for being state of law, besides of fundamental rights and freedoms acknowledge and respects, also must be protected.[2]

As seen above, Article 11 regulates general restriction reasons, but some of articles involve specific restriction reason. Such as Article 22 (1) and such as Article 36 as follows;

> ***Freedom of Movement and Residence***
>
> Article 22
>
> **(1)** Every citizen has the right to freedom of movement; this freedom can only be restricted by law for the purposes of providing national security and the prevention of epidemics
>
> ***General Provisions Relating to Property Rights***
>
> Article 36
>
> **(1)** Every citizen has the right to ownership and inheritance. These rights may only be restricted by law in the interest of the public.
>
> **(2)** Restrictions or limitations which are absolutely necessary in the interests of public safety or public health

2 Case reference; A/M 15/79 (D.12/80) https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=417

> or public morals or town and country planning or the development and utilization of any property for public benefit or for the protection of the rights of others may be imposed by law on the exercise of the right to ownership.

Therefore, interpretation of constitutional court is so crucial about general restrictions to protect fundamentals rights and freedoms. The Constitutional Court states that taking into account the criteria of justice and equity in the limitation of fundamental rights and freedoms is a requirement of the rule of law.[3]

The Constitutional Court explained regarding Article 11 that "fundamental rights and liberties can only be restricted by law, without affecting their essence", in cases where such restrictions which make difficult to exercise the rights and freedoms or make them unusable, they touch the essence of right and freedom. Accordingly, each subject should be evaluated in its own unique circumstances and conditions.[4]

Also the High Court's emphasis on the fact that the European Convention on Human Rights is a part of domestic law and that the Convention should be implemented by lower courts is also important for the assurance of fundamental rights and freedoms.[5]

Exactly at this point, it is necessary to mention the regulations of the Constitution regarding extraordinary situations in articles 124, 125, 126 ve 127[6]. As in most constitutions, the TRNC Constitution also regulates situations where constitutional rights can be restricted or suspended in times of emergency, as can be seen from the above-mentioned article texts.

Article 124 under the title of ***Declaration of State of Emergency due to Natural Disasters and Serious Economic Crisis*** regulates that; the Council of Ministers meeting under the chairmanship of the President of the Republic may, in the event of natural disasters, dangerous infectious diseases or serious economic crisis, declare a state of emergency, in one or more areas or in the whole of the country for a period not exceeding three months.

3 Case reference; A/M 11/80, D.9/80
4 Case reference; A/M 10/83, D.1/84
5 Case reference; Yargıtay/Ceza 44/2012 D.4/2013
6 http://www.mahkemeler.net/cgi-bin/anayasa/aing.doc

Article 125 under the title of ***Declaration of a State of Emergency due to the Spread of Violence and Serious Deterioration of Public Order*** regulates that; the Council of Ministers meeting under the chairmanship of the President of the Republic may, after consulting the Security Council of the Republic, in the event of strong signs of widespread acts of violence aimed at the elimination of the liberal and democratic order set up by the Constitution or the fundamental rights and liberties, or in the event of serious deterioration of public order, declare a state of emergency in one or more areas or in the whole of the country, for a period not exceeding three months.

Article 126 under the title of ***Arrangements Regarding State of Emergency*** explains the procedure to follow where it is decided to declare a state of emergency in accordance with Articles 124 and 125 of the Constitution and it also provides that, on the declaration of such a state of emergency, the operation of only the following articles of the constitution can be suspended: Articles 16, 20, 2l, 22, 24, 32, 33, 41 paragraph 5 (d), 42, 48, 49 paragraph 3, 53 and 54.

Some of those Articles, which can be -according to Article 125- restricted and are considered very important among the fundamental rights and freedoms are Articles 16 liberty and security of person, Article 20 inviolability of dwelling house, Article 21 freedom of communication, Article 22 freedom of movement and residence, Article 24 freedom of thought, speech and expression, Article 32 the right of assembly and demonstration, Article 33 the right to form associations.

The enumeration of which rights can be stopped in Article 126 is an important regulation for the protection of fundamental rights and freedoms and ensures these rights and freedoms cannot be added by law, nor can their fields be expanded in a way that is not foreseen in the Constitution. In the case 21/85 D. 9/87, the Constitutional Court emphasized and produced a parallel decision to this regulation.

Article 127 under the title of ***Martial Law, Mobilization and State of War*** regulates the restriction conditions in the aforementioned situations also.

In TRNC, also **Emergency Law** is in force and in parallel to the Constitution, this code involves the reasons about state of emergency.

About some articles of this code, a lawsuit filed in the Constitutional Court which annulled some articles as unconstitutional.

This case was ***TKP v. Counsil Of TRNC, Constitutional Court Action (case referenced 21/85 D. 9/87)***[7] ***and was*** about, that a political party (TKP) sued an annulment case against the Counsil of TRNC and claimed that, after 1985 TRNC Constitution was accepted, some articles of the Emergency Law become unconstitutional.

Before TRNC Constitution, Constitution of the Turkish Federated State of Cyprus was in force. After TRNC Constitution implemented, it is regulated that within 60 days, an action for annulment can be filed with the Constitutional Court on the allegation that the legislation in force is unconstitutional. This case was depended on this article and The Court examined that; Since it has been clearly determined in Article 126 (2) of the 1985 Constitution which constitutional articles will be suspended in the declaration of state of emergency, the enforcement of other Constitutional articles cannot be stopped by law. Therefore, the Constitutional Court annuled some articles of this code which is not included in the scope of 126 (2).

This decision is important as it emphasizes that the Constitutional Court cannot bring exceptions or limitations to constitutional provisions through interpretation.

III- TRNC JUDICIAL SYSTEM OF TRNC

At this stage, before proceeding to court decisions, I want to inform you about Turkish Republic of North Cyprus judiciary system. The judiciary in North Cyprus is composed of a two-tier Court Structure. The lower courts known as District Courts or Trial Courts and the higher court known as the High Court or the Supreme Court. North Cyprus is divided into 6 districts, and each district has its own court. There are also Assize Courts in 3 districts. The Supreme Court is located in the capital city, Nicosia, and acts as the Appeal Court for both criminal and civil cases, the Administrative Court and the Constitutional Court.

The Constitutional Court consists of five Supreme Court judges, and it has exclusive jurisdiction to adjudicate finally on all matters

7 https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=315

concerning the Constitution. The jurisdiction of the Court is stated under the Constitution.

According to the Constitution, Article 144, Constitutional Court has the jurisdiction to try the President of the Republic, the Prime Minister and the Ministers, for any offence committed by them. Articles 145 (1) regulates that the Constitutional Court shall have jurisdiction to adjudicate finally on a recourse made in connection with any matter relating to any conflict or contest of power or competence arising between State organs. Also according to Article 146, (1), the President of the Republic may, at any time prior to the promulgation of any law or of any specified provision thereof or of any decision of the Assembly of the Republic, refer it to the Constitutional Court for its opinion as to whether such law or any specified provision thereof or decision is repugnant to or inconsistent with any provision of the Constitution.

The main types of suits the Court deals with are annulment suits, reference of questions of unconstitutionality made by lower courts and Supreme Court Judges. According to Article 147 (1), the President of the Republic, political parties represented in the Assembly of the Republic, political groups and at least nine deputies or other associations, institutions or trade unions on matters concerning their existence and functions, may directly initiate an annulment suit in the Constitutional Court on the ground that a law, decree, rules, Rules of the Assembly of the Republic, decision of the Assembly of the Republic, regulations, or any of the provision thereof, is repugnant to or inconsistent with any provision of the Constitution.

Under TRNC Constitution, there is no right for individual application to the Court. Although there is no right of individual application in the Constitution, the right of institutions, organizations and political parties to file an annulment lawsuit against the legal regulations concerning their own fields, the constitutionality of the legislation, the protection of the constitutional provisions and fundamental rights and freedoms gives the Constitutional Court the opportunity to conduct an effective audit.

IV- CASE LAW

Under this title, through the decisions exemplified below, we would like to mention the perspective of the Constitutional Court and

Supreme Court regarding the protection of fundamental rights and freedoms.

i- Nina Maiko v. Mustafa Yeniada, Constitutional Court 5/2015 D.2/2017[8]

In this case, It has been examined by the Court whether the article of the law limiting the time for the mother to make a claim from the father for the care and education expenses of the child born out of wedlock to 5 years is unconstitutional or also in violation of the Convention on the Rights of the Child adopted by the Consent Act 6/1969.

According to review and decision of Constitutional Court, first of all, it is necessary to look at the position of the international agreements which are in force in the TRNC or included in the legislation by passing the Law of Approval from the Parliament in the hierarchy of laws of the country.

After the Court declared, the European Convention on Human Rights, the Convention on the Rights of the Child, Approval of the Convention on the Rights of the Child have statutory provision as stated in Article 90 of the Constitution and became a part of the TRNC legislation and likewise, the International Covenant on Civil and Political Rights became a part of our legislation.

The Court has emphasized that in interpreting the concepts of "human rights" and "rule of law" which are included both in the Preamble of our Constitution and in Article 1, Article 4 of the European Convention on Human Rights, Article 2 of the Convention on the Rights of the Child and Article 24 of the Covenant on Civil and Political Rights should also be taken into account.

The Court, examining the stated regulations, noted:

The rule that constitutional rules and articles of the Constitution should be interpreted in accordance with international law as much as possible has been adopted in the TRNC.

A system in which the rule of law exists is characterized as the state of law. The state of law, as expressed in many decisions, is a state that

8 https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=4089

"respects and protects human rights, establishes a fair legal order and considers it necessary to maintain it, and abides by the law and the Constitution in all its activities".

In a state of law, the law should have absolute sovereignty and all organs, including the legislator should consider themselves bound by the supreme rules of law in addition to the Constitution.

The human rights concerning this case before us can be listed as the right of a child to know his father, the right to demand financial contribution from his father to his life and education, the right to a good life and the right to receive a good education as a result of this contribution.

Every child should be given a minimum level of legal rights by the state from the moment they are born. For a child, whose mother and father are married, his father is considered to be the man who is the husband of the mother as he is born in marriage and the father bears the obligation to care for the child along with the mother. The mother of a child born as a result of an extra-marital union is known and accepted by the official authorities from the moment of birth, and the father is unknown. Article 6 of Chapter 278 gives the father the right to accept the child and register the child under his name, and the affiliation of the child is determined in this way. If the father does not or cannot do this, the mother has the right to apply to the court under Article 8 of the same Law. When Article 8 comes into play, the illegitimate child is considered to be in the same position as the legitimate child in terms of contribution to care, alimony and education. Up to this point, it must be accepted that the most fundamental rights of the illegitimate child are respected. However, in order for these most fundamental rights of the illegitimate child to exist, the mother must use this right until the end of the 5 years following the birth of the child. If the mother does not or cannot use this right, the child loses the right to learn about his father, to receive or demand monetary contributions from his father for his care and education. Since the guardian of the illegitimate child is the mother, only the mother of the child can use this right of application arising from Chapter 278. If the mother does not exercise this right until 5 years after the birth of the child, the above-mentioned rights of the child disappear. In this case, the limitation of the mother's

application with time may actually eliminate the rights of the child and may adversely affect the essence of the child's rights."

In light of the aforementioned, the Constitutional Court annulled the article regulating the limitation for illegitimate child as unconstitutional.

ii- Yaşar Akdoğan v. Attorney General of the TRNC Court of Appeal/ Criminal Action 23/2019 D.5/2022[9]

In this case, regarding the submission of an audio recording taken without the knowledge of the Defendant as evidence during the criminal proceedings, the Court's views are as follows;

"In case of recording a conversation with a person without his consent by planning in advance and obtaining evidence against them accordingly, by people who do not have any legal authority, and allowing the submission of the obtained evidence against the person in criminal proceedings; we are of the opinion that it would cause a serious violation of the rights to fair trial and right to privacy. In consideration of our contemporary modern judicial system, which respects fundamental human rights and follows universal legal principles, it would be more appropriate not to accept the testimony obtained accordingly as valid testimony by the Court as a requirement of justice in criminal proceedings.

As courts, we should not tolerate the submission of unlawfully obtained evidence to the court by violating the most fundamental human rights with the decisions we will make, or we should not encourage such unlawful behaviour by allowing them to be submitted.

Therefore, in the balance between the rights to a fair trial in Article 6 of the European Convention on Human Rights and the right to privacy in Article 8 with the public interest in criminal proceedings, it is a requirement of justice that this unlawfully obtained evidence should not be accepted due to the gravity of the violation. Thus, submission of the audio recording should not have been allowed."

As seen in the decision above, about to secure fundamental right, the Supreme Court strickly emphasized that violation of fundamental rights and freedoms cannot be tolerated in any way.

9 https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=4668

iii- F.G v. Attorney General of the TRNC, Court of Appeal/Criminal Action 35-79/2021 D. 4/2022[10]

In this case, the apellant complained that the Court made the mistake of not ordering that all testimonies of witnesses in the possession of the Prosecution and included in the indictment should be given to the Defense and/or finding that it should not be given to the Defense. At his point, the Court's interpretations and decisions are as follows;

"On account of the fact that the right to a fair trial, which is being sensitively followed by our criminal law system, is a human right regulated in the European Convention on Human Rights, we consider it appropriate to first examine the issue under the right to a fair trial and the decisions of the European Court of Human Rights on this subject.

In accordance with the right to a fair trial, the European Convention on Human Rights sets forth that the trial shall be conducted by adversarial procedure, by following a trial system in which the Prosecution and the Defendant can assert their claims and rights against each other as two equal parties, and the judge will remain impartial. Within the scope of fair trial, the principle of equality of arms, which is a part of the adversarial system, must be respected. The principle of equality of arms is to provide a fair balance between the parties, giving each party a reasonable time and opportunity to present their case, including evidence, in conditions that do not put them at a significant disadvantage against the other party. Accordingly, while striking a fair balance between the protection of the general interests of the society and the respect of fundamental human rights in criminal proceedings, the European Convention on Human Rights gives special importance to these rights and aims to establish a fair balance between the prosecution, which carries out a public duty to reveal crimes and criminals, and the human rights of the accused party (Fair balance principle is balancing between the rights of individual and interests of the public).

In this framework, Article 6 of the European Convention on Human Rights guarantees a defendant's access to the file and disclosure of evidence, and in this context, paragraph 6 (3) (b) of the Article coincides with the principle of equality of arms and the adversarial trial system.

10 https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=4665

In this context, it emerges from the aforementioned judgments that the right to a fair trial means that a person accused of a crime has the right to be informed of the documents and testimonies required to enable him to prepare his defense regarding the results of the investigation, which is carried out in the framework of the procedure. Therefore, it is a requirement of the principle of the right to a fair trial that the Defendant be informed of and has access to the documents and information necessary to enable him to present his defense during the trial phase.

When we continue our examination under our legislation and the decisions given by the Court of Appeal on this matter so far, there is no special regulation in Chapter 155 of Criminal Procedure Law that obliges the Prosecution to submit all the documents in their possession to the defense. Chapter 155 of Criminal Procedure Law and the basis of our criminal procedure system is common law and therefore, it is a known principle that the legislation and case law at the time the law was quoted should be consulted.

In referred law, the rule of openness in criminal cases was formerly seen as a mechanism to meet the problem of inequality of arms between the prosecution and the defence. Since the prosecution was funded by the state, the principle that the Defendant had to be told the facts of the case was accepted due to the apparent imbalance of resources between the two.

When we look at the decisions in our country, the necessity of giving the statements about the witnesses to the Defendant was emphasized in the decisions of the Court of Appeal/Criminal Action 60/2012 D. 2/2014 and the Court of Appeal/Criminal Action 74/2015 D. 3/2016 regarding the preliminary injunction and within the scope of equality of arms, it has been made compulsory to give the testimony or documents, on which the prosecution will rely, to the defendants to be tried in the High Criminal Court.

After stating the main elements of the principles laid down in the relevant decisions, we can summarize the situation as follows;

Due to the fact that the Prosecution carries out a public duty by law in criminal proceedings, they are obliged to present to the court all of

the documents and statements in favour of and against the Defendant that are in their possession or knowledge. Statements and documents collected regarding the matter cannot be hidden from the Defendant. In accordance with the principle of fair trial, the Defendant should be given the right to access this information in advance in order to give them the opportunity to make their defense. Pursuant to the principle of the right to a fair trial, the Prosecution is obliged to present all the information and documents in their file to the court, regardless of whether they are in favour of or against the Defendant; however, in cases when they don't want to present the other party beforehand (in exceptional cases such as state secret, the safety of the case, etc.), on the condition of explaining the reason, they should bring a witness or document to the knowledge of the court and it must be ensured that the court gives a fair decision.

On the basis of this principle, considering that there is no limitation on this matter in the legislation in our country (the restrictions on the access to the materials had no basis in domestic law Moigeger v. Russia), in order to ensure equality of arms in this matter between the Prosecution, which provides all the testimony in the criminal proceedings, and the Defendant, and to enable the Defendant to present their defense, it is required to provide access to the necessary statements that are included in the witness list, and it is necessary for the Defendant to be informed about them. The defendant succeeded in his first appeal. In the light of this result, it is necessary to give an instruction for the Prosecution to ensure that the Defendant has access to and is informed of all the witness statements in the witness list, which are included in the indictment and are necessary for the Defendant to prepare their defense."

As can be seen from this approach of the Supreme Court, it is sensitively emphasized that the provisions of the European Convention on Human Rights should be applied in the protection of fundamental rights and freedoms.

Regarding the second ground for appeal in the same case was about that the Lower Court erred in rejecting the Advocacy's request to have the Complainant examined by its own expert witnesses. The Court's said as follows;

"In the light of what we have stated so far, the right to respect for private and family life, protected in Article 8 of the European Convention on Human Rights, may be restricted in cases where it is necessary in a democratic society. The best interests of the child are important in the proceedings regarding sexual offenses and permission for medical examination may be granted only if it is demonstrated that it is necessary for the defense of the defendant party to be put forward effectively and adequately. However, care should be taken to ensure that a child does not experience secondary victimization by undergoing a medical examination again, and a decision must be made by considering what the child's best interests require and whether his or her consent is obtained for this examination. In cases where the best interest and physical and mental integrity of the child outweigh the need of the defendant party to be able to put forward their defense effectively by having the child re-examined medically, such a request for medical intervention should not be allowed.

When the Defense party, which is obliged to prove that the child's medical examination is necessary for the defense to be put forward effectively and adequately asserts that the medical examination of the complainant was carried out only by the other party, this does not constitute a sufficient ground for granting such permission and the Defense is not deemed to have convinced the court with this claim."

iv- Didem Gurdur V Aslan Coşkun and others, Court of Appeal/ Civil Case 140/2014 D.38/2020[11]

In this case, the plaintiff applied to the Court of Appeal, as a result of the annulment of the lawsuit filed by members of the police during a meeting and demonstration that had been assaulted and that her constitutional rights had been violated.

The review and decision of the Supreme Court in this regard is as follows;

"In the case before us, first of all, I need to examine whether the Right to Assembly and Demonstration, which is guaranteed by Article 32 of the Constitution, has been violated, since the incident occurred during the demonstration.

11 https://www.mahkemeler.net/cgi-bin/kararindir.aspx?cnt=4555

According to the "Right to Assembly and Demonstrations" which is given in Article 32 of the Constitution, citizens have the right to organize unarmed and non-violent assembly or public demonstration without obtaining prior permission. This right may be restricted by law for safeguarding public order.

This right is included in the Constitution under the title of "Fundamental Rights and Liberties".

Article 11 of the Constitution regulates "The Essence and Restriction of Fundamental Rights and Liberties". According to this article, fundamental rights and freedoms can only be restricted by laws for reasons such as public interest, public order, general morals, social justice, national security, public health and ensuring the security of life and property of persons.

When determining the criteria regarding the restriction of the right to assembly and demonstration in our country and the restriction or violation of the use of the right, we should take into account the rules of the European Convention on Human Rights, which we adopted with the Law No. 39/1962 and which are within the scope of the current legislation, and consider the principles and criteria of the European Court of Human Rights regarding the implementation of the Convention and apply these criteria in accordance with our current legislation.

…..

The foreseen restrictions and the obligation to maintain order should be used by considering the balance between public order and the exercise of Constitutional rights. On the one hand, appropriate measures must be taken for those who exercise their rights to enjoy their rights, on the other hand, actions that disrupt public order must be prevented and everyone's safety must be ensured. Measures and interventions cannot be carried out in a way that destroys the essence of the right.

As a result of this, the principles stated in the judgment of the European Court of Human Rights, Taranenko v Russia (application no.19554/05,13.10.2014, para.63), in terms of the way freedom of expression are exercised are still valid in terms of our legal legislation and not only the opinions that are accepted by the general public,

but also the opinions that will not be accepted by the general public are within the scope of protection. Pluralism, tolerance and open-mindedness are accepted as the requirements of a democratic society.

However, since the restriction of freedom of assembly and the intervention criteria are regulated both in our Constitution and in the European Convention on Human Rights, it is necessary to determine the restriction criteria here.

When faced with the allegation that a constitutional right has been violated in a civil case, the criteria stipulated by the Constitution for restriction are evaluated together with the principles of "legitimate aim" and "necessity in a democratic society" of the European Court of Human Rights. Thus, determining whether the intervention is proportionate to the legitimate aim pursued and whether the justification for the intervention is appropriate and sufficient must be determined within the whole extent of the case (see European Court of Human Rights Gün and Others, application no. 8029/2007, 18.6.2013 para 75). In this context, while evaluating the intervention, the Court should determine the basis of the balance between freedom and authority within the framework of these principles, taking into account the criteria of compulsory social need and the protection of the rights and freedoms of others. In this framework, the legitimacy of the intervention and the formation of the measure constituting the intervention should be evaluated according to the concrete case.

From this point of view, it is clear that the police have the authority to intervene in an assembly or demonstration in case the Constitutional restrictions and legal grounds that give the police the right to intervene are not respected. However, this intervention cannot in any way be in a manner and in a nature that violates the essence of the right guaranteed by the Constitution, the democratic social order and the principle of proportionality.

…

As I stated before while determining the criteria, in terms of public order, it is essential to keep the balance between those who exercise their constitutional right and the protection of the rights and freedoms of others."

In this decision, which also adopted the decisions of the European Court of Human Rights and also an important decision as it specifies which criteria can be taken into account when evaluating under what circumstances constitutional rights may be restricted or whether constitutional rights have been violated."

About interpretation of Constitution, Prof Dr. Bertil Emrah Oder stated that, in the interpretation of constitutional norms regarding fundamental rights and freedoms, "interpretation in accordance with international human rights law", as a type of interpretation in accordance with the system, stands out due to the connection of fundamental rights and freedoms with the ethical principles of law and the claim of universality.[12]

In TRNC, we could see easily that the Constitutional Court also adopts and implements this interpretation method as mentioned above.

V- CONCLUSION

In this presentation, we tried to provide an insight into TRNC Constitution regulations about fundamental rights and liberties, also how international agreements have the force of law and in the light of precedent decisions, the perspective of the Courts on the protection of fundamental rights and freedoms.

As can be easily understood from all that has been said, the TRNC Constitution is a democratic constitution in which fundamental rights and freedoms are regulated in detail, respecting human rights and adopting the rule of law.

In TRNC, the Constitutional Court is the greatest guarantee for individuals in the protection of fundamental rights and freedoms, and also ensures that fundamental rights and freedoms are interpreted in line with internationally accepted agreements and principles.

12 http://tbbyayinlari.barobirlik.org.tr/TBBBooks/468.pdf

ONE NATION? ONE LANGUAGE? THE HUMAN RIGHTS IN LANGUAGE DOMAIN: THE CASE OF UKRAINE

Yuliia Reminska
Marta Spodaryk

CONSTITUTIONAL COURT OF UKRAINE

ONE NATION? ONE LANGUAGE? THE HUMAN RIGHTS IN LANGUAGE DOMAIN: THE CASE OF UKRAINE

Yuliia Reminska[*]
Marta Spodaryk[**]

The greatest and the most precious good of every nation is its language, the living secret of the human spirit, its rich treasury, in which the nation puts both its ancient life and its hopes, mind, experience, feelings.

Panas Myrnyi[1]

I. OPENING REMARKS

Before starting our presentation, let us, on behalf of the Secretariat of the Constitutional Court of Ukraine, greet the participants of the 10th Summer School and express our deep gratitude to the ideological inspirers and organisers for the invitation. It is our privilege to address this prestigious event, as each Summer School is a unique platform for the mutually beneficial exchange of knowledge that is aimed to fostering expert discussions on various human rights processes. We wish all the colleagues continued energy and creativity in their endeavors, and we wish the organisers continued inspiration in holding such important and interesting projects aimed at maintaining scientific and practical relationships between employees of constitutional review bodies in the spirit of mutual support and constructive cooperation.

[*] Chief specialist of International Cooperation Division, Department of Communications of the Constitutional Court of Ukraine and International Cooperation.
[**] Head of the Sector of Research of Legal Positions of the European Court of Human Rights and Other Institutions of the Council of Europe, Legal Directorate.

1 1849—1920, Ukrainian prose writer and playwright.

II. FEW WORDS ON THE ESSENCE OF THE LANGUAGE RIGHTS

Language as a tool to connect the members of a particular community and assert their cultural and national identity has always played a prominent role in the development of any democratic society. With this in mind, the necessity for the development of a solid and universal language rights theory, the fulfillment of the possibilities unified in it, and the provision of appropriate constitutional safeguards for their realisation, is indisputable.

Namely, it is confirmed by the fact that the category of language rights has been *"normatively framed"* in some of the ***international and regional legal acts***. Notably, having laid the necessary foundation for the understanding of language as one of the central components of cultural identity, the Universal Declaration of Human Rights of 1948[2], International Covenant on Civil and Political Rights of 1966[3], and the International Covenant on Economic, Social and Cultural Rights of the same date[4], gave the green light to the further development of international instruments in the language protection domain.

In particular, the Universal Declaration of Linguistic Rights of 1998 refers to such terms as the "language community" and "language specific to a territory". Consequently, the first is defined as:

"[…] *any human society established historically in a particular territorial space, whether this space be recognized or not, which identifies itself as a people and has developed a common language as a natural means of communication and cultural cohesion among its members*".

The second one is understood as:

"[…] *the language of the community historically established in such a space*" [5].

2 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html.

3 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html.

4 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html.

5 United Nations Educational, Scientific and Cultural Organization [UNESCO], *Universal Declaration on Linguistic Rights*, June 9, 1996, available at: www.unesco.org/cpp/uk/declarations/linguistic.pdf.

From the substantial point of view, the aforementioned Declaration provides the ***comprehensive list of rights*** related to the language operation. Such rights are subdivided into two groups – personal and collective.

According to Article 3 of the Declaration, there are the following *personal rights*: the right to be recognised as a member of a language community; the right to the use of one's own language both in private and in public; the right to the use of one's own name; the right to interrelate and associate with other members of one's language community of origin; the right to maintain and develop one's own culture; the other rights related to language which are recognised by the International Covenants of 1966[6].

In contrast, Declaration's Article 4 constitutes a list of rights belonging to the *language groups*. They are as follows: the right for own language and culture to be taught; the right of access to cultural services; the right to an equitable presence of language and culture in the communications media; the right to receive attention in their own language from government bodies and in socio-economic relations[7].

It is noteworthy that along with the process of the language rights "normative generalisation", international community paid a great attention to the issue of *providing the substantial guarantees for the national minorities and indigenous people* to use and develop their native languages within a certain country they live. In this regard, among human rights instruments, regulating this sphere, are, for instance, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992[8], the European Charter for Regional or Minority Languages of 1992[9], Framework Convention for the Protection of National Minorities of 1994[10]. All of

6 Ibid.

7 Ibid.

8 General Assembly Resolution 47/135, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, December 18, 1992, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-persons-belonging-national-or-ethnic.

9 Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, ETS 148, available at: https://www.refworld.org/docid/3de78bc34.html.

10 Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157, available at: https://www.refworld.org/docid/3ae6b36210.html [accessed 14 September 2022].

these international documents contain non-discriminatory, inclusive and effective approaches to language issues.

In addition, in 1996 the Organization for Security and Co-operation in Europe appointed its High Commissioner for National Minorities, whose main role is to address the short-term triggers of inter-ethnic tension or conflict and long-term structural concerns[11].

Most of the European countries adopted legislation to regulate the use of languages. Until the end of the XX century, it was done with the purpose of reinforcing the knowledge and promotion of the usage of one official state language. However, the globalisation, along with migration, was one of the aspects, which facilitated the growing trend for protection of linguistic rights of lesser-used tongues. Thus, "unity in diversity" as the motto of the European Union also worked well within states in the context of rebalancing the relationship between the linguistic minorities and the respectful national governments.

However, despite such a rather active internationalisation of this idea, neither European nor domestic legislation has in its regulatory arsenal a definition that would exhaustively define the concept of linguistic rights. In this matter, extremely diverse approaches are offered in the specialised academic literature, on the pages of which scholars use *quite distinct terms* to denote this category of rights. Among them, in particular, are "language rights", "linguistic rights", "the right to linguistic self-determination", "the right to a safe language environment", "the right to linguistic identity", *etc*.

Without going into a detailed theoretical analysis of the doctrinisation of each of these terms, it should be noted that all of them *volens nolens* are perceived on a subconscious level only with such wordings as "national minorities" or "indigenous peoples". At the same time, when these terms are mentioned in the context of public law relations, they are endowed to some extent with a negative connotation, since it is implicitly implied some kind of violation of the rights of certain linguistic groups.

The ***term "language rights"*** will be used loosely in this presentation, meaning that it **refers to** a concept that encompasses a *variety of*

11 OSCE High Commissioner for National Minorities, available at: https://www.osce.org/hcnm/107875.

options for the unrestricted use, protection, and advancement of the language as a lingual component of national identity. Indeed, the accurate understanding and interpretation of these types of rights influences the appropriate dividing line between the dominance of a nation's constitutional identity and guaranteeing national minorities the right to free development. Thus, the category of language rights is endowed with a quite complex and multi-leveled nature, as it has several objects, concerns several types of speakers, and also involves not only the use of the language, but also other actions, in particular, in the field of information support, cultural development, education, protection of one's violated rights, *etc*.

Thus, we are inclined to believe that language rights are a **part of a broader concept** like *the right to self-determination*. This right is enshrined in Article 1(2) of the Charter of the United Nations, as well as in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[12].

12 Article 1(2) of the UN Charter states that one of the purposes of the United Nations is "*to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*."

Article 1 of the ICCPR reads:

"1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

Article 1 of the ICESCR reads:

"1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

In the light of the abovementioned, *linguistic self-determination* concerns not only national minorities, but also the ruling nation on the territory of a certain state. For obvious reasons, situations where the state language needs additional protection are less common in comparison to other languages. Nevertheless, the situation is different in each state, since the "one-size-fits-all" approach can never accommodate the vast differences and there should always be local specifics taken into consideration. Moreover, it is a particular state, which has discretion and is in a better position to effectively regulate language issues.

In this vein, the Council of Europe Commissioner for Human Rights stated once that supporting the use of the official or state language as a tool to protect public order, consolidate national identity and reinforce social cohesion is a legitimate objective of any state policy. Persons belonging to national minorities themselves benefit from proficiency in the official language, which fosters their inclusion in society and participation in public life. However, at the same time, the Commissioner also emphasized that this goal should not be pursued at the expense of the rights of speakers of other languages, especially those belonging to national minorities, nor should any measures taken to that end exacerbate existing cleavages[13]. In other words, neither the linguistic rights of national minorities, nor the rights of the ruling nation can be infringed by the state policy on languages. Thus, it leads us to a conclusion that the *main aspect in this sphere is to maintain the principle of a fair balance*.

Apart from the thoughts mentioned above, it is worth noting that today the constitutions of all democratic states have, although different models, but one formula for guaranteeing the rights to free development and use of languages, including state language and languages of national minorities. Nevertheless, in case of the latter, the access to that right is not unqualified. The ***overarching condition*** is that the fulfilment of the promise of free development of such rights must be reasonably practicable. In this context, what reasonable practicability means and entails lies in the heart of the constitutional courts' competencies in

13 Close the gap - How to ensure human rights for all. Compilation of Human Rights Comments published in 2018 and 2019 by Dunja Mijatović, Council of Europe Commissioner for Human Rights. 2020, available at: https://book.coe.int/en/commissioner-for-human-rights/9570-epub-close-the-gap-how-to-ensure-human-rights-for-all.html.

terms of interpretation of fundamental rights and freedoms enshrined in basic law of the state. Hence, when interpreting the constitutional and legal norms regulating the language issue, the constitutional review body should be guided by the idea of an ***appropriate balance*** between the promotion and development of the state language and the protection of various regional and minority languages used in the country.

II. NATIONAL LEGISLATION IN THE FIELD OF PROMOTION, PROTECTION AND REALISATION OF LANGUAGE RIGHTS

For a long time, the Soviet Law "On Languages in the Ukrainian Soviet Socialist Republic" adopted in 1989 regulated language issue in Ukraine. This Law gave the Ukrainian language a status of state language of Ukrainian SSR and provided some guarantees for the operation of minority languages. The preamble of this Law nonetheless created clear ideas and connotations about the *de facto* legal status of the Ukrainian language, since another language was recognised as the language of "*interethnic communication of the peoples of the Ukrainian SSR*", the knowledge and use of which was defined as "*the duty of state, party, public bodies and mass media of the Republic*"[14].

Clearly, following the collapse of the Soviet Union, the Ukrainian state was in desperate need of developing its own cohesive legislative framework in the sphere of language protection (namely, the Ukrainian language as the state language, as well as languages of national minorities in the context of the future integration of the national legal system into the legal system of the European Community).

(A) Case-law of the European Court of Human Rights

The practice of the European Court of Human Rights (hereinafter referred to as the ECtHR or Court) considering the language rights, is *reduced to cases in which representatives of national minorities challenge the alleged violation of their rights* provided for by the European Convention on Human Rights (hereinafter referred to as the Convention) and its Protocols (in particular, the right to private and family life or the right to education (Article 8 and Article 2 of the Protocol No. 1 respectfully).

14 The Law of the Ukrainian Soviet Socialist Republic "On Languages in the Ukrainian SSR" dated October 28, 1989, No. 8312-XI (ceased to be valid), available at: https://zakon.rada.gov.ua/laws/show/8312-11#Text [in Ukrainian].

At the same time, the ECtHR also heard cases, where linguistic rights were just an aspect, but a crucial one in an alleged breach of other human rights. In particular, the case of *Rooman v. Belgium* considered an alleged failure to meet the applicant's particular linguistic need in order to enable him to receive treatment that was consistent with his mental-health condition which entailed a violation of Articles 3 and 5 § 1 of the Convention. In its judgement, the ECtHR stated the following: it is not for the Court to rule in a general manner on the types of solutions, which could have been considered sufficient to respond to the applicant's particular linguistic need in order to enable him to receive treatment that was consistent with his mental-health condition. The Court emphasized that the domestic authorities enjoy a certain margin of appreciation in this area, allowing them to choose the arrangements for communication[15].

In addition, the ECtHR has also found in numerous cases, in a number of different contexts, that linguistic freedom as such is not amongst the rights and freedoms governed by the Convention, with the exception of the specific rights stated in Article 5 § 2 (a person's right to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him) and in Article 6 § 3 (a) and (e) (a person's right to be informed promptly of the nature and cause of the accusation against him and right to have the assistance of an interpreter if he cannot understand or speak the language used in court)[16].

As it was noted in the introductory part of the presentation that the principle of fair balance is a well-established concept in the ECtHR jurisprudence. In its case law, the Court noted repeatedly that democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position[17].

15 Case of *Rooman v. Belgium*, No. 18052/11, 13 January 2019, available at: https://hudoc.echr.coe.int/eng?i=001-189902.

16 Case of *Kozlovs v. Latvia* (dec.), no. 50835/99, 10 January 2002, and Kemal Taşkın and Others v. Türkiye, nos. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05, § 56, 2 February 2010, available at: https://hudoc.echr.coe.int/eng?i=001-142739.

17 Case of *Young, James and Webster v. the United Kingdom*, application nos. 7601/76; 7806/77 (1981) ECtHR, § 63, 13 August 1981, available at: URL: https://hudoc.echr.coe.int/eng?i=001-57608.

At the same time, one can observe an interesting trend in the protection of language rights. For dominant groups, their own rights have often been, and still are, invisible: they take them for granted. Even today, this is one of the problems when discussing and trying to formulate language rights. Dominant linguistic groups often feel a need to formally codify their language rights only when dominated groups, for example indigenous/tribal peoples, or minorities of various kinds, start demanding language rights for themselves. Most people connect language rights mainly to indigenous/tribal peoples, and most language rights are found among special minority or indigenous rights rather than general human rights[18].

Such perception of language rights, along with propaganda and the striving not to limit the rights of national minorities residing on the territory of Ukraine, led to a situation, where the state official language itself (*i.e.* Ukrainian language) needs additional protection at the domestic legislative level.

(B) Constitutional level

The introduction of special articles in the ***Constitution of Ukraine*** of 1996[19] was undoubtedly an important step in the settlement of the language issue, so the categories "*state language*" and "*language of national minorities*" were *endowed with a constitutional and legal nature*.

It should be noted that our Fundamental Law explicitly establishes various provisions to ensure a fair balance in realisation of the right to linguistic choice, as well as impose certain duties on public authorities in maintaining such a balance.

Namely, in line with Articles 10.1 and 10.2 "*the state language of Ukraine is the Ukrainian language*" and the State has a positive obligation to ensure "*the comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory of Ukraine*".

Along with the constitutional determination of legal status of Ukrainian language as an official language, Basic Law of Ukraine in

18 Skutnabb-Kangas, Tove, "*Linguistic Human Rights*", in Lawrence M. Solan, and Peter M. Tiersma (eds), The Oxford Handbook of Language and Law (2012; online edn, Oxford Academic, 21 Nov. 2012), available at: https://doi.org/10.1093/oxfordhb/9780199572120.013.0017.

19 Constitution of Ukraine, Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996, available at: https://ccu.gov.ua/en/storinka/legal-acts [in English].

its Article 10.3 provides for the essential guarantees for Ukrainian national minorities which consist in support of "*free development, use and protection*" of their native languages. In relation to afore-cited provisions, Article 10.5 of the Constitution stipulates: "*the use of languages in Ukraine is guaranteed by the Constitution of Ukraine and is determined by the law*".

Another Article 11 of the Constitution also embodies the positive duty of the State, based on the legal principle of equality with respect to promote "*the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine*".

Nevertheless, solely the provisions of Articles 10 and 11 of the Constitution do not limit the scope of the right to use languages of national minorities of Ukraine. Precisely, important constitutional mechanism for the realisation of language rights for national minorities of Ukraine contained in Article 53.4. According to this provision, "*citizens who belong to national minorities are guaranteed the right to receive instruction in their native language or to study their native language in state and communal educational establishments and through national cultural societies in accordance with the law"*.

In addition, it is also necessary, in this context, to have regard to the constitutional provisions banning discrimination broadly (in terms of the principle of equality) or specifically in the language use domain. The quintessence of the principle of equality is postulated in Article 24.1 under which all "*citizens have equal constitutional rights and freedoms and are equal before the law*", while the "anti-discrimination clause" can be found in Article 24.2, which states that there shall be no any privileges or restrictions based *inter alia* on ethnic origin, linguistic or other characteristics.

From the analysis of the above constitutional norms, it follows that the Ukrainian language and each language of national minorities are given an ***appropriate legal status***. At the same time, according to Article 92.2 of the Constitution, the procedure for the use of languages is determined exclusively by the laws of Ukraine, and ensuring the operation and development of the state language and national

languages and cultures in the Autonomous Republic of Crimea is the competence of the Autonomous Republic of Crimea (Article 138.1.8 of the Constitution).

Consequently, having declared these concepts at the highest legislative level, the framers of the Constitution vested in its normative construction a ***fundamental meaning***: the recognition of linguistic diversity on the territory of Ukraine is consonant with the recognition of the underlying values upon which the international (in particular, European) community stands for. Indeed, the corresponding constitutional and legal provisions offer a **normative formula** that is clear and easy-to-understand: *the Ukrainian language is entrusted with the state-building function, the function of ensuring the national identity of the Ukrainian people with the simultaneous preservation of borders and respect for the established guarantees of free development, use, and protection of the languages of national minorities*.

(C) Ordinary legislation

The fundamental ideas and principles that were laid down by the national constitution makers in the Constitution of Ukraine received their further normative concretisation and detalisation at the level of the ***field-specific laws***. As a small, but methodologically important remark, it is worth noting that in resolving the language issue, domestic legislator decided to choose the so-called *"planned-order approach to language"*[20].

It is worth noting an interesting fact that in our State, the issue of the use of languages of national minorities had legally normalised before the status of the Ukrainian language as a single state language has been legislatively synchronised.

In particular, **specific legislative basis** regulating this domain is comprised of the Declaration of the Rights of the Nationalities of Ukraine of 1991[21]; the Law of Ukraine "On National Minorities in

20 That is, to establish unified statutory grounds for balancing the language use in Ukraine with special reference to the principles of sustainable development of Ukraine's civic nation respect for national interests, proportionality, principle of tolerance, respect, and promotion of the development and use of languages of national minorities, *etc*.

21 Declaration of the Rights of the Nationalities of Ukraine of 01.11.1991, No. 1771-XII, available at: https://zakon.rada.gov.ua/laws/show/1771-12 [in Ukrainian].

Ukraine" of 1992[22]; the Framework Convention for the Protection of National Minorities of 1995 (entered into force in Ukraine in 1998)[23], the Law of Ukraine "On ratification of the European Charter for Regional or Minority Languages" (entered into force in Ukraine in 2006)[24].

The Law of Ukraine "On National Minorities" of 1992, without any doubt, can be positioned as the key law in the specified domain. By way of illustration, Article 6 of this normative legal act stipulates the State's obligation to ensure to all national minorities the right to *national* and *cultural autonomy*.

In addition, on July 1, 2021, the Verkhovna Rada of Ukraine adopted the Draft Law no. 5506 "On Indigenous Peoples of Ukraine"[25], which endows the Crimean ***Tatars***, ***Karaites*** and ***Krymchaks*** with the official *status of the indigenous peoples of Ukraine*. Indeed, the adoption of the specified Law has shown enormous progress in providing the required guarantees of autochthonous ethnic communities founded on Ukrainian territory in terms of cultural, educational, linguistic, and informational rights. Having implemented Article 11 of the Ukrainian Constitution, the Law prescribes that the State is obliged to provide the guarantees of studying the languages of the indigenous peoples of Ukraine, as well as constitutionally based safeguards to research, preserve and develop the certain languages, which are under threat of extinction (Articles 5.3 and 5.4).

Furthermore, a number of substantial guarantees for the implementation of national minorities' and indigenous peoples' language rights in Ukraine are established, *inter alia*, in **cross-sectoral legislation** governing various important areas of public life (in particular, education, television and radio broadcasting, culture, local government, freedom of conscience and religious organizations, *etc*.)[26].

22 The Law of Ukraine "On National Minorities in Ukraine" of 25.06.1992, No. 2494-XII (with following amendments), available at: https://zakon.rada.gov.ua/laws/show/2494-12 [in Ukrainian].

23 The Law of Ukraine "On the Ratification of the Framework Convention of the Council of Europe on the Protection of National Minorities" of 9.12.1997, No. 703/97-VR, available at: https://zakon.rada.gov.ua/laws/show/703/97-вр#Text [in Ukrainian].

24 The Law of Ukraine "On Ratification of the European Charter for Regional or Minority Languages" of 15.05.2003, No. 802-IV, available at: https://zakon.rada.gov.ua/laws/show/802-15#Text [in Ukrainian].

25 The Law of Ukraine "On Indigenous Peoples of Ukraine" of 1.07.2021, No. 1616-IX, available at: https://zakon.rada.gov.ua/laws/show/1616-20#Text [in Ukrainian].

26 Among such cross-sectoral laws are the following laws of Ukraine. The Law of Ukraine "On Television and Radio Broadcasting" of 1993 (with following amendments) establishes

Concerning the legislative development of the constitutional and legal status of ***Ukrainian language as a state language***, it should be noted that the process of enacting a special (and, most importantly, effective) law in this area was marked by a number of hard-hitting debates between academic corps, civil society representatives, and parliamentarians. As previously was stated, there existed a Soviet legislation on languages in Ukraine that, to put it bluntly, did not take into consideration the progressive standards of the Constitution, resulting in a substantial contradiction in domestic law enforcement.

In 2012, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On the Fundamentals of the State Language Policy"[27]. The Law established that the state language is Ukrainian, simultaneously expanding the use of regional languages in case the number of their speakers in the region was at least 10% of the population[28]. Nevertheless, in 2018 the Constitutional Court of Ukraine declared the specified Law unconstitutional due to violation of the constitutional procedure for consideration and adoption of the Draft Law during its adoption as a whole[29].

The ***Law of Ukraine "On Supporting the Functioning of the Ukrainian Language as the State language"***[30] (hereinafter referred to as the Law),

---

the principle of non-interference of the state in the direct reception of television and radio programmes and broadcasts from other countries broadcast in the language of a national minority or similar in a regional language (Article 4.4). The Law of Ukraine "On Local Self-Government" of 1997 (with following amendments) in its Article 44.1.1 expressly provides for the possibility of district and regional councils to delegate powers to the relevant local state administrations in the development and adoption of programs for the national and cultural development of national minorities (provided that they live compactly within a certain administrative-territorial unit). The Law of Ukraine "On Culture" of 2011 (with following amendments) concretises the constitutional norms in terms of updating the role of language diversity in the formation of a system of values ensuring sustainable development and consolidation of Ukrainian society, *etc*.

27 The Law of Ukraine "On the Fundamentals of the State Language Policy" of 3.07.2012 (ceased to be valid as unconstitutional), available at: https://zakon.rada.gov.ua/laws/show/5029-17#Text [in Ukrainian].

28 Most professional sources, in particular, claimed that a number of provisions of this Law, particularly when compared to the Soviet Law, limited the use of the Ukrainian language, contributing to further Russification.

29 Decision of the Constitutional Court of Ukraine No. 2-r/2018 of February 28, 2018 in the case upon the constitutional petition of 57 People's Deputies of Ukraine regarding the compliance of the Law of Ukraine "On the Fundamental of State Language Policy" with the Constitution of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/v002p710-18#n55 [in Ukrainian].

30 The Law of Ukraine "On Supporting the Functioning of the Ukrainian Language as the State Language" of 29.04.2019, No. 2704-VIII, available at: https://zakon.rada.gov.ua/laws/show/en/2704-19#Text [in English].

adopted by the Ukrainian Parliament in 2019, has eliminated most of the "blind spots" regarding the status of the Ukrainian language, but at the same time did not limit the rights of national minorities[31].

To get a better understanding of how the Law **normalised the status of the Ukrainian language** as a state language, it is suggested to review briefly with its following main provisions.

The preamble of the Law declares its main purpose:

"[…] *to strengthen the state-building and consolidating functions of the Ukrainian language, increase its role in ensuring the territorial integrity and the national security of Ukraine […]*",

as well as:

"[…] *to create appropriate conditions for ensuring and protecting the language rights and needs of Ukrainians […]*".

In addition, paragraph 4 of Final and Transitional Provisions of the Law states that "*until the temporary occupation of the part of the territory of Ukraine is over, one of the tasks of this Law shall be to facilitate the study of the Ukrainian language by those citizens of Ukraine who reside in the temporarily occupied territory of Ukraine defined in accordance with the law*".

The overall ***aim*** of the Law is to govern the functioning and use of the Ukrainian language as the state language in a wide range of domains of public life that are outlined by this Law across Ukraine's territory. At the same time, the Law does not apply to private conversation or the execution of religious ceremonies.

31 In particular, in line with Article 2.3 of the Law:

"The procedure for the use of the Crimean Tatar language or other languages of indigenous peoples and national minorities of Ukraine in the respective spheres of public life is determined by the law on the procedure for the exercise of rights of indigenous peoples and national minorities of Ukraine, subject to the specific features determined by this Law".

The text of the Law contains both positive and negative obligations of the State in terms of maintaining a reasonable balance between the obligation to study the official language and free development and use of one's native language. For instance, paras 2 and 3 of Article 21.1 establishes that persons from among national minorities and indigenous peoples of Ukraine "*… shall be guaranteed the right to study at communal educational institutions, in order to receive preschool and primary education, in the language of the respective national minority/indigenous peoples of Ukraine, along with the State language. This right shall be exercised by setting up, in accordance with the law, of separate classes (groups) providing education in the language of the respective national minority/indigenous peoples of Ukraine along with the State language, …*".

The Law obliges every citizen of Ukraine to be proficient in the state language. It establishes that the State provides every citizen with opportunities to master the state language through the system of institutions of preschool, general secondary and higher education. Furthermore, the state conducts free language classes for adult Ukrainian residents who previously had no chance to become fluent in the state language (Article 6).

The Law stipulates the requirement for public officials to know and communicate the state language in the fulfillment of their professional tasks in the realm of ***public service*** (Article 12.1). The National Commission for State Language Standards (Article 10.1) establishes requirements for the necessary level of proficiency in the state language, taking into account the Council of Europe's guidelines on language education (CEFR) (Article 11.1).

The Law in its Article 14 has expanded the constitutional foundations for the use of the Ukrainian language as the language of ***legal proceedings***, providing at the same time guarantees for the equality of the rights of citizens in the judicial process based on language. For that reason, Article 14.1 determines that the courts implement the state language in the process of legal proceedings. Whilst in line with Article 14.2 "[…] *other languages than the State language may be used in court proceedings in the manner prescribed by the procedural codes of Ukraine and the Law of Ukraine "On Judicial System and Status of Judges"*[32].

The Law provides for the use of the state language in the ***election process***. It establishes that ballot papers, information posters and election campaign materials, both printed and those, which are broadcasted on television and radio, are carried out in the state language. At the same time, it is allowed to duplicate election campaign materials in the relevant languages of national minorities and indigenous peoples for their distribution in individual settlements "[…] *in the manner and on*

32 As provided by Article 12.3 of this Law, "*courts use the state language in the judicial process and guarantee the right of citizens to use their native language or the language they speak in the judicial process*". The procedural codes of Ukraine, in particular the Civil Procedural Code (in its Article 9.3) and the Criminal Procedural Code (in its Article 29.3) establish that participants in criminal/civil proceedings who do not speak, or do not speak the state language well, have the right to testify, make motions and file complaints, speak in courts in their native language or in another language that they know, using, if necessary, the services of an interpreter in accordance with the procedure provided for by the relevant codes.

the terms established by the law in respect of the procedure for the exercise of the rights of Ukraine's indigenous peoples and national minorities" (Article 18).

Imposing a general rule for the use of the official language in ***cultural, artistic and entertainment events***, the Law allows the use of other languages, "*[…] where justified by the artistic or creative concept of the event organiser, [...]*", as well as in other cases, "*stipulated by the law in respect of the procedure for the exercise of the rights of indigenous peoples and national minorities of Ukraine*". At the same time, "*the provisions of this paragraph shall not apply to the use of languages during the performance and/or reproduction of songs, other musical works with text, or phonograms*" (Article 23.2). The Law requires foreign-language theatrical performances in state or communal theaters to be accompanied by translation, and stipulates detailed requirements for the distribution and screening of films (Article 23.6).

In the field of ***mass media*** and ***book publishing***, the Law allows the publication of printed media in two or more language versions, one of which is in the state language, provided that all language versions are identical in their volume, format and content, and are published on the same day (Article 25.1.2). According to Article 25.5 of the Law, the only exceptions are mass media published in the Crimean Tatar language, in languages of other indigenous languages, in English, or in another official language of the European Union (there is no need to issue a version in the state language). Similarly, the Law requires that "*at each site of print mass media distribution, the print mass media in the State language must amount to at least 50 per cent of the print mass media titles distributed at such a site*" (para 1 Article 25.4).

As applied to the ***commercial sphere***, the Law requires all legal entities registered in Ukraine to use the state language in relations with public authorities (*e.g.*, in the field of accounting, taxation, correspondence). Legislative provisions also establish a requirement for all business entities to use the state language in the field of consumer services (for instance, to provide information about goods and services, including in electronic commerce). Such information might be found in other languages. Furthermore, websites or pages on social media of businesses offering products/services in Ukraine must be loaded

in Ukrainian by default. Versions in other languages are permitted, however material in such a language should not be bigger in terms of volume or content than the Ukrainian version.

III. THE CASE-LAW OF THE CONSTITUTIONAL COURT OF UKRAINE IN THE FIELD OF LANGUAGE RIGHTS: BRIEF ANALYSIS

From 1996, *i.e.*, since the Constitutional Court of Ukraine (hereinafter refers to as the Court or CCU) was established, up to the present, **the cases of particular legal interest dealt**, among other subjects, **with issues relating to the language rights, and *in particular to***:

- interpretation of the scope and indispensable attributes of the status of the Ukrainian language as a state language in the context of the right of the Ukrainian nation to self-determination;
- official interpretation of the mandatory use of the Ukrainian language by public authorities, their officials, as well as in the educational process in educational institutions of Ukraine;
- changing in the language regime of the courts' activities and the narrowing of the existing content and scope of the rights and freedoms of human and citizen;
- the possibility of using in courts, along with state language, the languages of regional or minority groups;
- education in the native language in communal educational institutions for general secondary education in the context of the prohibition on establishing discriminatory preferences on the basis of language and ethnic origin.

Over the period of its activity, the Court delivered five decisions on various aspects of the realisation of the right to use and develop certain languages, thereby managing to form a fair and stable system of exemplary cases.

For the first time, the Court examined on a case concerning the ensuring the State's all-inclusive development and functioning of the Ukrainian language in 1999 in its **Decision No. 10-rp/99**[33].

33 Decision of the Constitutional Court of Ukraine No. 10-rp/99 of December 14, 1999 in the case upon the constitutional petition of 51 People's Deputies of Ukraine on the official interpretation

Issue: the need to official interpretation of certain provisions of Article 10 of the Constitution of Ukraine with respect to the mandatory use of the state language by state authorities and local self-government bodies, their officials, as well as in the educational process in public educational institutions of Ukraine.

The Facts: the subject of the right to a constitutional petition argued that officials of the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, the Administration of the President of Ukraine neglect the state language while performing official duties; simultaneously, the petitioners claimed that "there is a conscious disregard" in the use of state language in most state educational institutions of Ukraine; the provisions of Article 10 of the Constitution of Ukraine, thus, are not properly implemented[34].

CCU's Decision:

Concerning the ***concept of "state (official) language"***, the Decision emphasised the need of understanding it as the language to which the State has accorded the legal status of an obligatory means of communication in public arenas of social life. Expanding on this thesis, the Court went further and emphasised that granting the status of the state language to the Ukrainian language by the Basic Law "*[…] fully corresponds to the state-building role of the Ukrainian nation, which is enshrined in the preamble of the Constitution of Ukraine, the nation that historically lives on the territory of Ukraine, constitutes the absolute majority of its population and gave the official name to the state*".

The Court used an ***approach***, according to which the interpretation of constitutional norms is carried out within their systematic interrelations, as well as the features of the structural (textual) location in a certain section of the Constitution as a legal document. Against

of the provisions of Article 10 of the Constitution of Ukraine regarding the use of the state language by state authorities, local self-government bodies and its use in the educational process in educational institutions of Ukraine (the case on the use of the Ukrainian language) https://zakon.rada.gov.ua/laws/show/v010p710-99#Text

34 In the context of arguing the practical need for an official interpretation of the above constitutional article, it is important to note that certain case materials also speak of the need to develop and use the languages of national minorities in the manner prescribed by the law; the expediency of improving the legal regulation of the language question at the legislative level and the adoption of a nationwide program for the development and use of languages in Ukraine was also noted.

this background, the Court focused on the fact that the provision on the Ukrainian language as the state language is contained in Section I "General Provisions" of the Constitution, which establishes the foundations of the constitutional order in Ukraine. Consequently, the *concept of the state language is a component of the fundamental concept of "constitutional system" which is broader in its content and scope*.

The Court determined that the spheres of application of the state language may be attributed principally to those spheres that are designated by the legislation in conformity to the Constitution. In particular, in accordance with the current laws, the issue of the use of Ukrainian language is defined in relation to the consideration of appeals from citizens, activities of the Armed Forces of Ukraine and the National Guard of Ukraine, publication of printed products intended for official and commercial use, distributed through state enterprises, institutions and organizations (forms, receipts, tickets, certificates, diplomas, etc.), coverage of the activities of state authorities and local self-government bodies in Ukraine by mass media, processing of customs documents, *etc*.

In view of all the foregoing arguments, the CCU came to the following conclusion:

(1) "*The provision of Article 10.1 of the Constitution of Ukraine, according to which "the state language in Ukraine is the Ukrainian language", should be understood in such a way that the Ukrainian language as the state language is a mandatory means of communication throughout the territory of Ukraine in the exercise of powers by state authorities and local self-government bodies (the language of acts, work, record keeping, documentation, etc.), as well as in other public spheres of social life, which are determined by the law (Article 10.5 of the Constitution of Ukraine).*

Along with the state language, Russian and other languages of national minorities may be used in the exercise of powers by local executive bodies, bodies of the Autonomous Republic of Crimea, and local self-government bodies within the limits and in the manner prescribed by the laws of Ukraine.";

(2) "*Based on the provisions of Article 10 of the Constitution of Ukraine and the laws of Ukraine on guaranteeing the use of languages in Ukraine, including in the educational process, the Ukrainian language is the language*

of instruction in preschool, general secondary, vocational and higher state and communal educational institutions of Ukraine.

In state and communal educational institutions, along with the state language, in accordance with the provisions of the Constitution of Ukraine, in particular Article 53.5, and the laws of Ukraine, the languages of national minorities may be used and elaborated in the educational process".

Almost 10 years later, the Court delivered another **Decision No. 8-rp/2008**[35] that touched upon a sensitive question, *i.e.*, the issue of the use of the Ukrainian language in the judicial process.

Issue: the unconstitutionality of the provisions of Article 15 of the Code of Administrative Procedure of Ukraine, Article 7 of the Civil Procedure Code of Ukraine (hereinafter referred to as the Codes) regarding the language of proceedings and record keeping in administrative and civil courts.

The Facts: the authors of the petition argued that the Verkhovna Rada of Ukraine, by adopting the impugned articles of the Codes, violated the provisions of the Constitution of Ukraine in terms of guaranteeing by its norms a free development, use and protection of the languages of national minorities, which led to a change in the language regime of the courts of Ukraine and narrowing of the existing content and scope of human and citizen rights and freedoms.

CCU's Decision:

The Court, at the first stage of deliberation of this case, made an immediate focus on the essence of *judicial proceedings as procedural forms of justice* that cover the procedure for applying to court, the procedure for court consideration of a case and the adoption of a court decision.

Then, it was ascertained that courts implement the state language in the judicial process and *guarantee* the right of citizens to use their native language or the language they speak in the judicial process, *in accordance with the Constitution and the laws of Ukraine*.

35 Decision of the Constitutional Court of Ukraine No 8-rp/2008 of April 22, 2008 in the case upon the constitutional petition of 52 People's Deputies of Ukraine and the constitutional petition of the Verkhovna Rada of the Autonomous Republic of Crimea regarding the conformity of Article 15 of the Code of Administrative Procedure of Ukraine, Article 7 of the Civil Procedure Code of Ukraine to the Constitution of Ukraine (the case regarding the language of legal proceedings), available at: https://zakon.rada.gov.ua/laws/show/v008p710-08#Text [in Ukrainian].

In arriving at this conclusion, the Court accepted that official use of the state language in administrative and civil proceedings is regulated both at the level of specialised procedural codes and within the framework of a special law regulating the procedure for conducting legal proceedings. The systematic analysis of the specified legislation leads the Court to conclude that the ***State language is used to conduct court proceedings, draw up court documents and make other procedural actions and establish relations between the court and other subjects at all stages of consideration and resolution of administrative and civil cases***.

The Court thereby emphasized its continued attachment to the principles which afford the national legislator a genuine opportunity of providing the normative prescriptions that offer an adequate alternative in regulating of certain social domain. In this instance, citizens who do not know or do not know the state language enough, were granted the right to use their native language or the language they know in court proceedings.

As a final accord, the Court stated that the Ukrainian Constitution *prohibits citizens from being given priority based on their language*. Guaranteeing the use of Ukrainian national minorities' languages in administrative and civil processes is consistent with the European Charter for Regional or Minority Languages, ratified by Ukrainian law on May 15, 2003.

Therefore, the CCU considered that disputed regulation established by the Codes was fully compatible with the provisions of the Constitution of Ukraine.

Decision No. 17-rp/2011 of December 13, 2011[36]

Issue: the unconstitutionality of Articles 12.4 and 12.5 of the Law of Ukraine "On Judiciary and Status of Judges", which enable it to be used in courts alongside the state, regional, or minority language.

36 Decision of the Constitutional Court of Ukraine No 17-rp/2011 of December 13, 2011 in the case upon the constitutional petition of 54 People's Deputies of Ukraine regarding the conformity of certain provisions of the Law of Ukraine "On Judiciary and Status of Judges", the Criminal Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine to the Constitution of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/v017p710-11#Text [in Ukrainian].

The Facts: it was argued by the petitioners that the impugned provisions of the Law contradict Article 8.2, Article 10.1 of the Constitution of Ukraine; referring to the provisions of the European Charter for Regional or Minority Languages and the Law of Ukraine "On the Ratification of the European Charter for Regional or Minority Languages" (paragraph "b" of Article 4), the authors of the petition noted that these acts provide for the use of regional or minority languages in the judicial process only in certain judicial districts and exclusively in terms of granting permission to present documents and evidence in regional or minority languages; at the same time, from the context of Article 12 of the Law, it follows that the use in the judicial process of all languages defined in part two of the Law of Ukraine "On the Ratification of the European Charter for Regional or Minority Languages", shall be applied to the entire territory of Ukraine without any restrictions.

CCU's Decision:

The Court ruled that constitutional frameworks for ensuring the full development and operation of the state language by the State are applied in procedural legislation after repeating the legal positions expressed in previously analysed decisions. The latter prescribes that ***judicial proceedings and office work in Ukrainian courts should be conducted in the state language***. Indeed, *the option of using native language is only available to those involved in the case who do not know or do not have sufficient understanding of the state language*.

It was considered that the establishment of legislative mechanisms for the use of regional or minority languages in legal proceedings is deemed to be consistent primarily with the principle of equality of all citizens before the law (Article 24.1 of the Constitution). Specifically, one of the imperatives of this principle is the inadmissibility of restrictions on the rights of citizens, in particular participants in the judicial process, on the basis of language (Article 24.2 of the Constitution). In addition to this, according to the Court, **securing the possibility of using regional or minority languages in legal proceedings at the legislative level should also be seen in the light of ensuring the right of everyone to apply to the court**. The impugned legislative norms also continue and specify the right to challenge in court the choices, acts, or omissions of

bodies of state authority, bodies of local self-government, officials, and officers (Article 55.2 of the Constitution).

For the above reasons, the CCU held that the impugned provisions of the Law of Ukraine "On Judiciary and Status of Judges" is in conformity to the Constitution of Ukraine.

Decision No. 10-r/2019 of July 16, 2019[37]

Issue: non-compliance of the Law of Ukraine "On Education" of 2017 with the Constitution of Ukraine.

The Facts: according to the subjects of the right to constitutional petition, the provisions of the impugned Law had narrowed the content and scope of the existing rights and freedoms of certain category of persons (namely, the rights of persons belonging to national minorities and indigenous peoples of Ukraine to study in their native language in communal educational institutions for general secondary education), thus violating the principle of legal certainty as a component of the rule of law via establishing "discriminatory preferences" on linguistic grounds and ethnic origin.

CCU's Decision:

Having examined the Law in terms of ensuring ***balance*** between the study and use of the state language and the free development, use, protection of languages of national minorities and indigenous peoples of Ukraine, the Constitutional Court pointed out that the Law provided for the means and mechanisms for the realisation of the right to study the languages of the respective national minorities and indigenous peoples of Ukraine along with the ***study of the Ukrainian language*** as a state language by persons belonging to national minorities and indigenous peoples of Ukraine, since it ***is a condition of conscious unification of citizens within the territory of Ukraine***.

It is noteworthy that the Court placed emphasis on the aim of the impugned Law. It observed in this connection as follows:

37 Decision of the Constitutional Court of Ukraine No 10-r/2019 of July 16, 2019 in the case upon the constitutional petition of 48 People's Deputies of Ukraine regarding the conformity of the Law of Ukraine "On Education" to the Constitution of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/v010p710-19#Text [in Ukrainian].

"[...] it ensures a balanced approach to the study of the state language as a means of socialisation of the person and the functioning of the bodies of state power and bodies of local self-government on the constitutional basis and the study of the languages of national minorities, as well as indigenous peoples of Ukraine."

With these considerations in mind, the Court highlighted the following:

(1) by adopting the Law, the State has created the ***conditions for full realisation of the respective rights of national minorities, including indigenous peoples of Ukraine***, to study their mother tongue, as well as to receive education in the state language, regardless of their origin, to fully exercise the right to work determined by the Constitution (Article 43.1); to participate in the management of state affairs, in all-Ukrainian and local referendums, to freely elect and be elected to bodies of state power and bodies of local self-government; on access to the civil service, services in bodies of local self-government (Article 38); to receive free of charge higher education in state and municipal educational establishments on a competitive basis (Article 53.4); judicial protection (Article 55.1), *etc.*;

(2) the Law not only ***reproduces the content and scope of the constitutional right to education*** in the language of the respective national minority, but ***also provides for its realisation in two forms***: education in the native language (pre-school and primary) and the study of the native language (at all levels of general secondary education);

(3) the Law does not exclude the study of languages of national minorities; rather, its provisions seek to ***provide the circumstances for all Ukrainian citizens to learn the state language to be able to take out professional activities in the chosen sector of social life in the future***.

Thus, the CCU held to declare the Law "On Education" of 2017, as amended, to be conforming to the Constitution (constitutional).

On July 14, 2021 the CCU has delivered a *remarkable decision* concerning the support of the functioning of the Ukrainian language as the state language.

Decision No.1-r/2021[38]

Issue: incompliance of the Law of Ukraine "On Supporting the Functioning of the Ukrainian Language as the State Language" of 2019, as amended, with the Constitution of Ukraine.

The Facts: the authors of the petition claimed that certain provisions of the impugned Law "*actually mean discrimination against Russian-speaking citizens*", limit the list of languages of indigenous peoples and national minorities, and define "*selective use and selective protection of the language of one indigenous people and some other languages of national minorities [..].*", and "*[...]actually establish priority for the use of English and other official languages of the European Union*" over the other languages.

CCU's Decision

The Court's reasoning in the Decision is notable in that it focuses on ***Ukrainian language as a fundamental constitutional value***, *a particular characteristic and a major aspect of the Ukrainian State's unity, and an intrinsic part of its constitutional identity*. It emphasized in this regard:

"[...] the Ukrainian language is an inseparable attribute of Ukrainian statehood, which preserves its historical continuity from the ancient Kyiv era. The Ukrainian language is the ultimate condition (condition sine qua non) of Ukraine's statehood and its unity. […] therefore, any encroachments on the legal status of the Ukrainian language, as the state language, on the territory of Ukraine, are inadmissible, as they violate the constitutional order of the State, threaten national security and the very existence of the Ukrainian statehood".

This Decision is significant as it construed the ***term "Ukrainian people – citizens of Ukraine of all nationalities"***, as the comprehensive wording that embraces all individuals, regardless of ethnicity, who have a permanent legal link with Ukraine, *i.e.*, Ukrainian citizenship.

A number of case law points are worth noting[39].

38 Decision of the Constitutional Court of Ukraine No. 1-r/2021 of July 14, 2021 in the case upon the constitutional petition of 51 People's Deputies of Ukraine regarding the conformity of the Law of Ukraine "On Ensuring the Functioning of the Ukrainian Language as a State Language" to the Constitution of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/v001p710-21#Text [in Ukrainian].

39 As a disclaimer, it is worth noting that the Court's reasoning is not restricted to the legal

(I) The ***realisation of the rights of national minorities cannot be aimed at the separation (segregation) within Ukrainian society*** of those groups that differ, in particular, on language base. The removal of an individual (or, more specifically, a group of individuals) from a single society into the space of their identity endangers Ukrainian society's cohesiveness.

(II) The Court determined that ***knowing the Ukrainian language*** as the language of one's citizenship ***is the responsibility*** of every Ukrainian citizen. It was stressed, among other things:

"[…] The free mastery of all Ukrainian citizens in the language of their citizenship is a guarantee of the unity and stability of society, the presence of interethnic harmony in it, the effective functioning of the state, and its positive perception by its own citizens and the international community as a full-fledged and democratic actor, as confirmed by the centuries-old experience of the world's states. The European experience unambiguously demonstrates that the state language plays an enormously significant function in society as a linguistic integrator, a means of cross-national (interethnic) communication, especially if the community is not mono-ethnic, as it is in Ukraine. In any state where people speak different languages coexist, the official language, that is, the state language, is desperately required to allow people to communicate with state officials and other people."

(III) Given the Russian Federation's use of the ***Russian language as a tool for geopolitical expansion***, the Constitutional Court sees this as a reason to assume the ***legislator's differentiated approach*** to the use of Ukrainian national minorities' languages as objectively and reasonably justified, concluding that there are no grounds to declare the Law discriminatory in this regard.

Thus, the Constitutional Court of Ukraine held to declare the provisions of the Law "On Supporting the Functioning of the Ukrainian Language as the State Language" of 2019, as amended, to be in conformity to the Constitution of Ukraine (constitutional).

perspectives stated in this Article. In this regard, the authors of the presentation opted to reflect those elements of the Court's Decision that provide support for Ukrainian people' right to linguistic identity.

IV. CONCLUDING REMARKS

The principle of promoting linguistic variety is now firmly ingrained in national legal systems due to the ongoing processes of globalisation of the international order. This unquestionably necessitates that the national legislator regulates the issue of language use, specifically the process for the operation and use of the state language, the mechanism for spreading its use among the state's multicultural population, as well as the process for using the languages of national minorities. Primarily, all of these issues are reflected at the level of state constitutions in the form of fundamental concepts, principles, as well as rights and freedoms.

Since the aforementioned values, principles, and rights are enshrined in constitutional and legal norms in the broadest sense, constitutional review bodies play a crucial role in determining how to interpret the state's fundamental laws in light of various historical, social, cultural, and economic contexts. The *Court is thus an authentic interpreter of Fundamental Law, which materialises by its decisions the supremacy of the constitution over ordinary law*.

As can be observed from the analysis of the CCU's case law practice, there has been a growth in understanding of the constitutional model of language rights as the Constitution of Ukraine has been interpreted. Additionally, on this foundation, it is actually guaranteed that, *without altering the wording of the Constitution, one or more of its parameters will evolve or change in response to a changing social and legal system*. The Court's decisions play a transformational role in this respect by "enveloping" the particular institutions and norms of the Constitution. The latter serves as a sort of guarantee for the "living" constitutional paradigm of language rights.

As a final accord to mention, the CCU's case law in the language domain has developed an algorithm, which includes the answer to the one but important question: ***Do language rights have an inviolable minimum core that may not be limited by the legislator and may not be subjected to any balancing with competing rights and interests?***

In answering this question, the Court determines the **harmonisation of the law's purpose with the provisions of the Constitution of**

Ukraine, which consists in the proportionality of legislative regulation in the field of learning the Ukrainian language (as the state language) as an instrument (means) of the socialisation of the individual, the functioning of public authorities and local governments on constitutional foundations, on the one hand, and languages of national minorities and indigenous peoples of Ukraine, on the other.

КОНСТИТУЦИОННО-ПРАВОВОЕ ТОЛКОВАНИЕ ОСНОВНЫХ ПРАВ И СВОБОД ЧЕЛОВЕКА КОНСТИТУЦИОННЫМ СУДОМ РЕСПУБЛИКИ УЗБЕКИСТАН

Kamola Khamidova

CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN

ДОКЛАД НА ТЕМУ «КОНСТИТУЦИОННО-ПРАВОВОЕ ТОЛКОВАНИЕ ОСНОВНЫХ ПРАВ И СВОБОД ЧЕЛОВЕКА КОНСТИТУЦИОННЫМ СУДОМ РЕСПУБЛИКИ УЗБЕКИСТАН»

К.Хамидова[*]

Ассалому алайкум!

Добрый вечер!

Уважаемые участники, коллеги 10-летней школы!

Позвольте поприветствовать Вас, а также поблагодарить организаторов сегодняшнего мероприятия – Конституционного суда Республики Турция за приглашение и предоставленную возможность выступить перед Вами.

Если честно, мы до последнего момента планировали участвовать в оффлайн формате вместе с Вами.

Но - по объективным обстоятельствам было не суждено!

Мой доклад состоит из II частей:

Первая часть – об основных правах и свободах граждан Республики Узбекистан, закрепленные и гарантируемые Конституцией Республики Узбекистан;

Вторая часть – о конституционных реформах в Узбекистане на сегодняшний день.

Узбекистан принял Конституцию в 1992 году. В этом году исполняется 30 лет. За тридцать лет с момента принятия Конституции в стране произошли колоссальные изменения. Это касается современных технологий, уровня жизни граждан и устойчивости национальной экономики.

Второй раздел Конституции Республики Узбекистан посвящен **«Основным правам, свободам и обязанностям человека**

[*] Senior Expert at the Constitutional Court of the Republic of Uzbekistan.

и гражданина», состоящий из 7 глав, где главы разделены по направлениям:

1. Общие положения;
2. Гражданство;
3. Личные права и свободы;
4. Политические права;
5. Экономические и социальные права;
6. Гарантии прав и свобод человека, а также
7. Обязанности граждан.

В разделе Основных прав и свобод урегулированы:

право на жизнь, право на квалифицированное медицинское обслуживание, право на образование, т.е. государство гарантирует получение бесплатно общего образования, право на труд, право на свободу мысли, слова и убеждений, право на свободу совести, право на социальное обеспечение в старости, права несовершеннолетних, нетрудоспособных и одиноких престарелых которые находятся под защитой государства, право объединяться в политические партии и другие общественные объединения, право участвовать в управлении делами общества и государства как непосредственно, так и через своих представителей, право обжалования в суд. А также, по статье 46 Конституции женщины и мужчины имеют равные права. Которые отражаются во всех сферах жизни.

На сегодняшний день в Республике Узбекистан проводится конституционная реформа. Глава государства внес предложение о необходимости внесения серьезных поправок в Конституцию и определил следующие приоритетные направления конституционных реформ:

первое - закрепление в Основном законе приоритет интересов человека исходя из принципа **«Человек - Общество - Государство»**;

второе - конституционное закрепление роли и статуса институтов гражданского общества;

третье - укрепление основ развития института семьи;

четвертое - отражение в Конституции государственной молодежной политики;

пятое - закрепление в качестве конституционной нормы принципа **«Новый Узбекистан - социальное государство»;**

шестое - введение в Конституцию специальных экологических разделов, правовых норм, касающихся глобальных климатических изменений.

Конституционные реформы планируется провести в три этапа.

На первом этапе изучив предложения и замечания общества, был разработан проект Конституционного закона «О внесении изменений и дополнений в Конституцию Республики Узбекистан» и внесен в Законодательную палату Республики Узбекистан.

В следующем этапе, Проект изменений в Конституцию вынесен на общественное обсуждение.

Третьим этапом является проведение референдума, который позволит узнать отношение народа к предлагаемым реформам.

На данном этапе в Узбекистане проходит активное обсуждение конституционной реформы и будущих поправок в Конституцию. Проект закона предусматривает около 200 изменений в порядке 60 статей Конституции. В рамках всенародного обсуждения поступило более 150 000 предложений.

Это в свою очередь, свидетельствует о том, что законопроект принимается на основе предложений нашего народа и Основной Закон- Конституция Республики Узбекистан в буквальном смысле становится народной Конституцией. Ведь каждая статья нашей Конституции должна стать программным документом и правилом жизни для каждого гражданина.

Следует отметить, что конституционная реформа может стать важным инструментом содействия «лучшему управлению» путем изменения конституционных положений, способствующих укреплению системы сдержек и противовесов между ветвями власти.

Это достигается прежде всего путем четкого распределения полномочий между Президентом, парламентом и правительством, формирования должного баланса в системе разделения властей, укрепления сдержек и противовесов, развития гражданского общества.

Также я хочу Вас ознакомить с реформой проведенной в конституционном судопроизводстве. За прошедший период в нашей стране создана прочная правовая база осуществления конституционного контроля, совершенствования конституционного судопроизводства, повышения эффективности конституционного правосудия.

Ранее конституционное судопроизводство Республики Узбекистан не предусматривало возможность внесения гражданами вопросов на рассмотрение Конституционного суда – конституционная жалоба.

Граждане имели лишь косвенный доступ к конституционному правосудию. Эти и другие факторы обусловили принятие нового закона.

27 апреля 2021 года был принят новый Конституционный закон «О Конституционном суде Республики Узбекистан», разработка и принятие, которого была предусмотрена Национальной стратегией по правам человека Республики Узбекистан.

В данном законе нашли отражение новые положения, обеспечивающие дальнейшее развитие конституционного контроля.

В круг субъектов, обладающих правом внесения вопросов на рассмотрение Конституционного суда дополнительно включены:

-Национальный центр по правам человека,

- Бизнес-Омбудсмен,

-Уполномоченный по правам ребенка (Ювенальный Омбудсмен).

Несомненно, расширение круга субъектов послужит усилению системы защиты прав и свобод граждан, особенно детей, а также законных интересов субъектов предпринимательства.

Новый закон предусматривает, что **граждане и юридические лица вправе обращаться в Конституционный суд с жалобой о проверке конституционности закона, если закон, по их мнению, нарушает их конституционные права и свободы, не соответствует Конституции и применён в конкретном деле, рассмотрение которого в суде завершено и все другие средства судебной защиты исчерпаны.**

Применение института конституционной жалобы способствует развитию доктрины конституционной законности и защите основных прав и свобод граждан. Предоставление гражданам права оспаривать конституционность закона способствует развитию демократизации общества и соблюдение законности в стране.

Можно с уверенностью утверждать, что с принятием нового Конституционного закона «О Конституционном суде Республике Узбекистан», с внедрением института конституционной жалобы система защиты прав человека в Узбекистане вышла на новый конституционно-правовой уровень.

Конституционный суд Республики Узбекистан проводит всеобъемную работу над совершенствованием своей деятельности по защите конституционных прав и свобод человека.

К примеру Конституционным судом Республики Узбекистан в 2014 году было рассмотрено дело и принято Постановление **«О толковании части первой статьи 21 Закона Республики Узбекистан «О гражданстве Республики Узбекистан».**

Части первой статьи 21 Закона Республики Узбекистан «О гражданстве Республики Узбекистан» дано следующее толкование:

под словами «лицо, постоянно проживающее за границей», следует понимать как лиц проживающих за границей, выписавшихся из места постоянного жительства в Республике Узбекистан и оформивших разрешение на выезд за границу на постоянное жительство в установленном порядке, так и лиц проживающих за границей без соответствующего оформления выписки из места постоянного жительства в Республике Узбекистан, разрешения на выезд за границу на постоянное место жительство.

Следовательно, норма части первой статьи 21 Закона Республики Узбекистан «О гражданстве Республики Узбекистан» может применяться и в отношении лиц проживающих за границей без соответствующего оформления выписки из места постоянного жительства, разрешения на выезд за границу на постоянное место жительство и проживающих за границей в течение пяти лет без постановки на консульский учет без уважительных причин.

Ещё один пример: В текущем году в мае месяце Конституционным судом Республики Узбекистан была рассмотрена конституционная жалоба о нарушении прав собственника.

Обращение, поданное в соответствии с требованиями нового закона, было рассмотрено на заседании Конституционного суда.

Дело было рассмотрено по существу и принято решение Конституционного суда. В настоящее время парламент внес соответствующие поправки в нормы закона.

Рассмотрение данного дела и принятие Конституционным Судом решения по данному делу послужили обеспечению защиты основных прав и свобод граждан, предусмотренные в Конституции Республики Узбекистан.

В заключение хочу отметить, что проводимая конституционная реформа и реализация нового Конституционного закона «О Конституционном суде Республики Узбекистан» способствует повышению эффективности конституционного судебного контроля в нашей стране.

В конце хочу поблагодарить Конституционный суд Турецкой Республики за организованную площадку обмен мнений и опыта.

Поздравляю с 10 летием летнюю школу. Это очень полезный, нужный опыт.

Между Конституционными судами Республики Узбекистан и Турецкой Республики налажены очень тёплые, дружеские и тесные отношения.

Желаем высоких достижений в деятельности **конституционного правосудия** в области обеспечения прав и свобод всем странам-участникам!

Спасибо за внимание!

CLOSING SPEECH OF THE TENTH SUMMER SCHOOL OF THE AACC ON "INTERPRETATION OF THE CONSTITUTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS"

22 September 2022, Ankara

Distinguished participants,

I would like to extend to you all my sincere and respectful greetings. This is the end of the 10th Summer School on the "Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms" organized by the Constitutional Court of the Republic of Türkiye as the Center for Training and Human Resources Development of the Association of Asian Constitutional Courts and Equivalent Institutions.

As known, we had to organise the last two summer school events through video-conference due to Covid-19. This year, it has been held in a hybrid format that enables both online and in-person participation. I would like to take this opportunity to thank you all for your participation and valuable contributions.

On behalf of the Center for Training and Human Resources Development of AACC, I would like to say that we are proud of the solidarity and exchange of information and experience among the AACC members. In the summer school event, which we have just organized with a wide participation this year, we have exchanged knowledge and experience with a total of 48 representatives from 24 different countries and institutions, 29 face-to-face and 19 online.

The issue of "Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms ", which is the subject of this year's summer school, has become even more important with the incorporation of the individual application system into our Constitution. It is an undeniable fact that the Constitutional Court's decisions and judgments through individual application system have

a transformative effect on the realization of the principle of democratic rule of law. While assuming this important role, the Court has avoided an approach that limits the sphere of fundamental rights and freedoms in individual application examinations, and in many applications, on the contrary, it has taken an expanding attitude.

Esteemed guests,

Before concluding my speech, I would like to express that we will send you our yearly publication called "*Constitutional Justice in Asia*" in which the presentations delivered during the 10th summer school will be collected as soon as possible. On this occasion, I would like to thank you all for your participation and contribution to this online Summer School.

Hopefully, this event will lead to further and greater cooperation and collaboration between our colleagues and our institutions.

I once again greet you all with my sincere respect and I extend my wishes of health, peace and prosperity to all of you.

Kadir ÖZKAYA

Vice-President of the
Constitutional Court of
the Republic of Türkiye

PHOTOGRAPHS FROM THE 10TH SUMMER SCHOOL

Prof. Dr. Zühtü Arslan
President of the Constitutional Court of Türkiye
Opening Session of the 10th Summer School

President Arslan delivering the opening speech of the
10th Summer School

Opening Ceremony, Grand Tribunal Hall of the Turkish Constitutional Court

President Arslan having conversation with the participants

President Arslan receiving the gifts presented by the participants

Participants visiting the Constitutional Gallery located in the Court

Family photo

Participants delivering their presentations during the academic program

Participants delivering their presentations during the academic program

The Executive Committee comprised by the Turkish Constitutional Court

Participants delivering their presentations during the academic program

Academic program

Dinner hosted by Mr. Hasan Tahsin Gökcan, Vice-President of the Turkish Constitutional Court, in honour of the guests

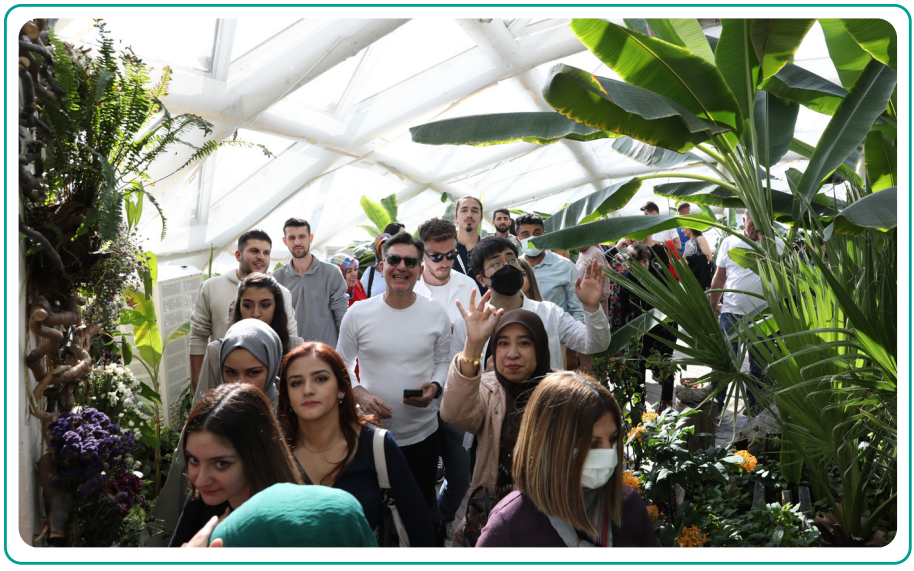
Family photo taken at the end of the academic program

Tour of historical places of Ankara

Participants taking photo at the Ankara Castle

Participants visiting Mevlana Museum in Konya

Sema Ritual-Whirling Dervishes



Tour of Konya Tropical Butterfly Garden

Participants arriving at the train station for departure to Ankara

Executive Committee of the 10th Summer School Program

Constitutional Court of the Republic of Türkiye

Name-Surname	Title
Dr. Murat Şen	Secretary General
Mr. Yücel Arslan	Deputy Secretary General
Mr. Fatih Çağrı Ocaklı	Director of the Department of International Relations
Ms. Özlem Talaslı Aydın	Deputy Director of the Department of International Relations
Mr. Korhan Pekcan	Officer at the Department of International Relations

Participants of the 10th Summer School Program
(In alphabetical order)

Constitutional Court of the Republic of Albania

Name-Surname	Title
Ms. Elona Gjergjani (online)	Legal Adviser

Constitutional Court of the Republic of Azerbaijan

Name-Surname	Title
Ms. Nigar Dunyamaliyeva	Deputy Head at the Department of International Law and International Cooperation

Supreme Court of Bangladesh

Name-Surname	Title
Mr. Abu Amar	Senior Assistant Judge
Mr. Monjur Kader (online)	Chief Judicial Magistrate

Constitutional Court of Bosnia and Herzegovina

Name-Surname	Title
Mr. Kenad Osmanović (online)	Judicial Associate

Constitutional Court of Republic of Bulgaria

Name-Surname	Title
Ms. Stiliyana Stoyanova	Legal Expert
Ms. Ginka Vihrogonova	Chief Expert at the International Relations and Protocol

Constitutional Council of the Republic of Cameroon

Name-Surname	Title
Dr. Joseph Koudjou	Head of Documentation and Archives
Ms. Lilian Awah Ngumaso	Secretary at the Secretariat of the Secretary General

Council of Europe

Name-Surname	Title
Ms. Olga Dmytrenko (online)	Lawyer at the European Court of Human Rights
Mr. Juris Rudevskis (online)	Lawyer at the European Court of Human Rights
Ms. Tuğçe Duygu Köksal	Former Lawyer at the European Court of Human Rights / President of the Human Rights Center of the Istanbul Bar Association

Constitutional Court of the Republic of Croatia

Name-Surname	Title
Ms. Renata Gerkman Rudec	Senior Constitutional Court Advisor
Ms. Nikolina Radonić	Independent Legal Adviser

Constitutional Court of Georgia

Name-Surname	Title
Mr. Iva Khavtasi	Legal Adviser
Ms. Tamari Kiknadze	Legal Assistant at the Secretariat of the Court

Constitutional Court of the Republic of Indonesia

Name-Surname	Title
Mr. Agusweka Poltak Siregar	Law Scholar
Ms. Intan Permata Putri	Researcher
Ms. Rizkisyabana Yulistyaputri (online)	Assistant Judge

Constitutional Council of the Republic of Kazakhstan

Name-Surname	Title
Ms. Aigul Mukusheva	Chief Consultant
Ms. Yuliya Verchenko	Expert

Constitutional Court of the Republic of Korea

Name-Surname	Title
Mr. Minki Hwang	Rapporteur Judge
Ms. Dami Park	Constitutional Researcher

Constitutional Court of the Republic of Kosovo

Name-Surname	Title
Mr. Altin Nika	Legal Adviser
Mr. Admir Guguli	Director of Finance

Supreme Court of the Kyrgyz Republic

Name-Surname	Title
Mr. Kubanychbek Alybaev	Head of the Expert and Analytical Department
Ms. Zhainagul Ashirmatova	Senior Consultant

Federal Court of Malaysia

Name-Surname	Title
Ms. Manira Mohd Nor	Director
Ms. Wan Aima Nadzıhah	Research Officer

Constitutional Court of Mongolia

Name-Surname	Title
Mr. Erdenabayar Batbold	Senior Officer
Ms. Bayarjargal Battulga	Senior Officer

Constitutional Tribunal of the Union of Myanmar

Name-Surname	Title
Dr. Cho Mar Htay	Deputy Director of the Procedural Department
Ms. Ei Ei Soe (online)	Assistant Director of International Relation Department

Constitutional Court of the Republic of North Macedonia

Name-Surname	Title
Ms. Tatjana Janjic-Todorova	State Adviser for International Co-operation
Ms. Majlinda Ismaili	State Adviser for International Cooperation

Constitutional Court of the Russian Federation

Name-Surname	Title
Mr. Pavel Ulturgashev	Leading Counsellor at the Department of International Relations and Research of Constitutional Review Practice
Mr. Nikita Igumnov (online)	Senior Consultant at the Department of Constitutional Foundations of Public Law

Constitutional Court of the Republic of Tajikistan

Name-Surname	Title
Ms. Usmonova Manizha Abdulmuminovna	Chief Specialist on Appeals of Individuals and Legal Entities
Mr. Amirov Shohmansur Dilmurotovich (online)	Chief Accountant

Constitutional Court of the Kingdom of Thailand

Name-Surname	Title
Mr. Tanawoot Trisopon	Constitutional Court Academic Officer at the Division of International Relations and International Affairs
Ms. Chutipa Sukniam	Legal Officer at the Legal Affairs Department

Supreme Court of the Turkish Republic of Northern Cyprus

Name-Surname	Title
Ms. Ayşen Toroslu	Senior Judge
Mr. Rauf Kürşad	Senior Judge

Constitutional Court of the Republic of Türkiye

Name-Surname	Title
Mr. İsmail Emrah Perdecioğlu	Rapporteur-Judge

Constitutional Court of Ukraine

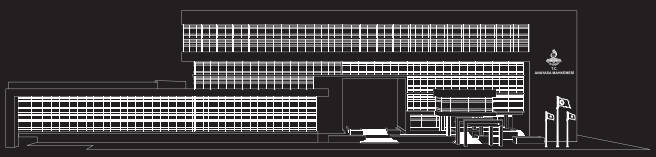
Name-Surname	Title
Ms. Marta Spodaryk	Head of the Sector of Research
Ms. Yuliia Reminska	Chief Specialist at the Communications and International Cooperation Department

Constitutional Court of the Republic of Uzbekistan

Name-Surname	Title
Mr. Shokhrukh Majidov	Senior Expert
Ms. Kamola Khamidova	Senior Expert

www.anayasa.gov.tr/en
twitter.com/aymconstcourt

10TH SUMMER SCHOOL OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TÜRKİYE
Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00
E-mail: tcc@anayasa.gov.tr
twitter.com/aymconstcourt

www.anayasa.gov.tr/en

9 786052 378977