MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

CACCJ
2010

Proceeding

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

GENERAL ELECTION LAW

Jakarta- Indonesia, 12 - 15 July 2010



Jakarta Declaration

on the Establishment of
the Association of Asian Constitutional Courts
and Equivalent Institutions

Jakarta, 12 July 2010


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CONSTITUTIONAL COURT JUDGES
WELCOMING DINNER
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CONSTITUTIONAL COURT JUDGES
"GENERAL ELECTION LAW"

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CONSTITUTIONAL COURT JUDGES

Proceeding

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

General Election Law

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Proceeding

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THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

PREFACE

It is an honour for us to be trusted to host the 7th Conference of Asian Constitutional Court Judges. Not only because it is attended by delegates from Constitutional Courts and Equivalent Institutions from around the World, but the theme of the conference also has a very important meaning for the development of democracy and the rule of law in each participating country, especially in relations to the law and practices in organizing general election.

Presentations and papers delivered by delegates, that contain ideas and information on the law and practices of general election in each country, and the discussion process which took place in the course of the conference, are very beneficial and serve as reference in developing democracy and implementing the principles of rule of law. Therefore, we deem it necessary to gather all of the materials in the form of a conference proceeding which we are going to present to all participants of the conference.

The proceeding contains written documentation of the overall organization of the conference, which are arranged alphabetically by referring to the phases that took place during the event of this conference, starting from the opening ceremony to the presentations and discussion in each session and lastly the closing ceremony. Papers and list of delegates can be found in the annexes.
We hope the proceeding will be beneficial for all us.

The Constitutional Court of
the Republic of Indonesia
Secretary General



JANEDJRI M. GAFFAR



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

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A. OPENING CEREMONY

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REPORT OF THE SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AT THE OPENING OF THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

Tuesday, July 13, 2010

Bismillahirrohmaanirrohim,

Assalamu'alaikum warahmatullahi wabarakaatuh.

Good morning and peaceful greeting to all of us.

- Honorable President of the Republic of Indonesia, His Excellency **Dr. H. Susilo Bambang Yudhoyono**,
- Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, **Prof. Dr. Mohammad Mahfud MD**, along with the Constitutional Court Justices of the Republic of Indonesia,
- Honorable President and Justice of Constitutional Court and Equivalent Institutions from the countries participating in this Conference,
- Honorable Head of State Institutions, Ministers of the 2nd United Indonesia Cabinet, and other State Officials,
- Your Excellencies, the Ambassadors of the Countries participating in this Conference,
- Distinguished ladies and gentlemen.

Let us convey our gratitude to The One Almighty God for His blessings and guidance enabling us to be here in this joyful morning to attend the **Opening of the 7th Conference of the Constitutional Court Judges** in a healthy condition.

As of today, July 13, 2010 until July 14, 2010, Justices of Constitutional Court and Equivalent Institutions will discuss various fundamental issues related to the system of the organization of General Election which is very

crucial for the development of democracy not only for Indonesia, but also for the countries in Asia and other regions.

With regard to the organization of this conference, on Monday, July 12, 2010, one of quite historical events in the development of constitutionalism in Asia had taken place that is **the Jakarta Declaration on the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions**.

Honorable Mr. President,

Allow us to take this opportunity to inform you that Indonesia was elected as the host of the organization of the 7th Conference of Asian Constitutional Court Judges of 2010 based on a resolution adopted by acclamation in the 6th Conference of Asian Constitutional Judges in Ulaanbaatar, Mongolia on September 29, 2009.

The theme that has been selected for this Conference is **"General Election Law".** The background of selecting this theme is the mutual desire of Asian countries to strengthen the implementation of the values of democracy in organizing of General Elections in the respective countries.

Honorable Mr. President,

On this occasion, may we also inform that the Conference participants include delegations from **26 (twenty-six) countries** and **2 (two) international organizations**. These participating countries are not only from Asia, but also from the Western Europe, Eastern Europe, Africa, the Middle East and America. The presence of delegates from various regions is not only for expanding the horizon of knowledge, but also for sharing information among the countries participating in the conference on experiences and best practices in state administration.

Allow me please to mention the countries participating in this Conference in alphabetical order, namely as follows:

1. **Republic of Austria,**
2. **Republic of Azerbaijan,**
3. **Brunei Darussalam,**
4. **Kingdom of Cambodia,**
5. **Republic of Chile**
6. **Republic of Colombia,**
7. **Arab Republic of Egypt,**
8. **Federal Republic of Germany,**
9. **Republic of Indonesia,**
10. **Republic of Kazakhstan,**
11. **Republic of Korea,**
12. **Lao People's Democratic Republic**
13. **Malaysia,**

14. United Mexican States,
15. Republic of Mongolia,
16. Kingdom of Morocco,
17. Republic of Nepal,
18 Republic of the Philippines,
19. Republic of Singapore,
20. Republic of Sri Lanka,
21. Republic of Tajikistan,
22. Kingdom of Thailand,
23. Democratic Republic of Timor Leste,
24. Republic of Turkey,
25. Republic of Uzbekistan, and
26. Bolivarian Republic of Venezuela,

The 2 (two) international organizations participating in this Conference are **Venice Commission** and **Konrad Adenaur Stiftung**.

In addition to active participants, this Conference will also be attended by observers from a number of institutions in Indonesia, namely Constitutional Court Justices for the Period of 2003-2008, Supreme Court Justices of the Republic of Indonesia, Members of the Judicial Commission, Members of the General Election Commission, Members of the General Election Supervisory Board, Members of the Constitutional Forum, Professors on Constitutional Law, Deans of Law Faculties and Lectures of Constitutional Court Procedural Law.

Honorable Mr. President,

This Conference are expected to a give positive contributions to the application of values of democracy in organizing General Elections in the respective participating countries. Therefore, in order to achieve optimum results, the theme of "**General Election Law**" has been divided into three sub-themes, namely:

1. Concepts of Electoral Systems in Comparison,
2. Typical Problem and Shortcomings in Law and Practice,
3. Dealing with Election Complaints.

In order to enable all members of the community to benefit from this conference, the Conference will be transmitted directly through **video conference** owned by the Constitutional Court of the Republic of Indonesia which are located in 33 (thirty-three) provinces and spread over 39 (thirty-nine) Universities throughout Indonesia.

In order to reach the observers of law and democracy studies both in Indonesia as well as abroad, this Conference will also be broadcasted **online** using **video streaming** through the official website of the Constitutional Court of the Republic of Indonesia (www.mahkamahkonstitusi.go.id).

In addition to the Indonesian language, English as well as other languages will also be used in this Conference in accordance with the configuration of countries participating in the Conference, namely French, Arabic, Russian, German and Spanish.

On the last day of the Conference, the delegates will also be introduced to Indonesia's diverse cultural heritage.

Honorable Mr. President,

This concludes my report with regard to the organization of the 7th Conference of Asian Constitutional Court Judges. The success of the organization of this Conference will be a manifestation of the collective endeavors of all participants in the context of applying the values of democracy in organizing General Elections, in Indonesia, in Asian countries and in other regions.

We would like to offer our sincerest **apologies** for any shortcomings in the organization of this Conference and to express our **gratitude to all parties** supporting the 7th Conference of Asian Constitutional Court Judges.

Furthermore, **may I now respectfully invite the Chief Justice of the Constitutional Court of the Republic of Indonesia** to deliver his speech and I respectfully invite His Excellency **the President of the Republic of Indonesia** to deliver his address and officially open the 7th Conference of Asian Constitutional Court Judges.

Thank you.

Billahi taufiq wal hidayah,

Wassalamu'alaikum warahmatullahi wabarakaatuh.

SECRETARY GENERAL,

JANEDJRI M. GAFFAR

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

REMARKS OF
THE CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA IN THE OPENING CEREMONY OF THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

Jakarta, 13 July 2010

Bismillahirrahmanirrahim,

Assalamu'alaikum Warahmatullahi Wabarakatuh,

Good Morning,

Peace and prosperity to all of us,

- Honorable President of the Republic of Indonesia, His Excellency Dr. H. Susilo Bambang Yudhoyono,
- Honorable Chief Justices and Justices of Constitutional Courts and other Equivalent Institutions from countries participating in this Conference,
- Honorable Head of State Institutions, Ministers and other State Officials,
- Your Excellencies Ambassadors of countries participating in this Conference,
- Distinguished Ladies and Gentlemen.

First of all, let us together praise and thank The One Almighty God for His grace and blessings allowing us the time and opportunity to attend **this Opening Ceremony of the 7th Conference of Asian Constitutional Court Judges.**

On this happy occasion, I would like to extend a very warm welcome to the participants and guests of the Conference. I would also like to convey our sincerest gratitude to Constitutional Court Justices and other participants of the conference who have come here upon the invitation of the Constitutional

Court of the Republic of Indonesia to attend **the 7th Conference of Asian Constitutional Judges.**

Honorable Ladies and Gentlemen participants of the Conference,

Before delivering my remarks, I would like to inform you that yesterday, 12 July 2010 was a very special and joyful day in the development of international relations especially for the Constitutional Court of the Republic of Indonesia.

On that august occasion, two significant events took place. ***First***, the signing of 4 memorandum of understanding, (MOU) between the Constitutional Court of the Republic of Indonesia and the Constitutional Council of Morroco. The ***second*** important event was **the Jakarta Declaration on the Establishment of the Association of Asian Constitutional Court and Equivalent Institutions**.

In my view, the signing of this Mou is the formalization of a binding cooperation based upon the intent of the countries concerned to enhance the on-going good cooperation which has actually been maintained this time. Principally, Mou is based on the intention of each country to cooperate in enhancing capacity and institutional building in their respective institutions.

Meanwhile, **the Jakarta Declaration** can be viewed as a milestone in the beginning of a more intensive and effective cooperation agenda among the countries involved in the Association towards achieving their shared goals and objectives as set forth in the **Statute of the Association.**

I hope that the signing of the MOU and the establishment of the Association will bring about positive implications for the countries involved in it, and it is expected to become a new supplement to the global agenda for the Promotion of democracy and constitutionalism.

Ladies and Gentlemen,

The 7th Conference of Asian Constitutional Court Judges addresses the theme about "General Election Law". In my opinion, this theme is a very interesting one and contains a certain degree of importance.

Theoretically, there is a general view saying that general election is actually the democracy itself, because general election is deemed identical to democracy. The better the organization of a general election, the better the implementation of democracy. Meanwhile, with regard to such view, the following question arises: is a country which has organized general election actually a democratic country?

Therefore, the issue generating the greatest level of attention and enthusiasm in the course of the development of democracy is how to relate general election to democracy. I believe that only a high quality, substantive general election is truly meaningful for democracy, rather than a general election which serves the purposes of mere formality, procedures and ceremony.

Every country has a different level of understanding of democracy where at a certain level it is it also likely to lead to certain experience with regard to democracy. In practice, such level of understanding and experience will be of

greatly influence for the system, procedures and rules applied as a foundation for organizing general election in the relevant countries. It is therefore not surprising that countries have their unique systems, procedures and rules in the organization of general election.

Such difference and variety constitute important subjects which need to be conveyed in this conference. We need to understand that this conference is basically a forum for sharing experience and information related to the handling of constitutional cases or other state administrative practices, including general election, for instance about which institution has the authority to settle electoral disputes in each country, or more specifically, the roles played by constitutional court and equivalent institutions in safeguarding general elections and at the sometime applying the values of democracy.

Therefore, it is expected that at the end, this conference will come up with ideas and recommendations which are basically oriented towards better and more qualified organization of general elections. At that point, this Conference of Asian Constitutional Court Judges will play a strategic role for paving new ways towards the realization of general elections based on the values and principles of democracy.

Ladies and Gentlemen,

In line with the development of constitutionalism ideas and the increasing demands for democratization all over the world, almost all countries claim themselves to be democratic countries, although at various different levels. In the course of development, there have been many new democratic countries that started their democratization agenda by reforming their constitutions. Constitutional reform has been deemed as the most fundamental measure for creating a constitution that provides better assurances for the institutionalization of democratic values. This has been due to the position of the constitution as the foundation and at the same time as the framework or design of democratic values.

That is why the idea to establish a Constitutional Court become highly prevalent in countries which were in a transitional period heading toward democracy, including Indonesia. The idea serving as a basis for such measure was that it was important to establish a state institution which had the function of safeguarding the constitution as the highest fundamental law of a country.

The Constitutional Court of the Republic of Indonesia has been present in Indonesia's Constitutional system since 2003 based on the Amendments to the 1945 Constitution. The Amendments to the 1945 Constitution provide a mandate for the establishment of a Constitutional Court as a new judicial institution serving as one of the executors of judicial authority.

As a constitutional organ, the Constitutional Court of the Republic of Indonesia has authorities based on the provisions set forth in the 1945 Constitution. It is stipulated in Article 24C paragraph (1) of the 1945 Constitution that the Constitutional Court has four constitutional authorities and one constitutional obligation.

Those four constitutional authorities include conducting judicial review of Laws against the 1945 Constitution, deciding upon disputes related to constitutional authorities arising between state institutions whose authorities are granted under the 1945 Constitution, deciding upon the dissolution of political parties and deciding upon electoral disputes. At the same time, the only constitutional obligation of the Constitutional Court is to decide upon the opinion of the Parliament that the President and/or Vice President has/have committed a violation of laws, or an illicit act, or is/are no longer meeting the requirements as President and or Vice President.

Furthermore, in line with the developments in Constitutional law and the demand for certainty of more democratic political conditions and government, the authorities of the Constitutional Court have been expanded. Based on the Law on Regional Government, the Constitutional Court of the Republic of Indonesia has the authority to hear and decide upon disputes over the results of regional head elections, which previously used to be the competence of the Supreme Court.

Ladies and Gentlemen, participants of the Conference,

In implementing the aforementioned constitutional authorities and obligation, the Constitutional Court of the Republic of Indonesia has been endeavoring to properly implement its function as the guardian of the Constitution. Based on its authority to conduct judicial review of laws against the 1945 Constitution, the Constitutional Court of the Republic of Indonesia is contributing to maintain harmony in the legal system and ensure that the substance of laws remain to be consistent with the norms and values of the Constitution at all times.

Up to 2010, the Constitutional Court of the Republic of Indonesia has conducted judicial review of a number of laws. Some of those laws have been decided by the Constitutional Court of the Republic of Indonesia as being no longer legally binding because they have been proved to be inconsistent with the 1945 Constitution.

In relation to safeguarding democracy, the Constitutional Court of the Republic of Indonesia has been involved in guarding general elections in order to ensure that they remain in line with the norms of democracy. The Constitutional Court of the Republic of Indonesia has become an institution which has the authority to handle and settle electoral disputes, either in legislative elections, election of the President and Vice President, or elections of Governors/Regents/Mayors.

With such authorities, the Constitutional Court of the Republic of Indonesia has been making efforts to safeguard the principles of democracy so as not to be violated and to be implemented properly in every phase of general elections. Thus far, the Constitutional Court of the Republic of Indonesia has always prioritized efforts for settling electoral disputes in a fair and civilized manner.

Ladies and Gentlemen,

Independence and impartiality are the keys to success for judicial institutions. We are very proud that in performing its duties, the Constitutional Court of the Republic of Indonesia has been able to work independently and that by doing so it has earned public trust. Such independence has been possible not merely due to our, the Constitutional Justices, strong will to remain free from external influence, but also because state institutions outside the Constitutional Court of the Republic of Indonesia have not been trying to intervene. The President of the Republic of Indonesia has never attempted to influence or interfere with the Constitutional Court of the Republic of Indonesia, even though there were many cases brought to the Constitutional Court of the Republic of Indonesia that were related to the interest of the President, either in the form of cases of judicial review or cases of electoral disputes.

It is for that reason that we would like to express the highest appreciation to the President of the Republic of Indonesia, who has been greatly compliant with the 1945 Constitution and understands the important role of the Constitutional Court of the Republic of Indonesia in building democracy. For the Constitutional Court of the Republic of Indonesia itself, independence and impartiality are construed and understood as immunity from external influence, not only from the executive body but also from the pressure of public opinion, non-governmental organizations or political parties.

This has been the information about the Constitutional Court of the Republic of Indonesia that I wished to convey to the participants of the conference as an illustration of the roles and position of the Constitutional Court performing its authorities strictly in compliance with the provisions set forth in the 1945 Constitution.

I hope that the aforementioned brief explanation could serve as information to Justices of Constitutional Courts or equivalent institutions in the countries participating in the conference, especially with regard to the roles in safeguarding the norms of democracy in general elections.

Ladies and Gentlemen,

It is a special honor for the Constitutional Court of the Republic of Indonesia to have been entrusted to host this conference. As the Chief Justice of the Constitutional Court of the Republic of Indonesia, there are two matters that I hope can be realized.

First, I hope that the Constitutional Court of the Republic of Indonesia will be able to act as a good host for all participants of the conference. Second, I hope that this conference can be held in an uninterrupted and successful manner without any significant obstacles, or in other words that it will be able to generate benefits that can be effectively used by all parties.

I would especially like to convey my gratitude to the President of the Republic of Indonesia who has honored the Constitutional Court of the

Republic of Indonesia and the delegates to this conference by sharing his precious time for officially opening this conference and also for attending the welcome dinner last night.

Finally, to all participants of the conference, I would like to wish you success in this **7th Conference of Asian Constitutional Court Judges**.

Thank you.

Wassalamu'alaikum warrahmatullahi wabarakatuh.



Moh. Mahfud MD
Chief Justice of the Constitutional Court

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

TRANSCRIPT FROM THE ADDRESS OF THE PRESIDENT OF THE REPUBLIC OF INDONESIA AT THE OPENING CEREMONY OF THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

STATE PALACE, JULY 13, 2010

Bismillahirrahmanirrahim,

Assalamu'alaikum warahmatullahi wabarakatuh,

Peace and prosperity to all of us,

The Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia,

The Honorable Heads of State Institutions, Ministers and Members of the United Indonesia Cabinet II,

The Honorable heads of Delegations of friendly countries,

Your Excellencies Ambassadors and leaders of international organizations,

The Honorable Governor of DKI Jakarta, Constitutional Court Judges, distinguished conference observers and participants,

On this wonderful occasion, I would also like to invite all of you here to once again express our praise and gratitude to The One Almighty God, for His grace and blessings, enabling us to attend the Opening Ceremony of this 7th Conference of Asia Constitutional Court Judges in 2010.

On behalf of the state and the government, I would like to welcome heads and members of Delegations to the conference from friendly countries, and would like to wish all of them a successful conference. I would also like to

congratulate on the Declaration on the Establishment of the Association of Asian Constitutional Courts and equivalent institution. This is an important historical milestone in building cooperation and partnership among Constitutional Court institutions in Asia. As the host country, Indonesia takes pride in the opportunity to welcome heads and members of delegations coming not only from Asia, but also from Europe, Latin America, the Middle East, and Africa.

Distinguished Ladies and Gentlemen,

The main topic of the conference, as already conveyed by the chairperson of the organizing committee and the Chief Justice of the Constitutional Court, is the general elections law, in the context of the general elections system and legislation. This is a most appropriate topic, indeed, as it is both forward looking as well as relevant to the dynamics of democracy occurring in our respective countries. We are all well aware of the vital importance of general elections in the context of democracy.

Accordingly, the system and law related to such general elections are equally important. I do hope that during this conference in Jakarta, you will be able to share your ideas and experiences related to the general elections system, law and implementation in your respective countries. I am well aware of the fact that there is no completely identical general elections law in any country, but I am also quite confident that there are many things in common.

I would also like to take this opportune moment to convey two views, hoping that they will be useful in the conference that you are holding in the next two days. First, related to the general elections and the general elections law, and second, my view of general elections, democracy and the rule of law. I would like to start with the first, namely related to general elections and the general elections law.

Distinguished Ladies and Gentlemen,

We are all well aware of the fact that general elections are an essential activity in democracy. That is why general elections must be free and fair. Organizers of general elections must also be fair. I would like to reiterate, the organization of general elections must also be fair, effective, orderly and secure. Accordingly, if this can be achieved, general elections, as the materialization of the people's sovereignty as well as the formal decision making process, can be implemented in a credible manner.

The credibility of general elections is universally marked by general elections law setting forth the main provisions concerning the organization of general elections. These include, for instance, the eligibility to cast a vote, the eligibility for being elected, the role of political parties, including public financing of elections, general election campaigns, the method of casting votes and vote count, sanctions for general election related violations and offences, and the resolution of disputes related to general elections.

An equally important aspect of the general elections law is the organization of general elections, some of these often being referred to as the General

Elections Commission, which is certainly expected to perform its duties in an independent and competent manner.

Distinguished Ladies and Gentlemen,

Once again, I am quite convinced that the implementation of general elections, as well as our respective general elections systems and laws are quite different, and that is exactly why the urgency for organizing this conference in Jakarta with the theme General Elections Law has been so evident. Once again, I do believe that it is exactly due to the different general elections implementation, the different general elections system and general elections laws in our respective countries, that the urgency of holding this conference in Jakarta with the theme General Elections Law has been so evident.

Distinguished Ladies and Gentlemen,

The second point that I would like to elaborate on is related to general elections, democracy and the rule of law. The question may arise, have we not encountered issues and challenges in the course of organizing general elections in our respective countries? I feel confident that we may all have the same answer to this question, which is that indeed, we have been encountering issues and challenges. If I may identify only a few among such issues and challenges encountered in general elections, I would only like to mention, among other things, the issue of holding general elections in a truly effective, efficient, orderly and uninterrupted manner. These also include participation, and the people's participation in general elections.

The question of ensuring that voters obtain complete information, thus enabling them to vote in a rational manner, that they have the liberty to vote and to abstain from voting, or to vote for political parties if votes are cast for political parties. Then concerning the prevention of general elections related violations, including the potential of engaging in money politics. These issues include the rules and implementation of dispute settlement in general elections related disputes frequently occurring in the implementation of general elections, both at the national as well as at the local regional level.

Distinguished ladies and gentlemen, considering the aforementioned matters, there are at least 3 key factors that determine the truly successful implementation of general elections. The first factor is a good general elections law. The second one is a credible general elections commission. And the third one is a high level and good quality participation of the public in general.

Distinguished Ladies and Gentlemen,

Speaking of general elections, we also necessarily speak about democracy and the rule of law. Mr. Prof. Dr. Mahfud, the Chief Justice of the Constitutional Court of the Republic of Indonesia, has just pointed out the relationship between democracy and general elections, while at the same time implicitly pointing out its relationship with the legal system.

Ladies and Gentlemen,

Democracy, of whatever type and in whatever format, is all about an exercise of freedom, as all that is related to rights, to the rights of citizens, is provided for in the Constitution. Democracy also emphasizes the importance of equality, equality to power, equal opportunity to obtain lawful power.

Both freedom and equality are related to the decision making process with regard to the party that will be granted the mandate or trusted by the people to lead them in their respective countries. It is for that purpose, that general elections are held, with all the existing variants, such as the election of the head of government, whether a president, a prime minister, or other similar positions. In fact, general elections can also be held at the local level in order to elect a head of region, such as a governor, a regent or a mayor.

I am happy to inform you that in Indonesia, the election of President and Vice President as well as the election of regional heads have been conducted through direct elections, namely since 2004 for Presidential election and since 2005 for the election of regional heads.

Distinguished Ladies and Gentlemen,

Therefore, good quality general elections are certain to contribute to the realization of good quality democracy. We also know that basically, democracy is not the ultimate goal. In fact, as actual practices in the life as a state and in state administration have shown, democracy is not capable of functioning in isolation. It cannot operate independently, there are other complements that enable the proper functioning of life as a nation, a government, and society in a country. The point that I would like to make is that, in addition to democracy, rule of law and good governance are also important.

Apart from so many interpretations, the rule of law is actually can be basically identified as the supremacy of law. The rule of law is not the rule of mind, nor is it the rule of persons. Therefore, one of the key factors related to democracy, the rule of law and the significance of general elections is the need for the law and the provisions of the law to be clear. The law needs to be promulgated and understood by the people. (The law needs to be) fair, not constantly changing, capable of protecting the fundamental rights and guaranteeing certainty. We certainly wish that our general elections law fulfills such principles.

Distinguished Ladies and Gentlemen,

If I was to a simple conclusion based on the two points that I have made earlier, I would say that a general elections law has to ensure that general elections can be implemented properly and with a good quality in accordance with the principles of the rule of law. It is also important that law fulfills the values of democracy, namely freedom, equality, people's participations and politics.

Distinguished Ladies and Gentlemen,

Honorable heads of delegations to this conference from friendly countries,

At the end of my remarks, I would like to point out the long history of political struggle, democracy, and general elections in Indonesia. As you may already know, Indonesia is currently in the process of a great transformation, reform and further improvement of our democratic life. *We are in the process of nurturing and consolidating our democracy.*

Since Indonesia gained independence in 1945, we have experienced various ups and downs in our political life and democracy. Within 10 years later, namely since 1955, we have also experienced the dynamics in implementing general elections, and thus far we have had general elections 10 times. We can say that the last 3 general elections, namely the general elections in 1999, 2004, and 2009, have been more the general elections that fulfilled the universally applicable norms and principles of general elections and democracy to a greater extent.

I have also mentioned earlier that since 2005 Indonesia has been holding general elections of regional heads, which have also been conducted directly. Indonesia is still continuously improving the quality of its general elections by learning from general elections held in the past. We will continue to maintain the good aspects, and will strive to improve the less adequate ones. We are also learning from the experience of friendly countries in running general elections.

However, we would like to share our pride and joy by the fact that the general elections that we have organized are basically home grown elections. The democracy that we have been developing also includes local values. Therefore, while we continue to respect the universal values of democracy, the democracy being developed in Indonesia can also be considered as a home grown democracy.

This is an ideal forum for me to convey, as Mr. Mahfud previously put forward, how Indonesia has been able to improve its life as a state with the establishment of the Constitutional Court. The Constitutional Court was founded as a part of a great transformation process in our country in the reform in the present-day era and as part as well as a consequence of the amendment to the Indonesian constitution that we refer to us as the 1945 Constitution of the State of the Republic of Indonesia.

As Mr. Mahfud mentioned earlier, the Constitutional Court has an extensive scope of roles, functions and duties. Therefore, the Constitutional Court also assumes a noble responsibility as it addresses fundamental issues in the life as a state in Indonesia. The Constitutional Court conducts judicial review of laws and regulations, deciding disputes of authorities arising among state institutions and the dissolution of political parties, as well as disputes related to the results of general elections and impeachment cases brought to court by the House of Representatives against the President and or Vice President.

Accordingly, [I would like to emphasize] once again the utmost significance of the roles, functions and duties of the Constitutional Court.

Since the establishment of the Constitutional Court, the fact that the Constitutional Court of Indonesia has become not only the guardian of our Constitution, but also an institution enforcing democracy, equity and human rights cannot be overstated. I am fully aware of the heavy load and great intensity of work and home work which have to be completed by the Constitutional Court. However, I hope and I believe that all of these will be properly manageable by upholding the rule of law that we all wise to enforce.

Once it can be implemented properly, the checks and balances in our state administration system will certainly improve and will have a higher quality.

Distinguished Ladies and Gentlemen,

This concludes my speech at the Opening of the 7th Conference of Asia Constitutional Court Judges of 2010. With all of these messages, hopes and appeals, with the blessings from The One Almighty God, *Allah SWT*, and by saying *Bismilahirrahmanirrahim*, I hereby declare that the 7th Conference of Asia Constitutional Court Judges of 2010 is officially opened.

Thank you.

Wassalamu'alaikum warahmatullahi wabarakatuh.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

VERBATIM OF CONFERENCE

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Asian Constitutional Court Judges

ìElectoral Systemî

Jakarta-Indonesia, 12 - 15 July 2010



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Venue : Ritz Carlton Hotel, Mega Kuningan, Jakarta.
Tuesday, Day Two : 13th July, 2010

SESSION ONE
CONCEPTS OF ELECTORAL SYSTEMS IN COMPARISON

(Discussion and introduction of different concepts of elections systems, overview of the broad variety – federal and unitary states, common law and statutory law countries, countries in transition or in different stages of development. Focus on the legal framework and whether the principles are laid down in the constitution, in ordinary status or in precedent case law respectively).

PART I

Moderator
Justice Harjono
Justice of Constitutional Court of the Republic of Indonesia

Good afternoon ladies and gentlemen. We are starting the full session of this conference. We do have a schedule for this afternoon. For this session we have three speakers and three panelists. We start too late maybe because of a

little tired after we had the ceremonial and lunch this afternoon. I do hope that we are enthusiast and I will call for first Hon. Dong Heub Lee to present his paper not more than 15 minutes because we have to take this time efficiently. I do hope that all participants already have the paper that's already distributed. So we can start with the Hon. Dong Heub Lee to present his paper. Please.

SPEAKER 1

Hon. Dong-Heub Lee
(Justice of the Constitutional Court of Korea)

ìELECTION SYSTEM IN KOREA: CONCEPTS AND CASESî

Thank you Hon. Justice Haryono for your kind instruction. It's a great honor for me to speak full in this session. I would like to introduce election system in Korea, concepts and cases. In a country based on the doctrine of popular sovereignty and representative democracy, election system is the core principle for organizing the country's ruling system and the essential means to realize the representative democracy. Therefore, in order to make people properly exercise their sovereign power to achieve the country's interests as whole as well as individual interests and thereby guarantee popular sovereignty, democratic election system should be established and well maintained.

The Constitution of Korea declares the doctrine of popular sovereignty also guarantees the people's franchise and provides constitutional basis for election process. Moreover, the Constitution guarantees freedom of expression in the election process and equal opportunity in election campaign. The Constitution also specifies the establishment of the National Election Commission for the purpose of fair management of elections In order for the election system to properly operate and sufficiently carry out its role in democracy, free and equal opportunity to participate in election process should be guaranteed to all citizens. Even so, the balance between freedom of election and its restriction should also be reasonably tuned depending on the country's level of political and social development, the maturity of citizens' civic consciousness, the past and present election culture and other economic and cultural conditions.

Therefore, our country, Korea, where absolutely fair and clean election culture has yet to be settled down despite more than 60 years of experience in elections, still has some legal provisions of election law that restrict the freedom of election in order to secure fairness in elections.

Accordingly, many constitutional complaints or motions to request for a constitutional review of statute have been filed against the provisions of election law in which the two important values, guarantee of the freedom of election and fairness in elections, conflict.

The Constitutional Court of Korea, in principle, has maintained strict standard of review with respect to the freedom of election, but at the same time, equally paid attention to issues of fairness in elections. Therefore, the Constitutional Court has rendered a decision of unconstitutionality in many election cases and as a consequence, contributes to guarantee the people's political freedom and right to equality and lays the groundwork for realizing the doctrine of popular sovereignty.

For today's presentation, firstly, I would like to provide an overview of Korea's election system in general. And in the second part, important cases regarding election law decided by the Court over the past 22 years will be presented.

Overview of election law system in Korea.

Basic Principles of Election are, as you know, 1) universal ballot, 2) equal ballot, 3) secret ballot, and 4) free election.

The types of the elections prescribed in the Public Official Election Act are the presidential election, the election for the National Assembly members and the local elections for heads of local governments and the members of local councils.

The presidential election is held every five years and the official campaign period lasts for 23 days.

The National Assembly election is held every four years and the official campaign period lasts for 14 days.

Next are Right to Vote and Eligibility for Election

A national of nineteen years of age or above has the right to vote in presidential election and the National Assembly election. A national who is nineteen years of age or above and is registered as a resident in the district under the jurisdiction of the local government concerned as of the record date of the voters list has the right to vote in local elections.

A Korean national who is residing abroad and nineteen years of age or above has the right to vote for the election of President and the proportional member of the National Assembly, even without being enrolled in the list of reporters for domestic domicile or registered as a resident or reporting at the place of domestic residence. In this case if such a Korean National residing abroad intents to vote overseas, for the above mention elections, each shall file an application for registration of an overseas voter with national election commission through embassies.

If a Korean national residing abroad is enrolled in the list of reported of domestic domicile or registered as a residence he has the right to vote even for the elections of local constituency members of the national assembly as where as the election of presidents and proportionally members of national assembly. In this case if such a Korean national residing abroad intents to overseas he shall make the report of an oversea absentee to the head of capital local government in writing through embassy.

Public officer election act used to restrict the voting rights of Korean nationals residing abroad on the condition of enrollment in the list of reporters

of domestic domicile. But in 2007, the Constitutional Court held the provision incompatible with the Constitution as it violated the voting right of nationals residing abroad. Pursuant to the Court's decision, the provision was amended.

However, a person falling under any of the following, as of the Election Day, shall be disfranchised: A person who is declared incompetent; A person who is sentenced to imprisonment, etc.

Next are the Election Districts and Full Number.

Election districts are units of district into which the whole electorate is divided for electoral purposes.

Election delimitation is a system to realize the principal aims of election, requiring certain standards. Delimitation must be done on the principle that it should serve to equalize the value of each vote and should not be unjustly partial towards any political group there is no Gerrymandering.

The total number of national assembly members is 299. Among them 245 are constituency members and 54 proportional members.

Next is Registration of Candidate.

If a person is to stand for an election, he or she needs endorsement by a political party or electors. If a member of a political party stands as a candidate for an election, the application for registration must be accompanied by the endorsement letter signed and sealed by the representative of the endorsing party.

There is a unique provision, when a political party endorses candidates for the election of proportional representative National Assembly members and proportional representative local council members, more than half of the candidates endorsed should be female.

Independent Candidate must be endorsed by a certain number of electors (for instance, for National Assembly election, from 300 to 500.

Candidateís Deposit.

A person who applies for candidate registration is to deposit a specific amount of money for the main purpose of preventing the election from being flooded with candidates and heating up, and guaranteeing the sincerity of the candidates. (For example, 500 million KRW is required for presidential election and 15 million KRW is required for National Assembly election.

Next to the Election Campaign, freedom of election is a constitutional principle latent in the electoral system of a democracy and it means the freedom of a voter to form his views and realize them. Nevertheless, election must be prevented from becoming corrupt from money, abuse of government power and slander, and it is necessary to minimize socioeconomic losses and side effects that might be incurred by allowing limitless election campaign.

The Details about Restrictions on Election Campaign.

Restrictions on Time.

Election campaign is only allowed from the day after the end of candidate registration to the day before the Election Day. Only, in order to guarantee the

equality of election campaign, we have the preliminary candidate system, that is, a preliminary candidate can do campaigning within limited scope provided in the laws.

Restrictions on Subjects.

Public officials, disfranchised people, minors, foreigners, cannot engage in election campaign.

Restrictions on Methods, typical examples under the restriction are as follows:

Interruption of the conduct of election campaign, bribery and contribution, unfair conducts, disturbance of electors' peaceful daily life, disturbance of social order and public morals.

The next is Restrictions on Expenses, Korea adopts the administrative total amount restriction system by which the election commission determines the total restricted amount of expenses for a relevant election.

Aspects of Election Campaign.

Followings are the types of election campaign allowed by the Public Official Election Act:

Election campaign using mass media, Campaign rallies in which candidates make a speech or interview at an open place, Interview and debate hosted by press agencies, Election campaign using prints including propaganda printed materials, etc. Election campaign using the electronic communication including internet homepage and using telephones from 6am to 11 pm.

Next is Public Management of Election.

Under the general idea of public management of election, the Korean Constitution makes it clear that election campaign should be carried out under the supervision of the election commission at each level within the limit set by Act and equal opportunity should be guaranteed. The constitution also declares the principle of public management of election in holding election campaign and defraying election expenses.

The last one is Election Litigation.

The Korean Constitutional Court does not have jurisdiction over the election disputes. In cases of presidential elections and general elections of the National Assembly, when there is a dispute over the validity of an election itself or the validity of electoral results, a lawsuit can be directly filed with the Supreme Court.

On the other hand, in cases of local elections, when there is a dispute over the validity of an election itself or the validity of electoral results, firstly, a petition can be filed with the election commission, and secondly, if there is an objection to the decision on the petition rendered by the election commission, a lawsuit can be filed either with the Supreme Court or with appeals court.

Meanwhile, when the issues as to whether an Act or Statute related to election violates the Constitution or infringes on people's fundamental rights become the contested subject matters of election disputes, the Constitutional Court may

conduct a constitutional review of the related Act or Statute. And recently, a lot of scholars, lawyers suggest that given the characteristics of election dispute, it is more desirable that the Constitutional Court has the jurisdiction over the election disputes since national election is a democratic process which grants governmental power to its relevant authority under the Constitution.

Next is the important decision by the Constitutional Court.

I enumerated a lot of cases concerning right to vote or eligibility to election or election campaigning but because of time constraint, I will only, I would like to explain three cases in short. Please see page 11 number 5. Problems on population disparity in electoral districts.

National Assembly Election Redistricting Plan Case.

The National Assembly Election Redistricting Plan was declared to be incompatible with the Constitution, as the division of districts for the National Assembly Election which exceeds the permissible maximum deviation of population in an electoral district, which is 50%, is beyond the limits of legislative discretion and therefore, violates the complainant's constitutional right to vote and the right to equality.

But, in autonomous Gu/Si/Gun council election, the Court has adopted a little more relaxed standard of permissible limits on population disparity by setting it at 60%.

Next case is please see page 13 number 6, restriction on deposit.

In the Deposit Money in National Assembly Election Case, the Court declared unconstitutional the provisions of the Public Official Election Act which requires a candidate for the National Assembly election to make a deposit of 20 million KRW when submitting the application for candidate registration and provides grounds for the return and forfeiture of election deposit. In this case, the Court stated that the deposit requirement of 20 million KRW is excessive considering the economic conditions of average citizens and therefore, will prohibit potential candidates from running for office only for the reason that he cannot raise the deposit money. Therefore, the provisions at issue violate the right of equality and the right of potential candidates to hold public office, and it violates the voters' freedom of choice.

The last one is please see page 16, small number 4, real name verification process.

This is restriction on methods, election campaign methods.

In *Real Name Verification of Internet News Site Case,* the Court held constitutional the provisions of the former Public Official Election Act that impose the duty on the Internet News Site to implement technical measures to identify the real name of the one who posts message expressing support for or opposition to political parties or candidates on the message board or chat room of its homepage during the election campaign period and to delete messages posted without the verification of real name, not in violation of the rule of clarity, the principle against prior censorship and the principle of the least respective means.

Moderator

Thank you Hon. Justice Lee from Korea. We have already heard and quote what the Justice has explained to us and please that is all of the material delivered. Taking note, because we have the opportunity for questions and answers opportunity after all the speakers' presentations.

SPEAKER 2

Hon. Zaki Tun Azmi
Chief Justice of Federal Court of Malaysia

ìCONCEPT OF ELECTORAL SYSTEMS IN COMPARISONî

Assalamu a'alaikum wr wb.

Good afternoon to all.

Mr. Chairman Honorable Judge Harjono,

Honorable judges, distinguished delegates, ladies and gentlemen,

The President this morning really and correctly said fair the effect and fair properly regulated election is the very foundation of democracy. Democracy for the people, by the people cannot exist without proper election.

But then, what happens if the person, voter or the candidate feels prejudiced because either has not been given proper rights to vote or he has been involved in bribery or the candidate has been invalid, disqualified. Then he has the court to look to. That is where constitution courts play the role. In Malaysia we don't have any particular courts to hear constitution issues. Constitution issues, including election is brought before the usual court. Appeal is direct to Federal Court, our highest court. And the same judges, to sit and hear other cases, will be appointed to hear election cases.

As many of you may be aware, Malaysia, as a federation of 13 states, has written constitution but basically our system of government is based on the Westminster type of government. Our election system is also based on the English British. And that system is also practiced in practically all commonwealth countries. So, for those familiar with the election system would really understand the system that we use in Malaysia.

In Malaysia, the Federal Constitution is the Supreme Law, unlike in England where Parliament is the Supreme Law. And the government is formed by the election. Elections are contested for the highest stakes in national politics. We have multi political parties, just like in Britain.

Malaysia obtained its independence in 1957, and since then we have been having an election every five years. Elections are held for the Federal Government as well as for each individual states. Elections, apart from being held every five years, is also held whenevera seat is vacant. It can be vacant because the

candidate or the member passes away. Or the election can be held because the courts hold that the election was not properly conducted.

Our second house of parliament which is the senate, the members are not elected, but by appointment. To regulate the election in Malaysia, we have quite a number of legislation which I have listed on page 4 in my paper. And the constitution also provides for the establishment of an election commission to monitor and regulate election in Malaysia. Election Commission is an independent body appointed under the Commission of the constitution. Whenever vacancy arises, the commission will be notified.

Now I come to the election process.

As I said the first issue of Writ, and then the procedure goes with the appointment of nomination of candidates. A day is fixed for parties to nominate the candidates. Candidates may be nominated not only by political parties but by individuals. Actually the nomination is done by the individuals under the panel of political parties or independent. Election commission will assign him a symbol for those who are not familiar to vote, so they vote for the symbol rather than the individuals.

Before the election, campaigns are allowed and they are allowed to go on until the midnight of the day before the polling day. And the campaign materials are allowed to be distributed but only if he holds a permit to do so. The polling day normally begins at 8 a.m. and ends at 5 p.m. It's very very important that election are held by secret ballot. And to ensure the presiding officers and the polling clerks are the only people apart from the agent of the candidates who can be present in the voting room or polling room. We have the representative of the commission to be there, voters come in, they vote, they go out. But to ensure it is truly independent, the candidate agent is allowed to be present in the hall and nobody else is allowed.

Because normally the federal elections to the parliament are conducted on the same day but they will have two different ballots. So they will put the ballot paper for the parliament in the parliament box and ballot paper for the state in the state box. At the end of the election for the day, the votes will start to be counted as soon as the election is over. And more often than not, the results are announced the same night.

This system has been introduced to speed up election in Malaysia. So that the counting is spread out to more places and will be sent to main areas where they would just total up voting taken in each voting area. So the results now in Malaysia come in earlier than before. Previously they will collect, assemble in one place and sometimes result don't come up in three, four, five a.m. in the morning, particularly when there are challenges against the results. They have to recount and recount but this rarely happens nowadays because results come up quite early.

As I said just now, what happens if candidates or a voter feels that he has been prejudiced because either there sre threats or bribery or whether the commission has not conducted the election properly, allowing non-voters to

vote and things like that. So they will take up by way of petition to the high court. Before I was appointed a judge for 22 years, I represented, I was a lawyer for a party in Malaysia. Among others responsibilities I carried, was to defend the party whenever there are challenges against election of any particular candidates.

We also filed petitions against other candidates as well. At the last election there were twenty petitions and nineteen petitions were dismissed. The election before that, I remember, 50 elections. Opposition will file the petition against the government and the government will file the petition against the opposition. So we sit down and OK, you withdraw that, and I'll withdraw this. Compromise. At the end of the day, everybody was happy because we found weaknesses in his own candidates. Some candidates were doing, well, not corruption, bribery but there are technical issues that could disqualify the candidates. So though I said 56 were filed by all parties, at the end of the day there was any none of the cases. Had the cases come on, I would be in court continuously every day for something like one year because I'll be running from court to court. It's not centralized in Kuala Lumpur. That's very interesting.

While doing these cases, there are very very interesting ways of how parties, candidates support the candidates doing things without the knowledge of the candidates themselves, which is very very important also. Money's been given, sorry, not money. Allegation been given. Allegation been made that candidates were carrying bags full of money. But for actual trial, you know, nobody can actually prove sort of things happen.

Our law says that when it involves corruption and bribery, the court lays a very heavy burden upon the parties to prove it. And by the nature of the bribery and corruption, it is easy to meet allegation but very very difficult to prove it. In Malaysia there are one or two cases which have been proven since our independence, but most of them failed.

One more factor I'd like to mention while talking about corruption is that if you are proven having commited bribery or corruption then you are disqualified to participate in the next selection, something for five years. You will also be able to be prosecuted and be sentenced to prison for corruption as well. These are all covered in my paper, actually.

One case, according to the judge, to be proven as corrupt, it is necessary to prove that some person has been thereby corrupted and induced by treating to vote for the sitting member.

Corruption in Malaysia for the purpose of election was not only giving money and things like that. Treating people is, if you bring people meals, dinners, lunches, but you must be sure that treating is for the purpose of persuading the people to vote for you. I mean, I can have functions every night, nobody cares. But if you can show that treating or the diner given is for the purpose of collecting votes for you, that is wrong. And yes, that's difficult to prove because particularly politicians give dinners, lunches to supporters every time.

There are quite a number of cases that I put in paper which you might like to read.

Also, the law provides certain procedures that candidates must comply with. Among others, he has to file in his file expense within 60 days after the election. He has to file with the commission how much expense for whatever it is. If he fails to do that, his position can be challenged in court.

The candidate can be disqualified if he is convicted or fined five thousand ringgit or sentenced to five years in imprisonment and disqualified for five years.

I think briefly that's the nature of the election in Malaysia is.

To conclude, I'd like to say a couple of things that I'm proud to say that Malaysia has played an important role as a final arbiter over any dispute relating to election. So far there has been no allegation. And also I would say that the existing election laws and regulations ensure a free and fair election as well as transparency of the election process in Malaysia. The process ensures a speedy declaration of election results and the formation of a new government in the country.

Thank you very much.

SPEAKER 3

Hon. Chalermpon Ake-uru
Justice of the Constitutional Court of Thailand

ìELECTORAL SYSTEM IN THAILANDî

Mr moderator, distinguished participants.

I will confine myself to 15 minutes as allotted by you.

Free and fair elections are essential component of representative democracy, the form of government that many countries practice nowadays. Through the electoral process the people of the country express their will in designating their representatives to serve as members of the legislative or executive branch of government.

Just as a soccer game needs rules as well as a referee and linesman, so an election requires a system of electoral rules as well as an election management body. The electoral system and I adopt a definition of the academicians Piere Carrone as "the set of procedural rules governing the expression of votes cast in a given election and their conversion into seats" is thus very important. Its function is to translate the will of the people into seats in the legislature or the offices of the executives, as the case may be.

In Thailand, our members of the House of Representatives, 76 out of 150 members of the Senate which together form the National Assembly or

Parliament of Thailand and public offices in the local government are elected. In this connection, the most important election is the general election of members of the House of Representatives.

In my presentation, I will attempt to give an overview of the electoral system in Thailand as applied in the general election of members of the House of Representatives for the purpose of comparison with the system of other countries.

First about the rules. Rules regarding the election of members of the House of Representatives are stipulated in the Constitution of the Kingdom of Thailand of 2007 section 93 to 98 and the Organic Act on Election of Members of the House of Representatives and the Installation of Senate of 2007. I append the text of the Constitution which is translated into English in the Annex.

Thailand adopted a direct universal suffrage which means that every citizen, except those who are excluded by law, can directly participate in the vote and elect his or her representatives without involvement of intermediaries. The election is by secret ballot and the forms of ballot paper used are exclusive to each election basis.

Our House of Representatives consists of 480 members, 400 of whom are from the constituency based election and 80 of whom are from the proportional based election. The term of the House is 4 years but it can be dissolved before that period. So, in Thai general election, the voters have two ballots: one to select their MPs for their constituency and the second to choose whichever political party they prefer most.

I will explain about the constituency based election. With regard to a constituency based election, a province will be divided according to the population census and provincial division into constituencies by which each constituency will have not more than 3 MPs. In case not every constituency can have 3 MPs, the constituency having 3 MPs will be designated first and the remaining constituency will have not less than 2 MPs. In case where a province has 4 MPs, it will be divided into 2 constituencies having 2 MPs each. This is in fact a case of the multi-member constituency.

An eligible voter will have the right to cast the member, the number of votes corresponding to the number of MPs in such constituency. The first 3 or 2 candidates, as the case may be, that obtain the most votes are declared elected.

As for a proportional based election, the whole country will be divided into 8 clusters of province. Each cluster will be regarded as one constituency and will have 10 MPs. A voter can choose only one list of a political party. Calculation of the number of MPs on the proportion basis will be like this:

- Suppose that in the cluster there are 7 political parties and these 7 political parties receive votes as follow:

Monday Party	receives	2,600,000	votes
Tuesday Party		1,450,000	votes
WednesdayParty		800,000	votes

Thursday Party	500,000	votes
Friday Party	350,000	votes
Saturday Party	200,000	votes
Sunday Party	100,000	votes

So, the total of the votes will be 6,000,000 votes

- The average votes per 1 Mp equal to total votes of every party divided by 10. So, 6,000,000 votes divided by 10 is 600,000 votes.
- The number of seats each party will receive is the total votes each party receives divided by average votes per 1 MP, i.e. 600,000.

The result will be as follows:

Monday parties receives the votes 2,600,000. The average will be 4.33. The number of seats allocated as initially will be 4.

Tuesday party 1,450,000. Average will be 2.42. Number of seat allotted will be 2.

Wednesday party would receive 800,000. Average would 1.33. Number of seat 1.

Thursday party 500,000. Average would be 0,83. Number of seat none.

Friday party 350,000. Average would 0.58. Number of seat none.

Saturday party 200,000. Average would 0.33. Number of seat none.

Sunday party 100,000. Average would 0.17. Number of seat none.

Then if you call together number of seat you'll get only 7 seats, but in that cluster we must have 10 seats. So, we'll look at the decimals. Thursday party 0,83. We'll get 1 more. Friday party 0,58 we'll get another one. Tuesday party 2.42 we'll get another one. So, the number of seat will be like this:

Monday will get 4 seats.

Tuesday will get 2 plus 1, equal to 3 seats.

Wednesday 1 seat

Thursday 1 seat

Friday 1 seat

Saturday none

Sunday none.

So, we'll get the total seat of 10 seats according to the system.

Now I would like to turn to the referee and linesman in elections. According to the our Constitution, the Election Commission was established as an independent constitutional organ. The Election Commission consists of a Chairperson and other four Commissioners appointed by the King by the advice of the Senate from persons of apparent political impartiality and integrity. They are selected by the Selection Committee and approved by the Senate. Their term of office is seven years and they can serve for only one term. I append my the translation into English of the part of the Constitution namely section 229 to section 241 regarding Election Commission in the Annex.

The Election Commission is the organ that control and hold, or arrange for an election or selection of members of the House of Representatives, senators,

members of a local assembly and local administrators, as the case may be, including the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner.

The Chairperson of the Election Commission has charge and control of the execution of the Organic Act on Election of Members of the House of Representatives and the Installation of Senators, the Organic Act on Political Parties, the Organic Act on Election Commission, the Organic Act on Referendum and the law on election of members of local assemblies or local administrators. He is also the political party registrar. The Election Commission also has the powers and duties to conduct investigations and inquires for finding facts or giving decisions on problem or disputes arising under the laws referred to above.

To assist in the work of the Election Commission, an Office of the Election Commission was also established as an agency having independence in personnel administration, budget and other activities as provided by law.

Moreover, the Election Commission has provincial branches, called Provincial Election Commission. These Provincial Election Commissions are appointed by the Election Commission. Most of the Election Commission's work is done at the provincial level, for example, preparing and checking the voter lists, identifying polling stations, recruiting and training polling station committees, determining and organizing a place for counting votes, etc. However, just before and during elections of the members of the House of Representatives the Election Commission has the power to appoint temporary positions, such as the constituency directors and to ask for assistance from government officers, personnel of state agency, state enterprise or local government or other state officials to perform all acts necessary for organizing an election.

The top priority mandate of the Election Commission are, of course, to organize, supervise elections and regulate other activities connected with elections, such as election campaigns and activities of political parties, candidates and persons having the right to vote so as to ensure that the elections proceed in an honest and fair manner.

One distinctive feature is the power of the Election Commission to conduct an investigation and inquiry in the case of complaints that an election has been carried out improperly or unlawfully. This has to be done forthwith and at the completion of the proceedings the Election Commission must pass a decision. If the Election Commission pass a decision to hold a re-election or suspend the right to vote before the announcement of the result of the election such decision will be final. If, after the announcement of the result of the election, the Election Commission is of the opinion that a re-election must be held or the right to vote of the member of the House of Representatives must be suspended, a complaint will be submitted to the Supreme Court of Justice for decision.

So, we can see that the Election Commission has an adjudicative power with regard to improper or unlawful elections insofar as the re-elections are concerned. In the past, the previous election law referred the complaints,

objections, petitions to the court of justice. But the proceedings usually took so much time as not to be able to cope with the deteriorating situation of electoral frauds. However, adjudication of criminal offences remain within the jurisdiction of the court.

Like the referee in the soccer game, the Election Commission of Thailand has two effective measures at its disposal to deal with the cases of electoral frauds. They are:

First, the Yellow Card. This is to be given to a candidate when frauds are to be found to be committed by other persons to help the candidate win the election. A re-election or a by-election will be called, but the person given a yellow card can stand in the new round of election.

Second, the Red Card. It is to be given to a candidate when frauds are found to be committed by himself or herself, or his or her spouse or children or close relatives with his or her support, or collusion or connivance. If the candidate gets a red card, his or her right to vote is suspended for one year which means that he or she cannot be a candidate in an election within that period.

So, I let's come to my conclusion. An electoral system as applied in Thailand as in any country has to be in conformity with the socio-political and cultural landscape of that country. As a set of procedural rules it needs an impartial and independent election management body to implement it effectively so that the goal of free and fair election could be attained. Thank you very much for your attention.

PANELIST 1

Hon. Jose Antonio Viera-Galo Quesney
Justice of Tribunal Constitutional de Chile

ìCHILEAN ELECTORAL SYSTEM DESCRIPTIONî

Thank you Mr. Chairman.

Thank you to invite a member of the Chilean Constitutional Court to participate in this important International Asian Meeting. You know Chile is a country with long and strong democratic tradition since the beginning of 19th century that was interrupted by military coupe in 1973. In 1990 democracy was established by a referendum that the democratic forces win to a reelection of General Binotche.

In those critical condition popular vote was away to return to democracy. After 20 years of normal democratic life, and after having studied the electoral system we have two main profits. The first one is the less participation of young people in the electoral process. At the beginning of the return to democracy young people participated for more or less 30% of the electoral. Now that was reduced to less than 10%. They don't register in their electoral service.

The second main problem is the discussion about the system to elect the parliament

In Chile all citizens over 8 years old must cast a personal secret of involvement vote at universal election. A system allowing Chileans living abroad to vote overseas remains to be implemented. Recently by reform of the constitution, voting has became a voluntary act while enrollment has turned out to be automatically and perhaps that could be favorized the participation of the young people in the election.

The Chilean president is directly elected by the people. If no candidate obtains a simple majority, a runoff between the two most voted candidates is held 30 days later. Election of major and council members are held separately. And the council members are elected by proportional system. The problem is in the way in which we elect parliamentarians and which in the chamber and in the senate. Parliamentary election are based on the election of two candidates per district or constituency. Certificate of candidacy for senator or representative submitted by coalition of political party may include up to 2 candidates per district or constituency. And in the case of independence candidacy up to one candidate. The two most voted candidate of the most voted coalition are elected. Unless a coalition double the vote cast for the next coalition. What usually happens is that the candidate is elected from each of two most voted coalitions per district. Doublings by a single coalition are very rare. The system tends to the equality in votes chambers, favorizing the first minority. The system has been subject to several criticism including the following. It generates an even representation a seat are obtained with 33% of the vote although the most vote of coalition secure 65% of the vote. Important minority are excluded from the parliament. While as we have already told the first minority is favourite by the system.

Third is to reinforce the formation of large coalition of political party. Nevertheless having competition it generated inside each political alias as only the most powerful candidate will be elected. The harshness of competition has led some coalition to avoid it by omitting a candidate appointing only one almost guarantee his / her election. Should the two most voted coalitions do the same, the election would be but an instance to reaffirm the decision made by the leaders of political parties. The system favors congressmen in office, as challenging candidates have few possibilities of defeating them. It forces complex negotiations must be held between the leaders of the political coalitions, thus making a bad impression on citizens. Paradoxically, the binominal system that is a name that we know in Spanish –binominale- forces political parties to coalesce into blocs and then weakens them as it promotes hard competition between them. This is the most the key problem that we have at this moment, not the system election of the presidency, not the system of election for municipality, but for the parliament.

The constitution established an electoral justice system comprises of an electoral national court and regional court responsible for verifying the general conduction of this election. This court added four by four members of the supreme court and add some members that were speakers or assistant speakers of the

house and a senate direct appointed or by a supreme court. The constitutional court has no competence on electoral matters. Law and trust electoral system serve with a duty to keep over a register and organize elections particularly in regards of voting places, pooling stations and tallies. If the system may be appeal before the electoral court. This electoral service is autonomous and is a public organization.

And at the same time, we have a law for political parties. It's very difficult to speak about electoral system without referring to political parties and within political system if it is a presidential one or parliamentary one. We have in Latin America a tradition of presidential system. In political parties we have a law that was enforced in the period of the dictatorship that contains several rules hindering its proper operation. A bill is under discussion at the parliament to reform that law to finance political parties activities out of public funds and to regulate optional primary election to appoint candidate to permit the people to participate in the decision of who must be the candidate for parliament or for other post.

At the same time, there is a strict regulation of advertising. In general advertising and especially the press and radio can only take place between thirty and three days before the election or plebiscite. Advertising is forbidden in TV, cinemas and video display. Nevertheless, the only TV advertising allowed consist in 30 minutes program broadcasting by all the channels twice a day, during one month, on a free basis, distributed pro rata among candidates and political parties or coalitions. The law also provides for a compensation to candidates and political parties, according to the number of votes cast in their favor.

In conclusion, we must say that in Chile we have a serious and reliable electoral system. A strong traditional democracy . All plans are resolved by a special court, and as I said constitutional court is not competent in this matter. The problem is that the electoral system for parliament, called binominal which governs from 1990 until now is very disgusting, its controversial. The electoral system will soon be significantly amended by the automatic enrollment of voters and, hopefully, by allowing Chileans settled abroad to vote at consular posts overseas. This would match the body of voters with the number of citizens entitled to vote, potentially increasing the current number of voters by over one third, especially young people.

These challenges requires non constitutional amendment. However, it would demand wide consensus to reach the heart to secure quorum prescribed by the Constitution: four seventhes of the representatives and senators in office. The increase in the number of voters will nevertheless substantially alter the electoral map and favor a revision of the whole system. We are not discussing the introduction of the electronic vote because our system is questioning when. The matter that is more controversial as I said, is the obligation as by the binominal system and also the obligation of the vote vis a vis the freedom to vote or not to vote. Then as you can see we have many improvements in the electoral system but at the same time we have many challenges in the future. Thank you.

PANELIST 2

Hon. Claudio Ximenes
President of Tribunal de Recurso of the Democratic Republic of Timor-Leste

"THE LEGAL FRAMEWORK OF THE ELECTORAL SYSTEM OF TIMOR-LESTE"

Thank you Justice Harjono, Honourable Head of Delegations, Member of Delegations, good afternoon. I am going to say something about the legal framework of the electoral system in Timor Leste. As the first one, I would like to say that Timor Leste is a unitary State, adopt the civil law system, it is independent, is an independent country since 2002. After a two -year under the United Nations Transitional Administration, so since 2002 under the UN Administration conditional, to hold 2 general elections for the Presidents of the Republic, 2 general elections for the parliaments and 2 general election for traditional leaders. The principles of the electoral system of Timor-Leste are laid down in the Constitution. The statutory law mainly provides procedural rules for the elections and all matters that are necessary for the fulfilment of those principles.

We can see in the Constitution the General Principles, the electoral process, the rule on the election of the President of the Republic and rule on the election of the Parliament.

In the first part of the Constitution saying that Timor Leste is a Republic, it is an independent Republic and based on the rule of law and the will of people.

And you can find in Section 7 contains the principles of universal suffrage and multi-party system. This section reads as follows:

The people shall exercise the political power through universal, free, equal, direct, secret and periodic suffrage.

The same principle is repeated again in another section, 65 and it reads:

1. Elected organs of sovereignty and of local government shall be chosen by universal, free, direct, secret, personal and regular suffrage.
2. Registration of voters shall be compulsory and officially initiated, to be single and universal and to be up-dated for each election.

This Section establishes the rule for electoral campaign and shall be governed by the following principles: Freedom to canvass; Equality of opportunity and treatment for all candidacies; Impartiality towards candidacies on the part of public bodies; and finally Transparency and supervision of electoral expenses.

It also includes the conversion of the votes and the conversion shall observe the principle of proportional representation; The electoral process shall be regulated by law and the Supervision of voters' registration and electoral acts shall be incumbent upon an independent organ, and the law establishes the competences, composition of this independent body and it incumbent upon the

Supreme Court of Justice to verify the legality regarding the establishment of political parties and their coalitions and order their registration or dissolution, in accordance with the Constitution and the law, to verify the legal requirement for candidates for the office of President of the Republic, to certify at last instance the regularity and validity of the acts of the electoral process, in accordance with the respective law and to validate ad proclaim the results of the electoral process.

It is incumbent upon the Supreme Court of Justice to declare disability of the incumbent President and confirm his death and confirm the vacancy of office. Currently there is no the Supreme Court in Timor Leste yet, as we had only 8 years in existence. So there is a transitional disposition in the Constitution and it stated that until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor.

The highest judicial instance of the existing judicial organization is the Court of Appeal (Tribunal de Recurso) established under Regulation of UNTAET, United Nations Transitional Administration of East Timor.

The ordinary statutes governing matters on electoral system are: (a) Law 5/2006 (28 December) establishing the National Electoral Commission; (b) Law 7/2006, 28 December, amended by Law 5/2007 (27 March), on the election of the President of the Republic; (c) Law 6/2006 (28 December), on the elections for the National Parliament; (d) and Penal Code of Timor-Leste approved by Decree-Law 19/2009 (April 8th) would defines the electoral crimes.

The law establishing the National Electoral Commission is the Law 5/2006. This National Electoral Commission as independent body and establish that it is incumbent upon the National Electoral Commission, to supervise the electoral process; to oversee the implementation of constitutional and legal provisions concerning the electoral process; to approve the regulations on the implementation of regulations under this Act and other election laws, and codes of conduct for candidates, observers, and tax professionals of the media; to promote the objective of clarifying citizens about the election; to ensure equal treatment of citizens in all acts of voter registration and electoral operations; to ensure equal opportunities and free advertising of applications during the electoral campaign; to consider and certify party coalitions for electoral purposes, as well as the lists of independent candidates; to inform the Prosecution about any acts which constitute unlawful election it is aware of; to prepare and submit to the Supreme Court of Justice the provisional results of the electoral result to allow the Supreme Court to validate and proclaim the final results of the elections.

And the decision of the Commission can be challenged through the appeal to the Supreme Court of Justice. Finally the electoral offenses, as the act of controlling the electoral system, some behaviours in violation of the electoral principles were considered crime, punishable with imprisonment and fine by the

Law. Now this position is included in the Penal Code of Timor-Leste, the Penal Code was approved in 2009 and you can find some electoral crimes such as fraud in electoral registration, obstruction candidacy, illegal electoral campaign, obstructing the freedom of choice, obstruction election unitary, violation of voting secrecy, violation of the obligation of being partial. So this ladies and gentlemen that I have to say is a Legal Framework of the electoral system of Timor Leste.

Moderator:

We still have one panelist Hon. Pemamiththa Abraham Ratnayeke from Sri Lanka.

PANELIST 3

Hon. Pemamiththa Abraham Ratnayake
President's Counsel and Senior Judge of Supreme Court of Sri Lanka

"CONCEPT OF ELECTORAL SYSTEM OF SRI LANGKA"

Mr. Chairman, I would like to thank you because I've been invited to this conference for the proper conducted of the election of democracy in this country, and that's the basic foundation of the country and actually if you refer to the 6 of the folder that is really the outline of my presentation. This is the brief of Presentation of Electoral System Wise outline of the system of Government of the Republic of Srilanka. I'm proud to deliver them and I'm happy to go out any further commission and encourage the system of Srilanka..

The concept of General Elections is referred to at the commencement of the Sri Lankan Constitution. Article 3 it is stated "in the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise." And article 4(e) of the Constitution states "the franchise shall be exercisable at the election of the President of the Republic and of the members of Parliament and at every referendum by every citizen who has attained the age of 18 years and who being qualified to be an elector".

Accordingly, in Sri Lanka the Supreme Law and other Election Laws recognize the following Elections:

The Presidential and Parliamentary elections which I refer to the constitution itself, then the Provincial councils and Local Authorities Elections, different level. Chapter XIV of the Constitution deals with the subject of "The franchise and elections". It contains provisions with regard to elections to the post of President and election of the Members of Parliament. Art. 88 coming under this Chapter states that every person is qualified to be an elector unless disqualified as laid down at Art. 89 of the Constitution.

Sri Lanka has an executive presidency and the President is elected at a separate election conducted solely for that purpose. The procedure for the Presidential Election is laid down in separate *amendment* just called the Presidential Election (Special Provisions) Act No. 2 of 1981. And also the procedure in respect of Parliamentary Elections is also laid down in separate Parliamentary Elections Act No. 1 of 1981.

I would like to emphasizing the different system which we have that proportional representation system in our country. I believe it has being adopted in Thailand, in Chile, Uzbekistan, Timor Leste, all the countries now have adopted this proportional representation system and if you look at our system, of the election of members of the parliament, we have all of the parts of the proportional representation system. Actually, the Parliament has a total membership of 225 members, Srilanka Parliament.

The election is conducted under a proportional representation system as laid down in Art. 99 of the Constitution. Should you you're your folder hold 6 of your folder.

Article 99(1) to (5) deals with the working of the proportional representation system.

Article 99

"At any election of Members of Parliament, the total number of members which an electoral district entitled to return shall be the number specified by the Commissioner of Elections in the Order published in accordance with the provisions of paragraph (8) of Article 98.

We have broken the country into provinces, 9 provinces and under each province we have electoral district. The numbers of impeach to be returned from each electoral district isdecided as *I have given* in the folder I gave given.

And every elector at an election of Members of Parliament shall, in addition to his vote, that even vote of the particular political party will also have in addition the entitle to use preference votes in respect of that candidate according to votes to use for the party and the reward of that candidate. So you have a different system there.

Any recognized political party or any group of persons contesting as independent candidates (hereinafter referred to as an "independent group") may for the purpose of any election of Members of Parliament for any electoral district, submit one nomination paper setting out the names of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by three. Each elector whose name appears in the register of electors shall be entitled to only one vote.

The recognized political party or independent group which polls the highest number of votes in any electoral district shall be entitled to have the candidate nominated by it, proportionally to be elected by the parliament, in accordance to the numbers of votes that the particular political party decision. So the preferred candidates have been elected tell preferences in proportion to the numbers of the votes the party gets at the election.

And also, Sri Lanka is divided into 9 Provinces and each of the Provinces has electoral districts under them. In all a total of 196 members are elected in the following manner:160 members are elected directly from the electoral districts.

Then 36 members are elected based on the provinces as laid down in the Article 9.6.4 of the Constitution, that is in term of the total numbers of votes that the particular party received is that the province gets out. each province gets 4 to 9 Provinces get 36.

And the balance 29 members are elected under Article 99A of the Constitution through the responsibility of conducting the elections is reposed on The Election Commission, that's the common phenomenon, which our country has adopted that's the system of the appointment.

The main object of the Commission as laid down by Art. 103(2) of the Constitution is "to conduct free and fair elections and referenda". The members are appointed for a period of 5 years and many provisions have been introduced to ensure their independence during the period they hold office.

It is the Supreme Court of Sri Lanka which has the jurisdiction to hear and determine any case challenging the election of the President. Art. 130 of the Constitution states

"The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on:

Any legal proceeding relating to election of the President or the validity of a referendum.

Any appeal from an order or judgment of the Court of Appeal in n election petition case.

Then we have, in addition to this, we have the Provincial Council Elections, which is at the lower level. And also the local authority election which I do not think to be the point at the moment.

I would like to observe about election commission and also I observe that in Korea, representation of Cuban, that is to be encouraged, that is federation now.

So that is the brief outline of the system of my country and of course if you read in the folder.

QUESTION AND ANSWERS PART I - SESSION ONE

Moderator: Justice Harjono

Justice of Constitutional Court of the Republic of Indonesia

According to the agenda, we are running out of time.

So I am asking you to skip the Questions & Answers, we will take a break for a while and will come back for the next session. Do you agree with that ? OK ?

Questions to be asked according to the papers presented to you.

Question:

I am Abdul Azis, I am Commissioner from the General Elections Commission of Indonesia.

My question is for Mr. Dong from the Republic of Korea: you have explained very interesting points about the restrictions of expenses for campaigns. My question is: is there any restriction also for candidates to receive an unlimited amount of money from third partes. In relation to your point also, is there any specific punishment for those who, for example, pass the limits of the restrictions of expenses in campaigns.

Hon. Dong-Heub Lee.

OK, as I explained before, Korea has a total amount restriction system, and in each, for instance, presidential elections, or each national assembly member election, the amount that can be used for that election is decided by law. And if more money is used, that can be a violation of the law and the interesting thing is you pay an election campaign manager or an accountant in charge of the election campaign office or an accountant for preliminary candidate commits an election crime and is sentenced to imprisonment of a fine exceeding 3 million Korean Won, the election of the candidate concerned becomes invalid. And if the candidate accepts a portion of vote, the money will be refunded by the nation. So in Korea principally the expenses of election is supported by the nation.

Question:

Honorable Chairman, I am from Malaysia.

My question is addressed to Hon. Judge Chalermpon from Thailand.

In Thailand it is noted that, in your paper it is stated that the election results are not challenged before the court of Law, or the court of justice, but it is brought before the Election Commission. You gave as reason, because the court proceedings take a longer time to render result. This is what is in your paper.

My first question is: how long does the election provisions take, I mean the time period for him to decide on any election dispute brought before it. That is my first question.

My second question relating to that is : is there an appeal process against the decision of the Election Commission in deciding the election dispute brought before it. In your paper you stated that complaints can be made before the Election Commission. Am I right ? So my question is : is there an appeal process of the decision of the Election commission on deciding this.

Answer from Thailand

As I said in my paper, the jurisdiction about the election law and the constitution dealing with the election is two steps in fact. The organization of the election is for the election commissions and the conduct of inquiry and decision making about a complaint in the first stage will be by the election

commission. This is in order to speed up the procedures especially when you have the election and the EC has not yet announced the election results, if there are any complaints, except the complaints regarding the criminal offense that will be dealt with by the election commission and the procedure will be very short, I think, not too long.

If the election commission has already announced the official result and there is a complaint, there is a question then you have to start the proceedings before the court of law. And if there is any appeal from the election commission also you can bring the case to the court of law, especially to the supreme court of justice, because in the supreme court of justice there is a special division right now that we call the election division dealing only with elections This is as far as the national election is concerned. For the local election, from the election commission you can appeal to the appellate court; we separate the jurisdiction between the supreme court and the appellate court, according to the level of election. For the national election, the election of MPs, the senators, it will be for the supreme court of justice, election cases division. For the local government, local authority election it will be dealt by the apellantl court. Does that answer your question ?

Review and Closing of Part I Session One
By Moderator : Justice Harjono

Well, I have to apologize because the time has run out. And you still have time for questions.

But the next session is also about election law, so it is also very interesting. So, I am sorry I have to close this session.

Day Two – Session One

PART II Moderator : Prof. Hikmahanto Juwana, S.H., LL.M, Ph.D.
Academician Of University of Indonesia, Jakarta, Indonesia

SPEAKER 1

Hon. Jamsran Byambadorj
Chairman of the Constitutional Court of Mongolia

"CURRENT SITUATION OF THE ELECTORAL SYSTEM IN MONGOLIA"

After 1990, the Mongolian Republic chose a democratic path of development society in our country. I think the constitution about the people of Mongolian and the constitution of the new Mongolia and the transformation of the Mongol

to democratic society it common section of the society of Mongolia has become reality.

And the fundamental functioning of Mongolia of the system of democratic election in Mongolia. With this democratic election system in Mongolian, people have the right to vote their representative of local government who has functioning with its law to be represented by each people.

The most important is to vote, but the election of Mongolian is seemed as part of the highest of democratic procedure to the people of Mongolian and as new experiment. The constitution of the Mongolian and the government of the Mongolian is belong to the people, the right of the people is realized to vote of their participation in government through the election of their representative in the government's organ.

In the second part of the Constitution of Mongolian they are aware of physical such as democracy firm as freedom, equality and the free of national election system of modern democratic society and government.

The main source of the Constitution of Mongolian which is the Great Government of Mongolian would like to create the expression.

I would like to show you with this presentation the main parts of the Mongolian Electoral System.

First one, the least in the laws, after 5 days of the election shall be formed the student holidays, usually the election is conducted on Sunday. In the month of holiday with arrival of the greatest number of voters to participate in this election. Although the greatest part of the population are husbands, we are able to realize the election such as democracy preview in summer.

Second, in Mongolia, the organization of election have been done several times to elect the great government of Mongolian through election. The provisions have been laid down to regularly the position of the election that is independent of political parties and other influences. The election system of the Mongolian follows the followers committees. There is a central committee, and there is a territorial electoral committee, there is a submissional commission committee and there is also another unit and participate to the election committee.

The central election committee has the function of groups encourage the position with relations of the government at a level of the society of the country for the government. The territorial electoral commission works at regional and submission office and through the time of election and it organize the works of organization of such election and it organize of central electoral committee. The territorial electoral committee formed by the central electoral committee like before Presidential Election and regional the electoral commission are also formed by the central to have the capacity to elect regional representative for organizing of relation the organization of which that includes election of candidates those who gather the most votes from there they will be elected into the representation of the government from the established of the member of the parliament one region of their several candidates of elected from each of the region.

Third, according to such relation the organization of such relation of the representative and they also participate in the prosperity, the structure of the organization of this committee they are established before the electoral election.

Fourth the regulation for participating to have list of the candidates and the composition of this list and the requirement requires that they have to be citizens. Unfortunately, in our country, there is already a phenomenon that sometimes the gaps in the system with the political parties of the candidates is not separatel and in this election do money politics and overtime these are manipulated so that people can vote many times over as exercise and this every times happens in capital cities and in other big cities throughout the country. And fortunately the candidates of the parliament of this can do right one to fix of the formulation of the more so they can use it for next time if only there is proof that at least can be shut down.

Five, presume of the works of the great government of Mongolia, parties and citizens may propose their candidates can consistently placed the subject of that have the capacity or ability of the candidate of each political party. Political party served as the situation that have determine also how the government function. Whomever party that takes part to the formation of the blog must present their official decision and establish the programmes for the formation of the blog for the registration of the central electoral commission. Parties who has not announced the official decision of the participation in the election day, they do not have the right to advance the candidates. And in the formanen they are the citizens, the representative of the citizen may become the candidates. In addition to this the right to propose of candidate to the president only belongs to the Great of the government of the Mongolia.

And six,

The ballots which is the main document of national is printed by the central of the commission and distributed by the central of electoral commission at least 5days before the voting is being conducted. The voters may elect are on the list.

Seven,

According to the law, the list number of the percentage of the voters will be considered can be eligible for the electors. If less than 50% participants for the election, then new election should be conducted.

Eight,

Central electoral commission on the recognition of the President of Mongolia, the government presenting him the list of people of representatives, the parties who have approved the result no longer than 50days after the election and if the result in the elected of government is 57% of the representatives are elected then the quorum shall be considered as a valid and there is the possibility to hold the first section of the parliament.

Nine and ten

In the event of the election of the recognition of the members of the parliament a new election should be conduction.

Eleven

With regard to the silence of the candidates there shall be a fund established for the election. In the first part of the adiquer it is determined that the expenses and finance for the campaign should be done by the party is private fund.

With this representation of the Election of The Situation of Election in Mongolia now please allow me to present several examples of cases of decisions made by the Constitution of Court of Mongolia Election Dispute. I would like to underscore the Constitution Court made the very significant rules. In June the past, the Constitution of Court of Mongolia have had several times for the constitution of violation of electoral laws including the article of the constitution of Mongolia. It is very important that right of the people are identically by the constitution court in regard of the violation of electoral law which to harm and so damage the violation of the voters formed also the result of violation election and the discussion by the constitution of court of such management must be done with regular concession. And this regard the court should the ability to examine the entire process of the documentation of the election. We have to allow that the court has the right and there has to be no exception for this and I'd like to thank for the attention.

SPEAKER 2

Hon. Justice Jose Portugal Perez
Justice of Supreme Court of the Philippines

"CONCEPTS OF ELECTORAL SYSTEM IN COMPARISON"

I did the elections also in a real sense the operation of the rule of law. I would have wanted to follow the great and presenting the summary of historical development of the Philippine electoral system which shows how subsystem evolve along with the developmental of our own democratic institution but due the time constraints, I would just left some of the portion over of this paper which already presented to you in your folders. And I've been permitted by the head of my delegation Justice Castillio to allow you to sleep because this is an unholy hour and we had that lonely already with just one condition please don't snore because you might disturb your signal.

I would first mention the development in our electoral system referring to a suffrage being extensive to the Filipino women and this happened in 1937, foundering in our 1935 constitution what I know was patch which is that the right and suffrage will be extensive for the Filipino women if it may plebiscite held for the purpose, not less than 300 thousand women possessing the necessary qualifications shall vote affirmatively on the question. And indeed that number was a pain.

May I also just mention about our 1935 constitution and in our 1973 and then in our 1987 constitution as regret election.

In the 1935 Constitution, it established the Philippine Commonwealth provided for a presidential form of government patterned on the US model. The Constitution originally introduced a unicameral National Assembly, but an amendment in 1940 re-established the bicameral legislature, and it's remained until 1972, that was during the time of President Marcos.

There were debates on the removal of the literacy requirements and the lowering the voting age from 21 to 18 and the authorization of absentee voting. At that time only the proposal to lowering the voting age and to remove the literacy requirement were approved. And in the 1987 constitution what was added a provision of absentee voting. I will proceed to the Philippine electoral system.

The electoral process in the Philippines is largely defined and governed the our present Constitution. Pursuant thereto, we elect our political leaders by direct voting. The people themselves choose who govern them. And in order to win, only a plurality of votes is required: the candidate who procures the most number of votes wins. It is not necessary that the winner obtain an absolute majority of the votes cast.

Pursuant to the mandate of the Constitution, the Philippines is governed by the multi-party system of politics. It states our constitution, present constitution and I called a free and open party system shall be allowed to evolve according to the free choice of the people." This provision provides the constitutional basis for the shift from a two-party system under the 1935 and 1973 Constitution to a multi-party system.

The Philippines hold elections on both national and local levels. On the national level, we elect the President and Vice-President who have govern six years, and the members of the Philippine legislature – called the Congress. The Philippine Congress has two (2) chambers: the Senate composed of twenty-four (24) senators, who do not represent any geographical district and who are elected for a term of six (6) years. No geographical district because they are elected nationwide, and we have small Representatives, currently composed of 269 members representing legislative districts apportioned from the provinces and cities of the Philippines in accordance with the number of their inhabitants and who serve for a term of three (3) years. And can be elected for two other periods or maximum of nine years.

The territorial and political subdivisions of the Philippines are the provinces, the cities, the municipalities and the *barangays*, the latter being the smallest and most basic political and territorial unit. Pursuant to a mandate of the Constitution, Congress enacted the 1991 Local Government Code which governs local elections.

Thus, on a local level, we elect the chief executive and legislature, respectively, as follows: for a province, the governor and vice-governor and the members of the provincial board; for a city or municipality, the mayor and vice-mayor and the members of the city or municipal councils; for a *barangay*, the *barangay* captain and the members of the *barangay* councils.

Owing to the lessons learned from the Marcos regime which lasted close to twenty-one (21) years, the Constitution of the Philippines now imposes a limitation on the terms of office of all elective public officials. The President is not eligible for any re-election; whereas the Vice-President cannot serve for more than two (2) consecutive terms.34 No senator can serve for more than two (2) consecutive terms and a member of the House of Representatives and all local elective officials, for more than three (3) consecutive terms of three years each term.

Another salient feature of the Philippine electoral system is the party-list system. Under this set-up, representatives from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector, are elected as members of the House of representatives.

One landmark case of this kind of election is called the *Ang Bagong Bayani Labor Party*, and may I just mention some of the guidelines mention in the Supreme Court decision and this is the first, the political party, sector, organization or coalition must represent the marginalized and underrepresented groups identified in Section 5 of Republic Act No. 7941.

Second, while even major political parties are expressly allowed by Republic Act No. 7941 and the Constitution to participate in the party-list system, they must comply with the declared statutory policy of enabling "Filipino citizens belonging to marginalized and underrepresented sectors to be elected to the House of Representatives." In other words, while they are not disqualified merely on the ground that they are political parties, they must show, however, that they represent the interests of the marginalized and underrepresented.

Third, in view of the express Constitutional prohibition that "religious denominations and sects shall not be registered," the religious sector may not be represented in the party-list system. So we would like to underscore this is the development of our electoral system, the party list system.

Also our country confirms and upholds the right of the youth to be heard in and to contribute to the formulation of laws and ordinances that concern and affect them. Hence, in its Declaration of Principles and State Policies, the Constitution of the Philippines declares that: "[T]he State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual and social well-being.

Thus, in the Philippines, at the *barangay* level, there is a youth council, called the *Sangguniang Kabataan*, composed of a chairman, seven (7) members, a secretary, and a treasurer,etc.

Finally, the electoral system in the Philippines also provides a mechanism for absentee voting. This is a similar to the system already discussed by the speaker before me. This law was promulgated during the 1986 constitutional convention. Also this was a realized that the constitutional was realized not to allow citizens provide a guidelines.

In the case of immigrants and permanent overseas residents not otherwise disqualified to vote ,they must executed an affidavit declaring their intention

to resume actual physical permanent residence in the Philippines not later than three (3) years after the approval of his/her registration as an overseas absentee voter. This is meant to be a statement that he or she never intended to abandon his or her domicile in the Philippines.

These number of laws were compile in the Omnibus Election Code of 1985. There was a question on the floor if I let go about what happened about a commission of election and what about to the decision of the committee. We have in the Philippine independent constitutional on election and this commission is in charge of the conduct, supervision, qualification of the candidates. So conduct and supervision of the qualification of the candidates. I mention the several of the officials that we vote for, start with Barangay, municipal, etc. and question regarding qualification is decided by commission of election and the decision may be appear to the Supreme Court. After the candidates had been proclaimed, all contests become electoral protests and as far as the barangay, officials and municipal official of concerned, the mayor, vice mayor are concerned. Electoral protests concerned its official at first decided by our court, original trial court, but the decisions are available to the COMELEC. And the COMELEC decision goes to the Supreme Court if it still contested. And so far as the provision official as our concern these protests are filed directly with the COMELEC. And if there's any question about the decision of COMELEC it goes to the Supreme Court which is our constitutional court by the way.

In a question about the how the members of the house of representative are concerned we have the body called The House of Representative Electoral Tribunal is composed of 3 justices of the supreme court as I say constitutional court and the members of the majority and minority congressman in the lower house of our congress. So far as the senator's self concern, the body which takes care of protests concerning the senator is the senate electoral tribunal again compose of the 3 justices of the Supreme Court and the member of majority and minority parties in the senate. In so far as the president and vice president is concerned the entire Supreme Court our constitutional court become the presidential election tribunal. At present we have a 10 decades and this is the protests of a losing vice president candidate Senator Marcova against vice president elected. This has been filed to the court and this is going to be processed and become a subject when we come home. I will proceed to my including paragraph because the protests of the professor.

The chairman before all of us is to move a pace with the action in our respective dynamic political field. Admittedly, our history and cultures vary so tools of our productive seven consequently election can be different. But basic principle of representative government are immutable, they are shared by all of us. So do we like if agree that every country should be able to keep instead with its changing our political landscape. That's revolution and reform should be as much a part of every country's electoral system as we are in original political processes. Truly ladies and gentlemen the whole of the rule of the game is classroom for lessons and theater for experiences in our universe of effort for strong and stable nation. Thank you.

PANELIST 1

Hon. Raouf Guliyev
Secretary General of Constitutional Court of Republic of Azerbaijan

"THE ROLE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN WITHIN ELECTORAL PROCESS"

Moderator:

Thank you very much, Hon. Perez.

I again apologize for asking you to stop. This is my moment, when I can stop the justices, as a moderator, of course.

Next we will have the Secretary General of the constitutional Court of the Republic of Azerbaijan, Mr. Rauf Guliyev. So, without further ado, please !

Hon. Raouf Guliyev:

Thank you, Mr. Moderator. My presentation will be very short, so I will finish quickly.

But, before speaking, I would like to congratulate also the Constitutional Court of Indonesia with the wonderful organizing of this conference, Presidents, judges, all the staff and to thank them once again for the invitation to come to Jakarta.

According to Art. 86 of the Constitution of Azerbaijan, the validity of results of parliamentary elections is verified and approved via(16:48) the procedures as specified by the Legislation. I mean the Law on Constitutional Court and Constitution. In accordance with Art. 117 of the Electoral Code the Central Electoral Commission verifies within 20 days the protocols of the district electoral commissions and within 48 hours submits them to the Constitutional Court. After getting those documents the Constitutional Court within 10 days verifies them with participation of specialists. The session of the Plenum of Constitutional Court devoted to verification of validity of results shall be held within 7 days after reception of materials by Constitutional Court.

During examination of a case connected with approval of electoral results the Constitutional Court asks the Court of Appeal and Supreme Court for information on the cases examined in those courts on protection of electoral rights of citizens.

Taking into account the results of verification the Plenum of Constitutional Court adopts by majority of 5 votes the decision on full or partial approval or disapproval of parliamentary elections. If the protocols of district electoral commissions correspond to the requirements of Electoral Code the Constitutional Court approves the results of elections. This decision is of final and cannot be changed.

The parliamentary elections held in 2005 were very important for Azerbaijan as they were first parliamentary elections held after accession of our country to Council of Europe.

I would like to touch upon some procedural aspects of adoption of the decision of Constitutional Court regarding the approval of elections in 2005. After getting the materials from Central Electoral Commission our Court invited the specialists and sent the inquiries to Court of Appeal, Supreme Court, Ministry of Justice and Prosecutor's Office asking them to provide the information on cases of violation of electoral rights and electoral legislation.

On the basis of materials submitted by Central Electoral Commission as well as the additional materials submitted by other state bodies and the opinion given by the specialists the Constitutional Court came to conclusion that 115 of 121 protocols of district electoral commissions which had been used by Central Electoral Commission to draw up the final protocol were corresponding to Electoral Code. The rest 6 protocols of district electoral commissions were contradicting to the requirements of above mentioned Code and thus the results of elections in those districts were not approved.

As you may see the competence of Constitutional Court connected to approval of parliamentary elections have certain limitations and the judicial investigation of Constitutional Court is confined to establishing whether the relevant documents meet the requirements of legislation.

At the same time one should bear in mind that by Constitution the Constitutional Court is attributed to judicial power and thus the modes of its functioning are characterized as judicial ones.

In this sense it would be relevant to note that the legislation of Azerbaijan does not recognize Constitutional Court as a political body. That means that the Constitutional Court is the highest constitutional body of justice and adjudicates on the issues of correspondence to Constitution and checking of legality. The intervention of Court into political processes and making the statements which carry the political nature does not conform to its constitutional status. Just one remark: this is not the only role of Constitutional Court of Azerbaijan in electoral procedure. Our Court can examine also the individual complaints. For instance, just before parliamentary elections there were some complaints as to the actions of certain institutions. But all of these complaints were related to the factual issues and not the legal ones. Since these issues were beyond the competence of Constitutional Court they were not admitted to judicial examination. The complaints related to the intervention into electoral process were sent to the Prosecutor's Office asking it to examine the facts of interference.

In conclusion, I want to mention that as to presidential elections I have to note that in this case the role of Constitutional Court is limited to first verification of the documents submitted by Central Electoral Commission, as to their correspondence to the requirements of Electoral Court, and second the declaration of results which are submitted by Central Election Commission. In case of the failing of conformity, the Constitutional Court can cancel the result of elections. Thus, the Constitutional Court officially announces the results

of elections what constitute the completion of all the procedure of presidential elections.

Moderator:

Thank you very much for keeping the time because I know for the speakers, it is unfair, because they have travelled a long way, but they have to speak for 10-15 minutes. But, again, since we have a time limitation, we have to be strict with the time.

Now, the next speaker is a person whom I know in the ASEAN Law Association. He was the Attorney General and currently is the Chief Justice of the Supreme Court of Brunei Darusalam. Hon. Dato Seri Paduka Hj Kifrawi bin Dato Paduka Hj Kifli.

The floor is yours!

The next speaker is a person whom I've known in the Andian Law association. He was the attorney General, and currently the Chief Justice of the Supreme court of Brunei Darussalam. So Honorable Mr. Dato Seri Paduka Hj. Kifrawi bin Dato Paduka Hj. Kifli. The floor is yours.

PANELIST 2

Hon. Dato Seri Paduka Hj. Kifrawi bin Dato Paduka Hj. Kifil
Chief Justice of Supreme Court of Brunei Darussalam

"ELECTION SYSTEM IN BRUNEI DARUSSALAM"

Thank you very much honorable chairman. I shall be very brief.

In Brunei Darussalam, members of the Legislative Council are in general appointed by His Majesty The Sultan and Yang DiPertuan.

Under the Constitution (the Constitution) His Majesty is vested with supreme executive authority. His Majesty is also the Prime Minister and Supreme Commander of the Royal Brunei Armed Forces. In the exercise of his executive authority His Majesty is advised by Members of the Council of Ministers who we refer as the cabinet minister and also by the Privy Council. Members of the Council of Ministers are also members of the Legislative Council. Some members of the Privy Council are also members of the Legislative Council.

Under the Constitution, His Majesty shall have the power to make laws for the peace, order, security and good government of Brunei Darussalam. In exercising this power, the Legislative Council debate Bills and if passed by the Council, the Bill would become law, if His Majesty has given the approval.

The Constitution provides that the Legislative Council shall consist of not more than 45 members, comprised of 30 persons, appointed by His Majesty who are ex-officio Members who comprise the Prime Minister and all Ministers appointed by His Majesty; secondly, titled persons; thirdly, persons who have

rendered distinguished public services; fourthly, persons who have achieved distinctions in the field of religion, management, profession, business, trade, agriculture, cultural arts or community activities, or who are representatives of particular communities; and up to 15 persons shall be elected in accordance with the laws relating to election in force in Brunei Darussalam.

The 15 members represent the 4 Districts in Brunei Darussalam.

Until the laws relating to elections are in force. Actually in 1962, there was an election. After the election there was rebellion so the government at that time suspended the laws. Until now the laws are suspended. That explains why the laws are not in force. I think we have similar laws like in Malaysia, Election Offences Act and so on, but they are suspended. So for the court, they have nothing else to do if there are any offenses or whatever.

Well, we have the ordinary court. But under the constitution, the reason amended constitution, the court has no power to do judicial review. Of course there are other means of getting remedies from the government. Usually people complain to Sultan and our Sultan usually will do something about it, setting up the inquiry, stiff inquiries or charging the person and other remedies.

Until the law would let the election I involve the 15 members are appointed by His Majesty upon recommendation by a Selection Committee. The 15 members recommended are selected from all village leaders from all 4 Districts in Brunei Darussalam.

In Brunei Darussalam village leaders are elected by the people from their respective villages. You might be wondering how come we have no election law yet. Village leaders are elected by the people. What we have actually administrative guidelines regarding election. Usually village leaders are elected, like in accordance with the rules of first class vote system. We have a rather simple way of electing leaders. So far we have the progress and whatever. Our country is small, 300 thousand population. We cannot afford to complicated procedures. Thank you very much.

Moderator :

The Chief Justice at the High Court. And currently he is serving as the Vice President of the Supreme Court in Singapore. So, Hon. Mr. Chao Hick Tin, the floor is yours.

PANELIST 3

Hon. Chao Hick Tin
Vice President of Supreme Court of Singapore

"ELECTORAL SYSTEMS IN COMPARISON: UNIQUE FEATURES OF THE SINGAPORE PARLIAMENTARY SYSTEM"

Thank you, Mr. Moderator

Distinguished Colleagues, first I would like to thank the organizers, particularly the Constitutional Court of Indonesia for having me and my colleague here in Jakarta. We greatly appreciate the hospitality extended to us.

The political structure of Singapore is basically the Westminster model of a parliamentary democracy with the executive power being vested in the Cabinet headed by a Prime Minister. This maybe contrasted to a political institution like what you have in Indonesia, or in the Philippines, where head of State as well as the head of the executive branch is the President. He is both the head of the executive branch as well as the Head of State. In Singapore, the Head of State is only a titular head. He does not run the day-to-day affairs of the government. However, I would like to make a statement later on when we complete. Now we had some sixteen years ago, made some amendments to our Constitution to change the office of the President from an appointed office to an elected office. This is something which I will vouch on later. Those of you who are familiar with parliamentary democracy would be familiar with how a parliamentary government is usually set up.

In short, the party with the largest number of elected Members of Parliament (usually having a majority in Parliament) will form the government. Members of Parliament are elected by the popular vote. Now how our members of parliament are elected, that is really no different from that system prevailing in Malaysia which justice Zaki had already earlier mentioned. Now, Singapore operates a single chamber of parliament. We do not have upper house. Elections of Members of Parliament are required to be held every five years. In practice, the President usually dissolve parliament before the full five years is up. This is done upon the advice of the Prime Minister and elections are required to be held within three months from the dissolution of the parliament. Members of Parliament are elected on the "first past the post" rule, like it is mentioned earlier by again, Chief Justice Zaki as well as my friend Chief Justice of Brunei. So, for example, in a 3-way fight, the winner needs not be somebody who gets the majority vote; he could be somebody winning less than the majority vote, but he will be the one elected as the member of parliament, provided he gains the largest number of vote. gets be he to be there is no necessity for any one candidate to win an absolute majority of the votes.

While most of you may be familiar with the election of Members of Parliament from discrete single-member constituencies, one unique feature of Singapore Parliamentary elections is the Group Representative Constituency (GRC). A GRC is a constituency represented by 3 to 6 Members of Parliament. Now, today I learnt something new, earlier on having heard my colleague from Thailand. They also have a kind of group representative constituency. There could be either two members or three members. But the slight difference between their system and our system: in our system, the entire members of 3, 4,5 or 6, have to be voted via voters on bloc. You cannot choose between the member from the same party. So, if one party nominates six members, another party nominates six members, the voter must elect either this group of six or the other group of

six. You cannot say: "I want three of here and three of the other. That won't work. That's not our system. But hearing from my Thai colleague, I got the impression in that case, in the case of two members constituency, you can vote according to what you wish. One candidate from this party, and one candidate from the other party, which is not our system. In Singapore, the reason why we introduced GRC, was to ensure that there is representation in Parliament of Members from the Malay, Indian and other minority communities. This would explain our parliament as follows. Here I quote our Deputy Prime Minister, he said this "In the 70s and early 80s, when there was increasing evidence of voting patterns along ethnic lines, the Government, after long debate, decided to introduce the GRC system. GRCs encourage political parties to take a multi-racial perspective, and ensure that our ethnic minorities will always be represented in Parliament regardless of who wins the election." That was a rational for you. To achieve this objective, the President will, prior to elections, designate for each GRC to have at least one candidate from the Malay community, the Indian community or other minority community. Thus, when candidates choose to contest the elections in a GRC, they must ensure on Nomination Day that their group has at least one candidate from the community designated earlier by the President. After Nomination Day is announced, any person desiring to run for election in a GRC as a person belonging to the Malay, Indian or other minority community will have to apply for a certificate that he belongs to that particular community. At present, in Singapore there are 14 GRCs and 9 single member constituencies.

Another unique feature of Singapore Parliamentary system is the inclusion of non-elected Members in our Parliament. We have two types of non-elected members in our parliament. One, we call them the Non-Constituency Member of Parliament (NCMP) and the other is the Nominated Member of Parliament (NMP).

NCMPs are chosen from among the opposition MPs who poll the highest percentage of votes but still lose at the elections. These candidates are *declared* to be elected as NCMPs. The law provides for a maximum of 9 NCMPs, and their actual number is calculated based on 9 minus the actual number of elected opposition MPs. So, for example, if 6 opposition MPs are elected, then the top 3 unelected opposition MPs who polled the highest percentage of votes will be declared as elected NCMPs. In the event that the highest percentage of votes is garnered by an unsuccessful opposition group contesting in a GRC, then the group will determine who among themselves who will be the NCMP(s). This ensures that there will be at least 9 opposition MPs in Parliament. You may ask why did we introduce this system of NCMPs? This was again explained in the Parliament. And here I quote "The NCMP scheme was introduced in 1984 to ensure that Parliament has at least a few Opposition Members, even if the electorate only returned candidates from the ruling party to Parliament. Three benefits were highlighted then. The first was to provide PAP Ministers and MPs with the experience of the cut and thrust of debate by sparring with Opposition Members. The second benefit was to allow the electorate to judge for themselves

what elected Opposition Members can and cannot do for the people. The third was to dispel any suspicions of cover-ups, since Opposition MPs would give vent to any allegation of misfeasance or corruption or nepotism, even if these proved false, and allow the Government to rebut them." So this was the rational given at the time, why this system was introduced.

Turning now to NMPs (Nominated Members of Parliament) – NMPs. They are nominated by Parliament and appointed by the President. The duration of appointment of an NMP is 2½ years. Half the period of a normal member of parliament. But very often they are re-appointed. These people are nominated by a Special Select Committee of Parliament from names submitted by the general public. Anybody in Singapore who would like to, particularly an individual who is very capable, he may submit his name to the Committee, and the Committee will consider all the names. And by the end of the day, they will nominate 9 persons to be appointed by the President as NMPs. I have been informed that my time will soon be up.

Again, I would like to tell you why this came on to do. And this is what was explained in the Parliament. And here I quote: There are Singaporeans who can contribute but who are not able, or prepared, to take part in elections and look after a constituency. For example, many foreign companies, in particular multi-national companies, do not allow their staff to take part in elections because they want to retain a neutral position in their host country. For the same reason, some local companies also do not allow their staff to stand for elections. The government hopes that these companies will allow their staff to become Nominated MPs because such MPs will not be politically partisan. Then we can have a group of Singaporeans hitherto not available, who can make a significant contribution from their wider experience, expertise and insights into our economic and social problems. Women are another category of Singaporeans who can contribute to public service but who are under-represented in Parliament. There are only four of them at that time. So we want to encourage more women to come forward. Most women who can contribute are immersed in their careers and with families to look after. Few women will want to handle three full-time jobs - elections and a constituency, plus a career, and family. They may be willing to become a Nominated MP if they do not have to look after a constituency. And that way, we can have more women in Parliament."

Last point I want to talk of is the unique feature of having a president who is elected directly by the people. But he does not have the day-to-day running of the government. The day-to-day running of the government still rest in the cabinet and the Prime Minister. We only introduced this system in 1993.

Before that, the role of the President was largely ceremonial. In 1991, the Constitution was changed to make the office of the President an elected office. The reason for this was as follows. Here I would like to quote from a white paper prepared by the government at the time the constitutional Amendment was introduced. It says that, why the office of the President was made an elected office. To give the President a wider role and responsibility. And the wider role and responsibility include to veto the use of the government's past reserves,

and to veto the appointment of key public service appointments. These are two main features of the enlarged role of the President. And it will explain the white paper as follows:

"To safeguard national reserves and assets, and the integrity of the public services, it is proposed to create an Elected President who will serve as a watchdog or custodian in these two areas. The Parliamentary system of government will not be altered. The Prime Minister and his Cabinet will govern the nation. Even in these two critical areas, the Prime Minister and his Cabinet still take the decisions, but they must seek the President's concurrence. If the President does not concur, a Government which is convinced of the rightness of its actions can take the issue to the people. The power of the President to grant or withhold his concurrence in these two areas amounts to a two-key safeguard mechanism. The Prime Minister and Cabinet will possess one key and will take the initiative. For their decision to be valid, the second key must be used; namely, the President must also concur." In short, we have made the President elected office to give him a greater responsibility in these two key areas: national reserves and public service integrity. So if the government would like to make any change of this, it requires the concurrence of the President. If the President does not agree, then the government has only one option: to go back to the people to get a mandate from the people.

I did that in short, that is what I wanted to say. Thank you.

QUESTIONS AND ANSWERS

Moderator:

I hope it is going to be direct and concise, I see Pak Theo Sambuaga there, yes Ibu over there, well another question, 3 questions, first we start with Pak Theo Sambuaga, former Parliament Member of Indonesia and also Minister.

Theo Sambuaga: Thank you Mr. Chairman. I should be brief.

Question number 1, I would like to, I wonder if the gentlemen, justice from Philippine and Azerbaijan can help to answer this question. In your system do you have any problems with the number of political parties represented in parliament, too many or too few perhaps must apply in the system based on the PR, Proportional Representation. But what I mean in our case for instance we of course as a democratic country and everybody have the right to form a party and a lot of parties participated in the general election, but when they come to the parliament only several parties represented in parliament, but even though it is already too many. For instance in 2004 election we don't have what we call now parliamentary threshold that's why in the result in 2004 election we have 13 political parties sent their member in the parliament but with the parliamentary threshold in 2009 election, we have only 9 political parties set. It helps to reduce the number of political parties in parliament and of course it helps as a result of effective government. Now, I would like to ask you, do you have any problem with this or do you have any law imposed to have the aim of

reducing political parties represented in parliament. My question number 2 is particularly the task of constitutional court.

As constitutional court deal with complaint dispute settlement of the result of election, do you have a problem as of too many complaints come at the same time as the result of the election to the constitutional court has to do the deal by the constitutional court. If this case happen in this case do you can you delegate your power to let's say to the public court to deal with this in the deciding on the dispute settlement of the result of the election. Thanks.

Moderator:

OK, we are going to gather the questions first and will ask the presenter to answer the questions. Next question from the lady with green jilbab.

Thank you my name is Sunny, from the University of 11 March. Thanks Prof Hikmahanto for your chance for me. May I ask also take clarification from 5 speakers about the general election threshold. Firstly, in our country the parliamentary threshold 2.5%. Secondly, how to take a regulation about general election threshold as well as parliamentary threshold and electoral threshold. And, thirdly all political parties agree to take regulation of general election threshold as well as parliamentary threshold and electoral threshold. What is your opinion.

Moderator:

This question is addressed to whom?

Sunny:

For the 5 speakers.

Moderator:

Oh, from 5 speakers, my goodness. Ok, the last question, please.

May I make a question to HE the Vice President of the Singapore Supreme Court,

HE make the comparison between what is it group representative constitutional MP with the group rep somewhat similarity. But I am impressed by the third category, the nominated MP, who is it? Somewhat similar to the kind of nominated senator in our upper house, the first question how could be sure about the politically neutral and non-partisan movement of these candidates or nominated persons, because there must be a mechanism that had been designed for make a safeguard against the nepotism. My second question is about the possibility that should there be any wrong with the nomination who could be the line to go to refer, you are the Supreme Court in Singapore to review of make kind of check of balance. Thank you very much.

Moderator:

Is this addressed to Justice Chao Hick Tin? Yes, please

Jaran from Thailand.

Moderator:

Jaran from Thailand and the question is addressed to Justice Chao Hick

Tin. So, let me start with Justice Jose Perez, Secretary General Guliyev, Justice Chao Hick Tin, Justice Byambadorj and Justice Kifrawi.

First, just mention that our system is the presidential system, andI am not qualified to, do I have the knowledge about, enough knowledge, this is concerning the parliamentary system. That's said, regarding the first question, the multi party system, as I mentioned a while ago it is constitutionally provided in our system that should be the multi party system. And this I think does not pose as much a problem in so far as the presidential system is concerned as it does in the parliamentary system. You vote for the person, not for the party. And the only instance when it is the group which is supported on is our party-list system and this as I already mentioned concerned our under privilege group, marginalized sector which is just special provision in constitution the general membership of our congress, senate this is still the district representatives voted directly upon by the people themselves as individuals not as nominees of the parties and the senate, which is composed of senators voted at the national basis, nation-wide. So, not much of the problem so far the multi-party is concerned. The concern of the President, is that because there are so many parties, not really that many really, be the majority of course is decide to be that which belongs to his party, I am referring to the President. However, as shown by our past political experience dependency for the various political parties to merge to coalition and to form group of coalition which will favor or which will be with the party of the President, aligned, I mean, with the party of the President. So, as days go by, even if originally the members let us say the House of Representatives belong to so many parties after several months the tendency of these multi parties to merge or coalition and they form the coalition that will align themselves with the incumbent president. And so far as the election, this is case of concern as I mentioned the level all election issues are ultimately and upward to the Supreme Court if they are not finally settled in the RPCS or in the Regional Trial Court or in COMELEC. In essence, under our system the Commission of Election is really the sole authority to determine protests. However all the exceptions is barangay and municipal officials whose problems are first drop to our regional trial courts and again to be appealed to COMELEC. Provincial officials go to COMELEC directly. Senators, senate electoral tribunal, representatives have the house representative electoral tribunal, president and vice president, presidential electoral tribunal. All these tribunals have memberships coming from the Supreme Court. Three involve house and senate electoral tribunal and presidential electoral tribunal, being in itself the entire Supreme Court involvement. I hope this is a satisfy answer.

Moderator:

Thank you very much. Next is Mr Guliyev.

Mr Guliyev: Thank you. Formerly we have the system of proportional election, but the constitutional reform and the electoral reform we proceeded from the proportional system to the majority one and on the basis of the election system in 2005 were held. Thus it is regarding the threshold, we have the majority election and the result of this we have let's say so impartial

representatives, non-partisan representatives and those who are not members of any kind of party. I guess in this version, this option, the citizen obtained those who cannot be represented not the political one, but from the social and economical rights. From the point of view complaints, yes we have the system, there is a constitutional court but as regards this system within the process of electoral of election the main issue is the candidates or any other of complaint that they should come to the constitutional court with the violation of their electoral right. Thus we granted his right to challenge any kind of the actions of any authorities regarding the violation of any kind electoral right to the ordinary court. The Constitutional Court finally when examine whether there was any kind of violation of the electoral rights of freedom apply to this court, as I said before, to get the information whether there were any kind of the complaints regarding the violation of the electoral rights and finally comes to the conclusion whether the rights of the candidate were violated or not. And this can serve as one of the basis for the cancelation of the result in one district during the parliamentary election.

Moderator:

Thank you very much. Justice Chao Hick Tin.

Justice Chao Hick Tin: Thank you. I like to response to our colleague from Thailand who posed the second question. I think this question relating to group representative constituency. I don't think that you expect an answer from me because I am only that our system GRC similar to that, but it is not the same. He asked regarding our appointment and MPs. How do we ensure that this person appointed as MPs are politically non-partisan. I am afraid there is no rule of law or principles anywhere that set up what criteria that we look out for.

What I would like to say is this. A person must first be nominated to be considered. He can be nominated by a friend, he can be nominated by a professional body or he can be nominated by business association. Anybody can nominate a person to be considered for appointment as an MP. All these nominations will go before a special selection committee of parliament, consisting of the speaker of parliament plus I think 7 other members. And they will scrutinize the nominations. Of course some nominations are not serious and this will so this should be taken out. But many nominations are from people who will see are leaders of professions, leaders in distance but who have not over the years are associated with any political party. I imagine that will be man of integrity whether not you the particular candidate nominated has been associated with any political party in the past.

You have been, I supposed, that may be a disqualification. But I suppose the Committee will have to use its best judgment to decide whether this person whom they likely to pick to be appointed who like to represent the kind non partisan view, which will be expressed by them in the parliament. If the Committee feels so satisfy, I suppose they will recommend this appointment. Apart from that I don't think that we have a fool-proof way to ensure that particular candidate appointed an MP will definitely be non-partisan. I would imagine there is no such special measure to ensure that. But having said that I would imagine that

most of us do have views about lot of things. And I am sure so long as the person speaks his honest truth, what he genuinely feel about the state affairs of the country, or about any particular policy, I am sure he would not be attacked as being partisan.

After all when you speak against a policy you represented of you that view may well be a view of a political party, but that does not make you a partisan. The second question asked whether there is any checks and balances of the appointment. Can somebody challenge an appointment of an MP through the process of the judicial system.

First I would like to say this now. An MP scheme has been implemented maybe about 20 years. So far, nobody has challenged appointment as such. But I would say this. This is a scheme provided by the constitution. Nominations come from members of public to the Committee and the Committee processes it, considers it and make a recommendation to the parliament and parliament approves it and send the name up to the person appoint. I think anybody would like to challenge such appointment to be unlawful or illegal will have a very difficult task to proof that. Of course, under constitution certain person cannot be members of parliament, whether elected or non- elected. I'll give you example, if you are not a Singapore citizen, there is no way you to be appointed. So if there is a mistake on that somebody should take it up. On the other hand, if a person is known to be an unsound mind or if an discharged bankrupt or for example he is been convicted of a serious crime he will be disqualified from the member of parliament that he should not be appointed to be nominated MP. So if any of these things had happened and if it is through the appointment process I imagine there is possible to challenge the appointment. But it doesn't happen so far. And that's all I like to answer to you. I hope its satisfactory.

Review and Closing of Part II Session One

Moderator : Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D.

Thank you very much Justice Chao Hick Tin. Is Justice Byambadorj here or he would like to response? OK, probably he is not here.

Ladies and Gentlemen, let us conclude today's session by thinking that every country, every jurisdiction has its own electoral system and the presenter have given you what are the electoral system of the country. Even though we cannot copy those electoral systems however we can learn each other by trying to understand the philosophy or the background of why that system is like that. So in this sense, I think all of you can mingle in dinner time I suppose and then chat with each other and learn more on our different electoral system.

Thank you very much, you have been very kind, you have been very patient and would like you to give a token of appreciation by a big applause.

End of Day Two – Sessions I and II.

Wednesday, Day Three : 14th July, 2010

SESSION TWO

TYPICAL PROBLEMS AND SHORTCOMINGS IN LAW AND PRACTICE

Elaboration on all legal regulations and their practice in reality related to the following issues: apportionment of electoral districts, registration of voters and voters' lists, dealing with voting by mail and of citizens residing overseas, fair competition between candidates, transparency in vote counting, financing election campaigns, allocation to elected members of parliament, et al.

PART I

MODERATOR

Prof. Jawahir Thontowi, S.H., Ph.D
Academician of Islamic University of Indonesia, Yogyakarta

SPEAKER 1

Hon. Mohammed Achargui
President of the Constitutional Council of Morocco

"THE ROLE OF THE CONSTITUTIONAL COUNCIL OF MOROCCO TO ENSURE FAIR COMPETITION AMONG CANDIDATES FOR ELECTION"

Interpreter

I will say that Morocco is a kingdom that has been established more than twelve centuries ago. It has its habits and cultures and so on. But in the year of 1962 Morocco has laid down a new law and has changed and shifted politically from a traditional way to a modern way which is more democratic. And this year, that is in 1962, they established the high court and there they have a commission that handles constitution that has the authority in guarding the conduct of constitution and this year when we amended the constitution, we found a constitution commission that has its own court that is independent and has its own standing. And it also has the fourth level in the authority that is present in Morocco.

The constitution in Morocco is first of all: King, and then the Parliament, and then the government and then the Constitution Commission and then you have all the courts. We all understand that in the Constitution system the so called how far the constitution is conducted and also supervise the parliament

and also handles problems and in terms of referendum, things that are related to the General Elections, and the Commission of Constitution besides makes all the verdicts even above other verdicts, around 600 verdicts are handled, because of the disputes, especially in the legislative area, it is very open for the people, especially for the common public. There are no special requirement only if they are very slight. All the verdicts of the Constitution Court, before I talk about the competition that is healthy in this way, I would like to say that the Constitution Commission, in the line that several principles of the Constitution that is regarded as the basis of democracy and it is based on this that the General Election is conducted, in the right way. And I would like to say that several major principles that the Constitution Commission regard that the conduct of General Election and the laws around the general election and also the regulations that are related to the general election is the authority of the Parliament and not the authority of the Executive Government Board.

The Constitution Commission also underlines that the multi party system is a constitutional principle and that is why the healthy competition in political life can only be realized if the multi party system is regarded important then the political loyalty towards the party is not a pre-requisite to put yourself as a candidate in a political world. Every citizen has the option to become a candidate even if not being part of a party. As long as the constitution says that there is freedom in the political party life, then there is also the freedom of political for every general public. They can join a party or not join a political party. And this is a political principle that I need to say before I go into other technical things that are part of the Constitution Commission. Especially related to the healthy competition between candidates that put themselves as part of the General Elections.

The Constitution Court regards that every decision that it makes, the heavy competition between the candidates requires three important conditions.

First of all, that the General Election be conducted in a good way, a healthy way so the process is in line with the regulations that have been determined by the law. In this case, for example, the constitution commission regards that every candidate if he/she was regarded as a criminal, then his/her candidacy is invalid and this also goes for those who are involved in offices that is related to the General Election commission. They have to be in line with what has been determined by the law.

The location of the General Elections must also fulfill the requirements that have been determined by the law. If the location of the GE does not fulfill these conditions, then it is regarded as invalid. The place of the General Election must be in line with the law. The polling stations must be agreed upon by all, and also everybody involved in the General Elections must agree with the decision and if this is not agreed, then it is regarded as invalid and no. 2, so that the competition is regarded as healthy, then the second requirement is that they must have the same opportunity, among the candidates. Same opportunity is important among the candidates, starting from the initial process until the General Elections. Starting from before the General Elections, up to the announcement.

In this case, the commission of constitution regards that it is important that they make regulations that is the basis of the general elections. If the regulations or the rules are made not in line with the law, not right, this will cause parts of the community does not get the right for a good political process, as a candidate . So it becomes an invalid election. Every citizen has the right to take part in the General Election, as long as they fulfill the political set up established by the law.

Therefore, the office that receives the candidacy of the candidates is considered. And if these are violated, then the candidacy would not be legitimate. Therefore the right to candidacy is considered to be a constitutional principle. The next pre-requisite that has been emphasized by the Constitutional Commission is the healthy competition which is to honor the freedom of the voters, in the long run the General Election itself is an expression of the will of the people, and this needs to be free, without the interference from any other factors that may impede or obstruct the expression of the voters. Therefore, in many of the decisions that have been made, Constitution Commission has cancelled several elections that were believed to have involved money politics, to influence the votes of the voters, and have cancelled several elections that are proven to have included violence. And to cancel elections if it is proven that the administration and the management of such election is not neutral without any reference from any candidate.

These are some of the significant examples of the political process which is considered by the Constitution Commission to guarantee healthy competition and therefore, assistance is given by the government ease the flow of election and to prepare all the facilities required in staging the election and to provide assistance in order to establish healthy competition.

In order to honor the time, I would like to say that General Election is an access in democracy. Just as has been said by the President yesterday , we cannot illustrate democracy without a clean election and a guarantee that has it been stipulated in the law to ensure neutrality of the election itself is truly important and the rule of the constitutional commission in safeguarding the neutrality of the election is important. And in my country, the Constitutional Commission that is neutral and is respected plays an important role in this model.

And I think that is all from me, thank you very much for you attention.

PANELIST 1

Hon. Prof. Dr. h.c. Rudolf Mellinghoff
Justice of Federal the Constitutional Court of Germany

"THE PERMISSIBILITY OF THE USE OF VOTING COMPUTERS IN DEMOCRATIC ELECTIONS"

Contribution to the panel "Typical problems and shortcomings in law and practice"

Yes, thank you very much. First of all I'd like to thank the Constitutional Court of Indonesia what we has done for last these years and this Conference and I'm very grateful to be called of Indonesia for that. As we speak this morning about typical problems and shortcomings in law and practice, I took out a bit time for matters which I think is discussable for most of people who are concerned of elections in modern times.

We live in a world that is dominated more and more by electronics and electronic devices. Also for electoral law, it will not be possible to ignore this development. In my brief contribution, I would therefore like to address the problems which are involved with electronic voting.

The spectrum of possibilities of electronic voting range from the use of electronic voting machines by which voters can cast their vote at a polling station, to voting in electronic networks, in particular online voting, in which the vote is transmitted from the computer at home to a public voting office.

In Germany and Europe, the constitutional courts have to deal with the use of electronic voting devices, so-called voting computers. In Germany, mainly voting computers have been developed and deployed which exclusively store the votes cast by the voters in an electronic memory.

In a decision of last year, the Federal Constitutional Court declared the use of these voting computers unconstitutional because it violated the principle of the public nature of elections which results from the fundamental constitutional options for democracy, the republic and the rule of law.

The public nature of elections is the fundamental precondition of a democratic formation of the political will. It ensures the correctness and the retraceability of the election events and thus creates an essential precondition for the citizens' well-founded trust creates an essential precondition. The state system of representative democracy, in which the rule of the people is not permanently exercised directly requires that the act of the transfer of state responsibility to the members of Parliament is subject to special public scrutiny, nobody will count out the voters behind closed doors. It is open to the public to count all votes in an election.

In a representative democracy, the election of the people's representation constitutes the fundamental act of legitimation. The casting of votes in the parliamentary elections is the essential element of the process of the formation of the political will from the people to the state bodies and thus it is at the same time the foundation of political integration. Compliance with the electoral principles which apply in this context and confidence in such compliance are therefore preconditions of a democracy that is able to function. Only the possibility to examine whether the election complies with the principles under constitutional law can ensure that there is no deficiency in the transfer of state authority to the representatives of the people, which is the first and the most important element of the unbroken chain of legitimation from the people to the bodies and office-holders entrusted with state duties.

Only if the voters themselves can reliably verify the correctness of the act of delegation, in other words, only if the election takes place "before the eyes of the public" can the confidence of the people as the sovereign in the composition of Parliament corresponding to the will of the voters be guaranteed; this confidence is necessary for the functioning of democracy and for the democratic legitimacy of state decisions.

According to the Federal Constitutional Court's ruling, voting computers which record the voters' votes in electronic form and ascertain the result of the election electronically only meet the constitutional requirements if the essential steps in the act of voting and in the ascertainment of the results can be checked by the citizen reliably and without special expert knowledge. The voter himself or herself must be able to verify even without a more detailed knowledge of computers whether his or her vote as cast is recorded truthfully as a basis for counting or at least as a basis for a subsequent re-count.

The major scope of the effect of possible errors in the voting machines or targeted election-rigging requires special precautions to be taken in order to comply with the principle of the public nature of an election. While, if voting papers are used, manipulations or election falsifications are at any rate only possible with considerable effort and with a very high risk of discovery, which has a preventive effect, programming errors in the software or targeted election-rigging through manipulation of the software of electronic voting devices are difficult to recognise.

If the election result is ascertained by computer-controlled processing of the votes stored in an electronic storage medium, it is therefore from the German point of view not sufficient if only the result of the calculation process as implemented in the voting machine can be taken note of using a summary paper printout or an electronic display.

The Federal Constitutional Court does not generally regard the regard the use of voting computers as unconstitutional. It must, however, be ensured that a reliable correctness check, which is required under constitutional law, is possible. The court did not have to decide what technical possibilities exist which comply with the principle of the public nature of elections by making it possible for the electorate to trust in the correctness of the procedure in which the election result is ascertained because the procedure is retraceable. The Court merely indicates possibility which are discussed by experts or which are already being used in other countries, for example voting devices which, in addition to recording the vote in electronic form, print out a paper record of the vote cast that is visible to the respective voter a so-called Voter Verified Paper Audit Trail, which can be checked before the definite casting of the vote and is subsequently collected to make verification possible.

An examination that is independent of the electronic recording of votes is also possible with systems in which voters use a voting paper and the electoral decision is recorded in electronic form at the same time for instance by means of a "digital voting pen" or subsequently for example by a voting paper scanner, in order to electronically evaluate it at the end of the election day.

The problems caused by modern technologies in electoral law became apparent not only in the election of US President Bush in the year 2000. In February last year, a CIA official said in a hearing in Florida: "... wherever the vote becomes an electron and touches a computer, that's an opportunity for a malicious actor potentially to make bad things happen." He stated that the CIA had registered irregularities during elections in several countries.

For instance, in the presidential elections in Ukraine in 2004, the supporters of candidate Viktor Yanukovych had secretly placed a "non-authorised computer" in the headquarters of the returning officer. This had been discovered by means of intercepted phone calls, with the result that the election had later not been declared invalid by the Supreme Court in Kyiv and had been ordered to be repeated. Yanukovych had lost the repeated election to his competitor Viktor Yushchenko.

From Macedonia, a CIA official reported a so-called "voters' genocide": members of the Albanian minority had been deleted from the digital voters' lists by means of a simple "Delete" command. Hackers in Georgia proceeded the other way round: they added to the voters' lists names of persons some of whom had already died in the 18th century.

And at least I can tell you the case that the state of Ohio accused the biggest name of a factory voting machine that had a software false in the computer and the last 10 years the counting of the voting computers were false. So you see the difficulties with voting computer.

Thank you very much.

PANELIST 2

Hon. Mauricio Gonzales Cuervo
President of the Constitutional Court of the Republic of Colombia

"CONSTITIONAL CONTROL ON RE-ELECTION IN COLUMBIA"

Interpreter

I will speak in my mother tongue, Spanish.

First of all I would like to thank the Constitutional Court and also to the President for invitation and to Constitutional Court of my country and of course it is difficult to turn down an invitation that is so important that is the 7th Asian Conference and also experiences in this program shows that this opportunity is an exceptional kind opportunity as I mention yesterday, where the President was present. It has very important function to guarantee the democratic life of the citizens of this country.

First point that I would like to convey is the political system in Colombia where the constitutional law is very specific that determines the position and

also the term of office of the President of Colombia is born with the Independent Republic State in 1821, they form the first constitution and after that in the new future we are going to celebrate the 200 anniversary of our independence, Colombian Independence. And 11 years after we were independent we finished laying down our constitution for the first time.

First information is about the general election system, that is the Presidential, first of all it is the Presidential Law that is different from the public system whether how the parliamentary system for us the Presidential system we elect directly by the citizens whether they are male or female and have the office that is parliament.

The system, the Presidential system has a historical experience that is important, so that the president after holding his office cannot be re-elected. So historically a prolonged term of office because historically there is a possibility that the government can be re-elected again, directly. So now the election of the President can only be done after he has been terminated, his office has been terminated. I would like to explain the relation our Presidential system and also the possibility of the reelection of the President at the next term of office.

In 21st century we have reform, a general election reform. The Congress of Colombia determines that it is possible for a president to be reelected consecutively or directly after he has ascended his term of office. That means that the term of office of the President will be no longer than four years. But it is a guarantee that the people really wished that the President prolonged his term of office.

In Colombia it is said that the reelection of a President means that the President has an 8 years term of office which is divided into two terms of four years for each term of office. Why is this? Because we have a history that is related to the political party where a President in the year 2002 who was so popular and his term of office lasted only for one time. And after that the people wanted him to be reelected : President Uribe Velez. He won 80% of the votes and he had the popular support of 64% and 70% at the Parliament. And that is why during that time we saw that a President can prolong or extent his term of office. And he was reelected for the third time, and then the Constitutional Court made an intervention in this case.

The reelected is constitutional with the condition that he has prepared the condition and they will pick who it is. And nevertheless this year, 27 February the Constitutional Court differently from the past 5 years declared that constitutional reform in giving the possibility of a President to be reelected again that is for the first time consecutively is declared in constitutional. Why this declaration? Because differently from what happened in the first reform in 2005, they reclaimed that this was done is not in line with the condition as laid down in the constitution. That is this initiative is an initiative that is over the top. And the campaign is also over the top.

There's a possibility that also to increase force on the people through the influence of money that is involved, and also the money in the budget is far

from the budget that is determined by law. This has caused a problem with the people and the people are appealing against this.

And these days the Court has determined that the President is given the third mandate for the first time can be difficult or cause trouble for the election of the President. And also the Constitutional Court declares that if there is an appeal to change to constitution, basic principle or basic elements that is determined in the constitution which cannot be changed even with the main constitution or perhaps by force for example the Congress in that way they have decided finally that to overcome the separation of power of the President where the President can be in office for twelve years without limitation is not right and also not legislative like and also other controlling bodies.

This is considered that all the accumulation in a long time, accumulation of power that can make a power that is, and also cause a separation from the power of the people. So the basic principle of the alienation of the Presidential election that is a possibility that President doesn't follow the term of office or being powerful a lot of time and this will prevent it and make the people had a choice to choose of the President.

I would not in confrontation with the constitution, so when the Constitution Court saw this, where the President can conduct a general election without following the constitution law and not fulfilling the rights of the minority and also compete and give the rights of the people with the President that has this power. And this is regarded where the President doesn't fulfill the constitutional rights of the people. And this is regarded as a wrong doing and so after 3 months in January after we have decided the constitution of the people, we conducted a Presidential Election, which was regarded as most peaceful after the past 4 decades. And the result is so satisfying for the democratic view point and you can say that the former Defense Minister of the present President Mr. Juan Manuel Santos who is appointed as President Colombia for 2000 until 2014 with the 70% vote from the people.

And the conclusion is that in Colombia there is a possibility for Constitutional reform can be an object of the Constitutional Court and the first point in following the procedures and also in following the rule is regulated by the Constitutional Court. And number two there is theory of delimitation of making changes in constitution with regard to achieve power but they cannot change the constitution. That is the final decision.

This is the final part of the constitution because it doesn't disturb the structure of democracy which is available in Colombia and also in following the constitution because the several existing powers or accumulation of powers can be a threat to democracy and also the system of check and balance.

Finally Colombia I can say that it separate its constitutional power regarding the polarization and politics from the President of the public where they are victimized and they can attack directly if you do not put his name to be reelected and also they must respect the result of the Constitutional Court. And the people of Colombia have shown they have constitutional culture and follow the result by taking part in this election.

QUESTIONS AND ANSWERS

PART 1 – SESSION TWO

Moderator:

Thank you very much indeed.

We would like to cordially invite from the audience to response and may be explore your experience in your country and trying actually to address to one of our speakers, honorable speakers and panelists. We have actually time more than usual actually I would like cordially invite 5 persons from different countries, of course, so please raise up your hand and we can directly address, may be from Germany, Morocco and from Colombia. Could you please, welcome for your ideas.

OK, yes one we got one person at the moment, two, three, over here and ok at the back, four, and ok five. So we have actually 5 persons from different countries and would you please named yourself and from which country you come from. Would you please the first person. OK

Questions

Nepal, Justice Khil Raj Regmi.

I would like to put the question to the honorable Justice Mellinghoff on the issue that he mentioned in his paper. The establishment of the federal constitutional court in 2009. Honorable Justice could you please elaborate the concern of the case and the decision laid down by the court. I heard to know why federal constitutional court declared the use of working computers on constitutional and the reason can you mention the case. Thank you.

Moderator:

OK, and then second person, please.

James Foong

My name is James Foong from Malaysia. My question is directed to Honorable Mellinghoff of Germany. This relates to electronic voting of course this is the thing of the present and the future. I wonder whether you have done any studies to other countries beside those that you have mentioned, particularly in India where they have used electronic voting and what are the results of, is there any CIA investigation into this software? Thank you.

Moderator:

OK, thank you. Over here please.

Widodo:

Thank you. My name Widodo from the Constitutional Corporate Procedural Law, Lecture Association from Indonesia. To honorable Justice Prof Mellinghoff, Germany.

I think it is very interesting for your constitutional court decision about using of voting computers and I think I agree with the decision because practice in Indonesia but maybe you can explain for me another legal reason out of the public nature of principles. Thank you.

Moderator:

OK, is there any person there, one person that is enough 4 person. Could please,

Mariano Del Castillo :

I am Mariano Del Castillo from the Philippines. My question is addressed to Honorable Rudolf Mellinghoff, Germany. More or less the same question that has been propounded already.

In the Philippines we have just went through the first national computerized election and presently we have a pending election process due to this computerized election. There were ballots that were declared invalid and so we will be going through investigating these invalid ballots. How has it been the experience in Germany if you had a computerized election. Do you go through the same individual ballot or do you just review whatever print out of the memory that has been restored or stored in the computer. I would like a more detailed explanation of how you go about in validating your computerized election. Thank you.

Moderator:

Thank you. I would like to start with the explanation from the Honorable Mellinghoff.

Answers

Honorable Rudolf Mellinghoff, Germany:

I think to talk about voting machines and voting computers is something to put a nail into a washing nets, as I hear that. I probably start with the precondition of our case a little bit. When we had to deal with this case, we had studies out of Netherlands, studies out of Ireland and studies out of computer hackers who looked at these voting computers used in the Germany, Netherland and Ireland. And they all found out that it is possible to change the software to manipulate the software without anybody seeing it at the end. And even you can change the software of the computers shall be the voters cast his votes and sees the computers as working correctly but that what is come out is a totally different result.

So that was that thing before the case and so we looked after studies we found in English and other languages. We did not find as you asked cases of India, a study of India. But we found a study in the United States, we found it in the Netherlands, we found it in some countries of Europe. And all of those studies showed that at the end you must be very trustful in computers and very believable in computers if you just let it go and cast the vote and just get what you see on the display. So, that was the reason why we asked ourselves,

is that a constitutional question and with what constitutional preconditions we have to look at. So if you have an election and the voters, the people vote for a parliament, it is totally natural that the counting of the votes is public. So it is not normal that you take the ballots into a closed room and then you come out and present some figures, and that's it. It is totally normal that the counting of the votes is opened to the public and that's the principle the public openness of the election. So that public really can rely what has happened in the election and then we look at how is this with the computers voting. And we said you know we don't judge about all possibilities about electronic voting, but these machines we used in Germany we don't have control over the result. So we judge in our judgment that you must have some kind of public control of what is coming out of the computer. And that is why we looked at several machines used in other countries. So you can have for instance a computer scanner which scan the votes so yet that you have the efficiency of the computer that you get a very fast result out of the election, and on the other hand you have the paper to make a cross check and see whether the computers work properly and we said we must have some kind of cross check that not only wise computer experts know but the normal people in the street can control. And there are possibilities with computers so that you have for instance in computers who prints out what you are voting you can see that I have voted and it is in the computer you put it aside and then later you take for instance to 2,3 or 5 computers and control whether they work properly. So you have possibilities to use voting machines but in Germany it is only allowed if you have a secured cross check that is possible by normal people and not only by computer experts.

As on that election 2005 we used these voting computers we didn't find any evidence that there really was fraud and as the theory of the election already lasted quite long time, we said ok, these are the precondition for the future. So if you want to use voting machines in the future, you must have these reliable computers with the possibility of cross checks. So I think, that is an answer of your questions from all people who asked me to answer on that. Thank you very much.

Maurico Gonzales, Colombia:

How does the constitution code in Colombia controlled had made control to what is constitution through which reform that is wanted by the people that is one of the questions that is one of the questions, that is often, because that is one the debate of the cons theory in col. What happened with the reform on the general election of president whether the congress says or declared that the referendum does not have is not valid legally and what has done is that there is the law that in place.

Your question is very interesting because it endorsed the people or obstruct the people of getting its aspiration which is one of the constitutional principle of the people because what is most important here is the constitutional right of the people with the Colombia as country and we have also noted several things has happened, and democracy has the certain guarantee that it is built to ensure the constitutional right of the people in relation to what has been conducted in the

20th century in Europe where a political party have won democratically and then demolish the democracy. So this is constitutional that is based on the democracy where it can kill the democracy itself. So for that it is needed several principles that ensures that the democracy will not be killed by democracy itself.

That is what we are trying to build that is to determine the right of the executive and also the government but on the other hand also the right of the people. Thank you.

REVIEW AND CLOSING OF PART I SESSION TWO

Moderator

Prof. Jawahir Thontowi, S.H., Ph.D

Thank you very much for all speakers and panelist to this session. And I think I would like to make some kind of review. The first, that good law is not good enough for trying offer a good quality of general election. But rather human quality to follow in the line of constitution and the rule is very important. The second summary is high technology is possible to use whether for the country want it to be applicable but the point is how, public participation could check the tools and the availabilities to the voters. I think this is important, and I would like ask the audience to make applause to our honorable speakers, thank you very much.

PART II

MODERATOR
Dr. Sigit Riyanto, S.H., LLM.
Academician of Gadjah Mada University, Yogyakarta, Indonesia

SPEAKER 1

Hon. Bakhtiyar Mirbabaev
Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan

"CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN AND IMPROVEMENT OF THE ELECTION LEGISLATION" (PROBLEMS AND SOLUTIONS)

Dear Ladies and gentlemen!

First of all let me express my great gratitude for invitation of the representatives of Uzbekistan for today's so high level international conference to its organizers – to Constitutional Court of the Republic of Indonesia and Konrad Adenauer Foundation.

From the first days of its independence the Republic of Uzbekistan has put forth the task of creating humane and democratic law-governed state, which was proclaimed in the Constitution of the Republic of Uzbekistan.

The Constitution confirmed that Uzbekistan is sovereign democratic republic and that democracy in the Republic of Uzbekistan is based on the principles common to all mankind according to which the ultimate value is a human being, his life, freedom, honour, dignity and other inalienable rights. Democratic rights and freedoms are protected by the Constitution and laws.

In the Constitution it is stipulated as one of political rights of citizens the right of citizens to participate in the management of public and state affairs. Thus, according to Article 32 of the Constitution citizens of the Republic of Uzbekistan have the right to participate in the management of public and state affairs, both directly and through representatives. Such participation shall be exercised by way of self-government, holding referendums and democratic formation of state bodies.

President of the Republic of Uzbekistan Islam Karimov said, that "The concepts of democracy and the elections always move together, they connected with each other. Elections stands for democracy. Democracy stands for elections".

For that reason one cannot imagine democratic law-governed state and civil society without elections. Elections are a legal tool of providing the participation of citizens in formation of representative power of state authority. Elections are a form of nation's expression of will, in result of which representative power of state authority is formed. Democracy and freedom in elections affects directly on improvement of the quality of representative power of state authority's activity.

Therefore during the years of independence the electoral system which existed during the totalitarian regime was thoroughly reformed under auspices of President of Uzbekistan Islam Karimov. In point of fact a new electoral system was formed. The concept of omnifaceted democratization of electoral system was elaborated and gradually implemented, in consequence of which it was created a considerably unique system of elections. The election legislation has been improved systematically, i.e. in all courses. The attention was paid to the guarantees of both active and passive election right of citizens.

The formation and improvement of electoral system so as the development of the Republic of Uzbekistan in whole during the years of independence can be divided into 2 stage.

First stage, from 1991 till 2000 – the stage of elaboration and adoption of the legislative framework of the formation of representative power of state authority.

In this stage there were adopted the Constitution of the Republic of Uzbekistan and a number of laws, aimed at creating the legal framework of organizing and conducting elections.

In the Constitution there were distinctly represented main principles of state and social construction, including priority of human rights and headship of the norms of international law. With consideration of these principles there were determined the foundations of electoral system, was done work on formation of integral system of representative bodies of state authority in the center and municipalities.

The second stage, from 2001 till present – the stage of further improvement of election legislation, aimed at active democratic renewal and modernization of the country.

In this stage the improvement of election legislation was aimed at accomplishment of main key goal of this period, i.e. consistent gradual transition from strong state to strong civil society.

In this period supreme state representative body was converted to bicameral Oliy Majlis of the Republic of Uzbekistan. In this respect a number of alterations and additions were introduced to the election legislation, aimed at democratization of elections, efficient provision and improvement of the guarantees of the election rights of citizens.

The guarantees of the election rights of citizens depending on in which legislative act they are fixed can be divided into three groups.

1. The guarantees fixed in the Constitution of the Republic of Uzbekistan.
2. The guarantees fixed in constitutional laws.
3. The guarantees fixed in other laws. The guarantees of the third group in its turn can be divided into two subgroups: the guarantees fixed in the laws dedicated to elections directly and the guarantees fixed in one or another law, obliquely affecting the issues of elections.

It should be noted that all these guarantees no matter where they are fixed interrelated and compose single system.

In accordance with Article 43 of the Constitution of the Republic of Uzbekistan safeguarding the election rights, so as the other rights of citizens, is vested on the state.

In accordance with this provision of the Constitution the state creates and improves the system of the legislative acts on elections, takes care of their inviolately execution, stipulates responsibility measures of the individuals who violated the election rights of citizens. In accordance with Article 117 of the Constitution the right to vote, equality and freedom of the expression of will is guaranteed by law.

With the goal of implementing this norm of the Constitution special Law "On the guarantees of the election rights of citizens" was adopted on the 5th of May 1994. The provisions of the Constitution on the guarantees of the election rights of citizens were elaborated in it.

As the President of the Republic of Uzbekistan Islam Karimov has noted: "First of all, life itself demand us unconditional observation of rule of law principle and freedom of expression of will, provision of necessary conditions for realization of rights and freedoms of citizens, mass media, conditions for secret

ballot and equal suffrage, in other words inviolately observation of democratic norms and standards".

Constitutional law "On the results of referendum and the main principles of the organization of state authority", adopted on the 4th of April 2004, proclaimed provision of the guarantees of the rights and freedoms of citizens on the basis of generally accepted principles and norms of international law, as well as gradual liberalization all parts of political life, state and social construction as main principles laid on the foundation of the work on improvement of national legislation.

The Constitution of the Republic of Uzbekistan determines the legal framework of the electoral system of the country. Chapter XXIII of the Constitution which consists of the Article 117 is dedicated to electoral system of the Republic of Uzbekistan. In accordance with this article citizens of the Republic of Uzbekistan have the right to elect and be elected to the representative bodies of state authority.

The citizen of the Republic of Uzbekistan who has reached eighteen years old has the right to elect. A deputy of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan, as well as a member of the Senate of the Oliy Majlis of the Republic of Uzbekistan may be a citizen of the Republic of Uzbekistan who has reached on the date of the election twenty five years of age and permanently residing on the territory of the Republic of Uzbekistan. For the deputies of Jokarghy Kenes of the Republic of Karakalpakstan it is required to be reached twenty five years of age, for the deputies of district and city Councils of peoples deputies it is required to be reached twenty one years of age.

Only citizens, who have been legally certified as insane, as well as persons in prisons, may neither elect nor be elected. In any other cases direct or indirect infringement on citizens' election rights is inadmissible.

The elections are held on the basis of the general, equal and direct suffrage by secret ballot.

In the Republic of Uzbekistan elections are held in multiparty basis. In the end of 2008 the alterations and additions stipulated by the demand of time and international norms and aimed first of all at further liberalization and democratization of the election legislation were introduced to the electoral system of the Republic of Uzbekistan.

In particular, enhancement of the role and influence of political parties in state management, introduction of the institution of the plenipotentiary representative of political party, providing them with certain rights and powers, aimed at protecting the interests of political parties allowed to improve further the electoral system, which met great support of international community.

In result of these modifications the representation of citizens in Legislative Chamber of Oliy Majlis of the Republic of Uzbekistan considerably extended, where the number of seats was increased from 120 to 150. It introduced a new principle aimed at protecting the environment, natural resources and environmental safety of the public, in accordance with this principle in the

Parliament it was allocated 15 seats for the members of Ecological movement of Uzbekistan.

Thus, today 135 deputies of the Legislative Chamber are elected on a regional single-member constituencies on a multiparty basis, 15 members of the Legislative Chamber are elected from the Ecological movement of Uzbekistan on its conference.

Members of the Senate of the Oliy Majlis of the Republic of Uzbekistan are elected in equal quantity – in six person – from the Republic of Karakalpakstan, regions and the city of Tashkent by secret ballot at relevant joint sessions of deputies of Jokarghy Kenes of the Republic of Karakalpakstan, representative bodies of state authority of regions, districts and cities from among these deputies.

Voters, regardless of their location, whether they are in another city or province or territory of another State, are guaranteed the right to participate directly in elections.

Voters have the right to freedom of expression of will and secret ballot. District election commissions, organizing the vote in specially allocated areas, provide citizens with the opportunities to free and secret expression of will. Control over voters' expression of will is not allowed.

Citizens of the Republic of Uzbekistan who have reached by the day or on the day of election the age of 18 years, either permanently or temporarily residing in the territory of relevant election commission are entitled to be included in the voter's list.

Voters are provided with the opportunity to get acquainted beforehand with the voter's list in the premises of the district election commission.

The voter has the right to declare to the district election commission about the error or inaccuracy in the voter's list. Within twenty four hours the district election commission must check the statement and either remove the error, or issue the applicant a certificate of reasoned rejection of the application.

To carry out pre-election meetings bodies of state authority are obliged to provide voters with the specially equipped premises, the necessary reference and information materials. The time and place of the meetings are reported to the voters in advance.

The entire election campaign is based on the basis of general publicity. The decisions of relevant election commissions on the formation of constituencies and district polling stations, electoral commissions, as well as the results of registration of candidates, voting and elections, published in the press.

Voters have the right to get acquainted with the program of future activities of political parties and individual candidates involved in the elections.

On voting day, voters are guaranteed the right to replace the damaged ballot for a new one.

Voters, who are not able to be on the day of elections at their residence, have the right to vote in advance. In such cases, the relevant district election

commission at the request of the voters gives the electoral lists of prescribed form with adequate data about the candidates for deputies. Voters can leave a filled electoral list in a sealed envelope to a member of the district election commission.

Voters, who can not come into premises for voting because of health condition or other reasons, have the right to file an appropriate request to the district election commission, which is obliged to organize voting in the seat of the voters.

In Uzbekistan it is achieved compliance of the electoral legislation on guarantees of the election rights of citizens with the generally accepted norms of international law. An important place in this case have the international legal documents of the UN. For example, according to Article 21 of the Universal Declaration of Human Rights, the will of the people is the basis of the authority of government, this will is 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.

The Constitution embodied the rule stipulating that the procedure for the elections shall be specified by law. Implementing this provision of the Constitution it is adopted a number of special laws on elections. They guarantee citizens the right to appeal the actions and decisions of officials, state bodies, election commissions, infringing the election rights of citizens. Citizens may appeal to election commissions, state bodies, court.

Article 272 of the Civil procedural code of the Republic of Uzbekistan stipulates that the court should not later than three days consider appeals against decisions of election commissions, if it left less than six days till the day of elections, then it should be considered immediately. The complaint tried by court with the participation of the applicant and the representative of the relevant election commission, if the complaint concerns not the applicant but another person, that person shall also be invited to the court. The court decision transferred immediately to the relevant election commission and the applicant.

Criminal code of the Republic of Uzbekistan (Article 146) stipulates criminal liability for violation of the secrecy of voting, falsification of election documents, making fictitious entries on the ballot or subscription lists, notorious incorrect counting of votes in the organization and conduct of elections.

In accordance with Article 147 of the Criminal code criminal liability is established for obstructing by violence, threats, deception or corruption the free exercise of citizens' right to elect or be elected, to conduct canvass, exercise of the proxies of candidates for deputies of their mandate.

Thus, the Constitution and election legislation of the Republic of Uzbekistan are a solid foundation, the main basis of free and democratic elections and serve as a guarantee of the right of citizens to participate in the management of state and public affairs, in the formation of state bodies of representative power and aim at achieving the main goals of the country - creating democratic state and strong civil society.

SPEAKER 2

Hon. Penn Thol

Member of the Constitutional Council of Cambodia

"GENERAL ELECTRION: THE TYPICAL PROBLEMS AND SHORTCOMINGS IN LAW AND PRACTICES"

Honorable chairmen and Judges,

Distinguished Guests,

Ladies and Gentlemen,

I am much honored to participate in this important event bringing together Asian Constitutional Court Judges and representatives of relevant international and regional organizations from other regions in order to exchange very useful experiences.

But first of all, I would like to thank the Constitutional Court of the Republic of Indonesia for organizing this conference so that we can exchange our views on "the typical problems and shortcomings in law and practice" concerning with the General Election. Also, allow me to take this opportunity to thank the Konrad Adenauer Foundation for arranging our delegation's travel itineraries.

On this issue of the Session two, dealing with the typical problems and shortcomings in law and practice, I wish to refer to our 1993 Constitution, chapter 12 *new* on the creation of the Constitutional Council and fixing its role in the Article 136 *new*: "The Constitutional Council shall have the competence to guarantee the respect of the Constitution, to interpret the Constitution and the Laws adopted by the National Assembly and definitively reviewed by the Senate. The Constitutional Council has the right to examine and to decide on litigations related to the elections of the Members of the National Assembly and to the elections of the Senators."

In its competence to guarantee the respect of the Constitution, to interpret the Constitution and the Laws adopted by the National Assembly and definitively reviewed by the Senate, the Constitutional Council can examine the constitutionality of laws before or after their promulgation, except the organic laws, the rules of procedures of the National Assembly and of the Senate which shall be examined before their promulgation (or their implementation). Concerning the competence to examine the constitutionality of the organic laws, the paragraph 1 of the article 16 *new* of the law on the Organization and the Functioning of the Constitutional Council and the law on the amendment of this law stated that the organic laws and their amendments, once adopted by the National Assembly and definitively reviewed by the Senate, must be sent by the President of the National Assembly to the Constitutional Council for the control of their constitutionality, before their promulgation. Thus, with reference to the above-mentioned matters, the law on the Elections of the Members of the

National Assembly is one of the organic laws which the Constitutional Council has already examined its constitutionality.

In its competence to examine and to decide on litigations related to these legislative elections, the Constitutional Council acts as a court, despite the fact that it does not belong to the Judiciary Power.

The law on the Organization and the Functioning of the Constitutional Council and the Amendment of this law also provide for its competence before and after the legislative elections. The Articles 25 *new* to article 35 of Section 3 of this law give details of the procedure. In the Article 26, the Constitutional Council is mandated to examine before the elections and to decide on:

1. any petition from a political party or a candidate who contests the decision of the National Election Committee rejecting the complaint related to the candidacy or to the list of registered candidates. This petition shall be filed within 7 days at the latest after receiving the notification from the National Election Committee;
2. any petition of a person contesting the decision of the National Election Committee rejecting his/her request for registration on the voters' list. This petition shall be filed within 5 days at the latest after receiving the notification from the National Election Committee;
3. any petition by an individual or his/her representative against the decision of the National Election Committee rejecting the complaint about his/her missing name, or the objection to the registration of names or the upholding on the voters' list of the name of any individual whose conditions are considered inconsistent with the law on the elections. The petition shall be made within 5 days at the latest after receiving the notification from the National Election Committee. After receiving the petition, the Constitutional Council shall decide on the aforementioned case within 10 days at the latest;
4. any petition of political party contesting its registration on the list of political parties being refused. The petition shall be filed within 5 days at the latest after receiving the notification from the Ministry of Interior. After receiving the petition, the Constitutional Council shall decide on the case within 30 days at the latest.

The Article 27 *new* deals with the competence of the Constitutional Council to examine after the elections and to decide on:

1. any direct petition against the results of the elections by an individual or a political party candidate to the elections. This petition shall be filed within 72 hours at the latest after the proclamation of the preliminary results.
2. any petition from an individual or a political party contesting the decision of the National Election Committee rejecting their petition against the results of the elections.

This petition shall be filed within 72 hours at the latest after receiving the notification from the National Election Committee. After receiving the petition, the Constitutional Council shall decide on the aforementioned case within 20 days at the latest.

The Article 29 *new* gives the power to the Constitutional Council if it deems

necessary, to temporarily suspend the contested result of the elections concerning a member of the National Assembly or a member of the Senate or a political party.

In addition, the Article 34 *new* deals with the decision of the Constitutional Council on the cases related to the regularity of the elections, to the eligibility of a candidate for the elections and to the eligibility of a candidate declared elected. The Constitutional Council may agree or disagree with the decisions of the National Election Committee, declare the nullity of the elections that have been contested, or declare the candidate as duly elected.

In order to provide fair competition among candidates, the law on the Elections of the Members of the National Assembly and the law on the amendment of this law stipulate several conditions:

- All media, including state-run press, television and radio, shall make their services available to the National Election Committee at no cost for the purpose of publicizing electoral work and conducting voter education.
- The National Election Committee shall take steps to publicize political messages at the request of a political party which has been registered running in the election, based on equal and orderly access to media.
- In exercising their rights to publicize, political parties and candidates shall refrain from using violence, abuse, or contemptuous remarks, causing fear,confusion and loss of confidence in the secrecy of voting.
- Public theaters, stadiums, parks and halls shall be made available to all candidates or political parties that have been registered for running in the election offering to rent for electoral campaign, based on equal and orderly access to those facilities.
- During the electoral campaign, political parties and candidates who wish to rent public theaters, stadiums, parks or halls, in accordance with Article 77 of this Law, shall submit an application to the managers of these facilities at least three days before the scheduled campaign meeting; and a copy of this application must be sent to the relevant Commune/Sangkat Electoral Commission. The manager of the facility shall respond to the applicant within twenty-four hours the latest of receipt of the application.
- Political parties or candidates may conduct their campaign in private areas or halls with the consent of the owners but political parties or candidates must inform the relevant Commune/Sangkat Electoral Commission.
- All political parties and candidates shall not interfere with or obstruct activities of other political parties or candidates.
- Every political party and candidate shall avoid using threats, intimidation or violence against citizens, other political parties or candidates. Political parties and candidates shall not incite their supporters or voters to use threats, intimidation or violence against other parties or candidates.

The law on the elections of the Members of the National Assembly and the law on the amendment of this law, in order to make the vote counting transparent, provide some conditions as follows:

After the announcement of closing of the polling, the Polling Station

Commission shall record the number of voters who have cast their votes as well as the number of unused ballot papers, and shall arrange the counting of the ballots at the Polling Station in accordance with the Regulations and Procedures. If the counting of ballots at a given polling station cannot be conducted because of force majeure or insecurity, the National Election Committee shall separately issue directives regarding the case. National and international observers and political party agents may participate as witnesses of the ballot counting.

Meanwhile, the law on the elections of the Members of the National Assembly and the law on the amendment of this law also set forth some points related to financing election campaigns such as:

- All expenses for electoral campaign incurred by a political party or a candidate shall be covered by that political party or candidate.
- Every political party that has been registered for running in election shall have an account book showing sources of incomes and expenses for electoral campaign purposes. The National Election Committee may examine the account book, if necessary.
- All contributions received by a political party shall be credited into a bank account and all electoral campaign expenses shall be debited from the same account.

Finally, it should be noted that in relation to the election, the Constitutional Council examines and decides on the complaint of a political party concerning the refusal of it registration by the Ministry of Interior. And during the elections of the Members of the National Assembly and of the Senate, the Constitutional Council examines and decides on the direct complaint from any political party within 72 hours after the proclamation of the provisional results of the elections or on the complaint in appeal from a political party contesting the decisions of the National Election Committee. Moreover, the Constitutional Council has the competence to rule on litigations related to the elections of the Members of the National Assembly and those of the Senators; on the complaints concerning the initial electoral rolls at the time of the electors' registration and on the complaints occurred during the electoral campaign. In this case, the Constitutional Council acts as a Court.

Thank you very much for your kind attention!

PANELIST 1

Hon. Constancio Carrasco Daza
Justice of Electoral Tribunal of the Federal Judiciary of Mexico

"FEDERAL ELECTORAL TRIBUNAL DEFENDING POLITICAL RIGHTS"

Interpreter

Thank you very much for the association of the constitution of court for the invitation that has been given to the election commission of Mexico. I am happy to be able to represent the members of electoral organization that elect the President. Our country is the representative republic with the population of over 100million with over 40million voters and there are six political parties with extremely presidential organization due to the 2006 presidential election has resulted such changes in Mexico in such of voters. This has caused extensive debate among political parties based on the agreement and that was as a result of the community and the reduction of the legitimating of the government. Therefore we have carried out substantial changes in our election concerning the reduction in financing and time of campaign and control access for the radios and television for political parties during campaign period and restriction on negative propaganda including modification that relate to this by the election court and this is the highest court for election that guarantees that all activities that are carried out by the election commission in the regions are in accordance with the constitution among them.

The establishment of the highest constitution of court that determine whether the elected president is valid or not valid and this is extremely presidential because this is determinate is a traditional institution and not apolitical institution. And this was further strengthen with reform in the electoral court and to refuse laws on election that a constitution of control system towards the law and election and provide guarantee to individual and political parties to gain access towards their legal rights and then the constitution of court also carry out analysis on the laws and regulations and on certain level they are able to provide rulings of an election at this level this will carry out the abstract control which is the right of political parties to provide control of a concrete of the constitutional to the election court.

The election court was established through the higher chamber of the election court, one of the authority is to guarantee the political right of the citizen and to guarantee that this political rights are not violated by the election commission. It is found that guarantee to provide right for the citizen. And this can be seen through the court house and initial that political right could be gathered by internal has found that the right of the voters are protected through the implementation of the control mechanism and the competence of the election court and the judges are able to prevent and to be a part of the chamber that deals with states issues. And this will also include prerequisite under human

right and to provide the right of the citizen to use their right and to ensure that not only the end of the result of the election and political parties and from all the possibilities of the citizens also have the right of source of control to type of questions : that our country is through the permanent promotion of publishing of this things.

The court that has existed at 2005-2008, and 2009 we have ruling the decision over 13000 cases has established coordination to issue the constitution rights domestically especially for the politicians and based on this to improve the political right through the highest votes given by the highest court also precedence to provide political right for the citizens to be voted as the candidates and those people who have violated the laws and to give freedom to translate it since the American influence and to give these people of the right and there's the possibilities of the constitution of court concerning the laws, the rules of these people to participate to the political system as a universal right could stand as the regulation that is what which is of the general election. And if the regulation of rules is not aligned with law and is not right this will cause that the candidacy of the candidates which considered with repeat of our related than the candidacies would not be legitimated therefore the right to be the candidacies to be a constitution of principal.

The Mexican prerequisite that has been emphasized by the constitution of commission is the having competency which is to honor the right of the voters and the long one the general election is fair the expression of is to be free without any interference from any other factor that may impeach and obstruct the expression of the voters therefore in many of decisions that have been made the constitution of commission have cancelled several elections that has been approved to be private money politic to influence the group of the voters and have cancelled several elections that have proven to have included violence and to cancel election when it is proven that is the mutuality the administration and management of such election is should be any of the candidates.

This is some of the significant example of the consequences which are to be considered by the constitution of the commission to guarantee having fair completion among the candidates and therefore assistance is given by the government to ease the flow of the election and to prepare all the facilities required in smoothing the election and to provide assistance in order to establish a happy competition.

In order to honor to time I would like to say that general election is one of the neutrality democracy just as has been said by the president yesterday we cannot illustrate democracy without the election. And the guarantee that has been stipulated in the law to ensure the neutrality of the election itself is extremely important and the rule of the constitution of commission and in my country the constitution of the commission that is neutral and is respected place an important role in this matter.

And I think that's all for me and thank you very much for your attention.

PANELIST 2

Hon. Arcadio Delgado Rosales
Justice of the Supreme Court of Venezuela

"POLITICAL RIGHTS AND PARTICIPATORY DEMOCRACY FROM THE PERSPECTIVE OF THE CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA"

MODERATOR

Now the next speaker is Judge Arcadio Delgado Rosales from Venezuela. Judge Rosales, the floor is yours.

Interpreter

First I would like to extend my gratitude for extending the invitation to the 7th conference of Asean Constitutional Court Judges. In this opportunity, our paper relating to the political rights and consists of the participatory election on the 1999 Constitution of Venezuela. It is not only a process that is related straight from the old constitution to the new 1999 constitution but a qualitative element that is relevant and different and the changes of the representative system in the world and other participatory system that relates to several mechanisms that in general do not need a referendum system could be used in a check up and in the text that allows special changes in the form of formal changes and to hold informal changes. Also through this we can analyze the participation of the people in the public where we can make communal meeting where we can achieve not only how, what we can achieve from this meeting through the mechanism of involvement but also to create a structure through a way and try to modify the institutional through the accidental models.

What we have been trying to do today, we will try to get two decisions, where Venezuela is situated at this moment and also the countries that are considered the Roman family. We do not follow the Anglo-Saxon system but we are going to the continental law. Politically we do not have a parliamentary system but a presidential system that is infused by the American system. You also need to know that the constitution of 1969 where there is the distribution of three powers of authority: legislative, judicative and judicial, where they go through substansive change, and we can also add here that is the power of the people or the more power which is the district attorney and also the agencies to protect the people. We also go through the election court to ensure that the election is going on well and not depended on the judicative and executive power. And this is a new power, an agency or body that is the commission of election.

In the beginning, the structure of our country, because we do not have a constitutional court that is specific, that is related to, we have learnt from other countries and also from our own country, theoretical we see that we have a certain authority, so that we can make decisions during conflict, and at the same time to place what we call a result of constitution conflicts. In the constitutional court,

we call it El Pala Constituzional, there are several judges and sometimes a debate amongst the judges. So we also conduct control towards the constitutional power of the executive board but we also can conduct interpretation towards the constitution where we can also by other bodies that are related whether it is in line with the constitution. And we also have authority, we can also go into other bodies of authority temporarily.

The political power of the National Assembly cannot be forced and we have elect members for the electoral commission and thus, we have improved this body so the agency is better. And through the Constitution we can also follow to a certain extent, but only when needed. Well that has been predetermined and with the initial reference to the character of Venezuela, I also would like to give a reference that is brief on some points that I would like to convey. That is, to conduct synthesis of the characteristics and the system in the election system in Venezuela it is very important that we need to look at the basic principles of the constitution.

For the first time, Venezuela is one of the biggest or the most representative of democracy in the traditional form in the Western world. One of the aims of this is to make changes. In the past it was just very limited and strict where the representatives of the people is through election and ongoing and with the aim or reforming, that is to make a referendum. And it is difficult to conduct a referendum. In article 2 of the new law that is healthy and the aim is in the viewpoint of the organic is to change the democratic which is represented and change it into the participative democracy.

How can we achieve this change, whether the article 5 talks about the principle of the power of the people where they handle the constitutional rights and political rights, they are well aware from the beginning. And you can see the differences between the old constitution which was conducted previously and the power of the people that is conducted by the liberal constitution from the initiative from the constitution movement, the mandate whereby the people will chose the representatives and at least in the presidential countries, their representatives can conduct the government program and they can be substituted politically and can be charged through the supreme court. But this can be changed in the new constitution where the national principles is parenthesis through the mechanism especially with the direct involvement of the people active and passive. Everyone who is representative by the people, their accountability are mandated .

And also the political right, we would like to underline that the institution for the accountability of the free right of the political party but the budget originating from the public according to the rules of general election and used for consultation in the election. And a referendum cannot be carried out. A referendum that is legal up to now has not for the national council and organizational laws that have certain principles.

For voting systems, there are laws that regulate on proportional voting, proportional representation, unfortunately I cannot give you real examples of the latest elections that were carried out or in that case conduct an analysis

including the referendum that was done, and finally a referendum of agreement that eliminates the restriction to carry out the elections not only for presidential election but for all other public representatives.

I would like to make a certain defense about the elections, relating to the constitutional rights and its transparency, is in Venezuele quite normal. What is important is that there is an auditing system both in terms of hardware as well as software that is open to the public, including the availability of verification of all ballots where 51% turned out to be valid over the electronic system is used.

To finalize this, due to time constraints, I would like to say thank you very much.

QUESTIONS AND ANSWERS

Moderator:

Papers originated from 2 different regions, represented by Judge Bakhtiyar Mirbabaev and Judge Penn Thol from Asia, and also Judge Carrasco Daza from Mexico and also Judge Delgado Rosales from Venezuela. I believe that this issue is very interesting and very dynamic for all of us, and most of you I think would like to share your experience and knowledge as we are concerning this matter and also have more discussion with all of the speaker and panelists, however we have a very tight schedule on this conference, so for the next opportunity I would like to commit invite three of you from the floor to ask to speakers and panelists, and please indicate from which you are come from and also to which that you would like to ask the question. May I invite you?

First of all from the petro Thailand, and second one the ladies and then we have once more opportunity to ask question. Ok, the third one. We have three questions, first of all from The Petro, please.

Questions

Thailand :

Thank you very much Mr.Chairman, Bp. Sigit Riyanto. I would like to address my question to all judges from Uzbekistan, Cambodia, Mexico and Venezuela. I see a little agree some election cases can be political to some extends since the political interest are greatly involved in the case. But I do believe the judges in Constitutional Court are independent and impartial. However in practice of the judges are human being and political interest are one of the temptation of the judges in handling cases. My question is how is your constitution and legislation guarantee that the independent and impartiality of the judges in preventing abuse of power of the judges in handling the political cases like the election cases. Thank you very much.

Moderator:

We invite the second question, ladies.

Valina Singka Subekti, Indonesia:

Thank you to Bp. Sigit Riyanto, my name is Valina from Forum Konstitusi Peace Association and members on the parliament on a special committee it is a committee of Amendment Constitution and I was also the member of national electoral commission. So my question goes to all the speakers and justice, so I hope each of you will answer my question is about registration of the voters. Voters is the fundamental aspects of the democratic election, it's the base of representative democracy. It is to make sure that everyone in our country is registered, because it is the rights of citizens, political rights. So I would like to have an innovation from all of you could you explain about how you conduct the registration of voters. What is the nature of registration of voters? It is continuously, do you conducted manually or computerized? And secondly, what happen if there are complaints from the citizens if they are not registered in the voter's lists, and then they lost the right to vote. Is there any sanction in your election law, if there is a sanction, what kind of sanction? I would like to ask you also what is the nature of your national electoral commission? Is it an independent body or it is part of the government? Thank you.

Refly Harun, Indonesia:

Thank you very much, my name is Refly Harun from Central Electoral Record.

My question is address to Hon. Judge from Mexico, Sir. Constancio Carrasco Daza. I think the electional court or the tribunal court could be a model of electoral dispute settlement in a country like Indonesia, because it figures think about more than one hundred voters in Indonesia compare to Mexico maybe 40 million, as you mention before. I would like to know about your experience, your country experience about the strength and weaknesses to have electoral election court because my organization for example try to introduce electoral court in Indonesia considering of time limits, considering of so many dispute, because in our constitution only result election can be handled by the constitutional court, but ordinary dispute regarding to the elections goes to ordinary court in Indonesia. But the problem is, it takes long time and then you know when it is settled by ordinary court, sometimes the election process is already finished. So sometimes for justice seeker, there is no hope for them to get the remedy if there is a problem like this. And then it is not a question for ordinary speaker from Venezuela, I think I agree with you, electoral voting is also an alternative in country like Indonesia and other developing countries like Indonesia, Venezuela and Mexico. Because even though we grow with the ordinary counting process for example sometimes is very very bad in Indonesia for example is so complicated. I think electoral voting could also be a model for the lesson in Indonesia. Thank you very much.

Moderator:

I would like to invite Judge Bakhtiyar Mirbabaev to respond. Judge Mivbabaev the floor is yours.

Answers

Hon. Bakhtiyar Mirbabaev:

Interpreter:

I think the two question are not posted to me directly.

Hon. Penn Thol:

I cannot review all the details about it and for the registration for the election we have parties that help the candidate this been handled. People coming complaint so and we send to the council to decide if you missing lame or why you reject certain party. I can explain all the details because I'm not competent to answers the question.

MODERATOR

Thank you Judge Penn Thol, we move to judge Constancio Carrasco Daza from Mexico. Judge Daza the floor is yours.

Hon. Constancio Carrasco Daza:

Interpreter:

Thank you. I think the problem in a constitutional country the formation of a model that forms court constitutional or general election commission because of the number of voters that is many quantitatively and demographically. I understand this is a fundamental thing but I would like to bring it to context in the structure of constitution in mexico and why the general election was form. Because the model that we adopt that is an electoral system that because the term of office that is three years for the members of parliament and later on the members parliament of the second level that has term of office for six years and the executive also got six years. Mexico has 30 states, and because of this reality every year prominently we conduct election. For example this month on the 4th of July, the people of Mexico conduct the regional election in 12/6 for the regional members parliaments and 15 regional members of parliament and this has made us at every instant making election system, undergoing election process. As a consequence at the certain period of times we have many problems and complaints and the 900 most and municipalities technic problem. And If you look national map, this causes certain complexity from the result of the regional election.

I would like to answer looking at the reality in Mexico perhaps I can also share with other countries that have the same demographic are geographic. The complexity that we face in determining the dates for the regional election whether this for regional parliament as well the half the region. We have 4 months to accept complain from the result of election and there are many things and also sanctions that we have conducted and this is very complex by the Supreme Court has to resolve many cases and off course this is not an ideal situation, but this is a reality that is apparent in Mexico from day to day. And hopefully this can be decreased and as concrete proposal with the general election court fundamental excuse is that the highest court in Mexico is Constitutional Court and it doesn't

have a tradition to guard and guarantee people provide all political party all the people in relation to the right to have the voting rights. And because this rationally has been guaranteed by the court and also the Supreme Court. So the Constitutional Court will return to its authority to reform, to make changes. We have this court for 15 years; we have succeeded in guaranteeing the political right of the people. And in the period of time we have achieved many results. Last year we have made 14 files. It was a guard to election and this is the complexity of a regional country. This is the complexity that's apparent in our country. Hopefully this will be the answer why we have general election court like this. But in countries where the countries do not have violations and complaints that quantity in numbers whether rights the people do not need this.

But for the countries who have the same problem like Mexico have, perhaps you can consider to form general election court like in Mexico. Thank you.

Moderator:

We would like to invite Judge Rosales from Venezuela. Judge Rosales, the floor is yours.

Hon. Arcadio Delgado Rosales, Venezuela :

Interpreter:

There are three questions. The first is Mexico regulations towards the demographic situations which is the same as in Asian countries. I will discuss specifically the first is under Independence. How to guarantee this. Actually I understand that we have discussed with relation to the highest court or the Constitutional Court to handle this. We can discuss it with regard to the characteristics of the general election or election, and also supreme court and also other constitutional bodies. I will believe it's the responsibilities of the supreme court uses very complicated system, where involves not only many public powers but also the community. The representative that involves the culture candidates where the judicial whether representing from the people because they may come from the university, academician and so on. And with the commission of the high court of eleven members they can call upon and invite the mass media to make an analysis and also make press selection for them and go through and ask the people to evaluate. And they selected in written form and given to the national council. And this is the selection process.

The second level of selection, for example judges appointed for terms of twelve years without any re-election. So they can pass through this time. And we're talking about the declaration of constitution but through this complicated process, perhaps there is the highest form of dependency from the other public offices. And we can say that independence on the form of the body for example in our case in Venezuela, the political opposition, who is the president is really illogical because it involved in the election in 2005 and so in the end the voice of the public is very pro the president. And politically, besides the constitutional politics we can also influence the results and with the representing of the people in any form of ideology. And it also involves the judges. We try to save the

amenity of the judges. And we have the national school for judges and I'm the director of that school where we conduct classes. Opposition members of parties are also involved. They advise the legal rights. With the second aspect is to note down the register. We have electoral system which is different from other bodies. They are not only given the rights to register but also to the civil right. These are new regulations.

Through this way we have payment from registration to make it continuously improve. This is a system where the new voters can be counted and be used with permanent character. We have no problem with one registry or two which is done through the election process. Registry process that is permanent and can be used and improve from all the political parties.

REVIEW AND CLOSING OF PART II SESSION TWO

Moderator: Dr. Sigit Riyanto, S.H., LLM

Thank you for Judge Carrasco Daza, for your explanation and presentation in this session. Honorable judges, distinguished guests and ladies and gentlemen, discussing about regulation and implementation concerning election is very interesting. We have learned from these four speakers in this session today. Generally speaking, the constitution already provides the framework and guarantee the right of the people. However the implementation of the regulation already stipulated in the constitution and in the organic regulation is not that easy. For the sake of the quality of democracy, protection of the people rights so consistent effort to improve the implementation of the regulation is necessary from time to time and also very important.

Honorable judges, distinguished guests and ladies and gentlemen, as we learned from our guidelines on the program, we have very limited time in this session. I would like to thank to all of you for your patience and for your contribution to this session. I believe that all of you already provide great contribution to this important conference by participating in this session. And also we would like to thank to all of judges and speakers in this session, honorable judge Bakhtiyar Mirbabaev form Uzbekistan, honorable judge Penn Thol from Cambodia, honorable Constancio Carrasco Daza from Mexico and also honorable Arcadio Delgado Rosales from Venezuela.

So as a token of our appreciation to the excellent presentation and big contribution to this session, so let us give applause to all of them.

Thank you.

Wednesday, Day Three : 14th July, 2010

SESSION THREE
DEALING WITH ELECTION COMPLAINTS

Discussions of the relevant provisions and existing practice in dealing with election complaints either by supreme or constitutional courts, by ombudsmen, election commissions or parliamentary committees in particular, lessons learnt and best practices are highlighted

PART I

MODERATOR : Prof. Dr. Saldi Isra, S.H., MPA
Academician of Andalas University, West Sumatra, Indonesia

SPEAKER 1

Hon. Khil Raj Regmi
Justice of the Supreme Court of Nepal

"DEALING WITH THE ELECTION COMPLAINTS IN NEPAL"

Thank you, respected moderator and Chair of this session, my colleague the speaker and the panelist of the defend country, distinguished Delegates and the Ladies and Gentlemen.

First of all I'd like to congratulate to the Constitutional Court of the Republic of Indonesia, especially Chief Justice for organizing this conference. It is my great pleasure to be here as a speaker in this august assembly, I'm dealing with election complaints in Nepal, a bit experience.

The theme of the 7th Conference is rightly devoted to election and constitutional and legal issues related to it. Periodically elections, not only allow sovereign people to exercise their political rights to elect their own rulers, but also open up a process whereby they get involved in the governance of the state. Elections, therefore, add vibrancy to representative democracy, if they are held in an impartial and healthy manner.

Yesterday, and today we listened to distinguished speakers who shared their experiences on the concept of election in comparative setting and problems and shortcomings of law and practice related to it. In this session, I will bring the Nepalese experience on the election related complaints and the judicial response to them. Before I do that let me put to this august gathering the constitutional position of the Supreme Court of Nepal in essence. The Supreme Court is the final court of appeal and is vested with the power to judicial review. It also

issues prerogative writs. The constitutional issues that come to the Court in the form of individual or public interest petitions are handled by the Special Bench which deals with constitutional matters.

The Third People's Movement of April 2006 culminated in the promulgation of the present Interim Constitution, 2007 which promised to establish a republican and federal form of government and provided for a Constituent Assembly to draft a new Constitution. The election for the Assembly was held in 2008. The Interim Constitution has also introduced changes in the electoral system. A mixed system of first-past-the-post and proportional representation now fills up the 601-seats in the Constituent Assembly. The proportional representation system has made the Constituent Assembly inclusive with representation of various marginalized and disadvantages communities.

A healthy representative system can be established only when the elections are free and fair. For this to happen, the independence of the body that conducts election is crucial. The Interim Constitution provides for the appointment of the Election Commissioners by the President on the recommendation of the Constitutional Council. Under the Interim Constitution, Election Commission conducts, supervises, directs and controls the election to the Constituent Assembly, any referendum to be held under the constitution and elections to the local authorities. To operate these functions smoothly a host of laws are also enacted.

In order to ensure fairness and impartiality, Nepal has for quite some time used the services of the lower court Judges and Officers of the Nepal Judicial Service for the conduct of election. These judges and officers are deputed to work as Returning Officers with the permission of the Judicial Council and the Judicial Service Commission respectively. The observation and monitoring of election by independent observers- both domestic and international- is a more recent best practice. During the Constituent Assembly election held in 2008, more than 60,000 national and over 800 international observers went to different parts of the country to observe election.

Now, coming to the election related complaints, I take the view that it should be examined in the broader ambit of election. This starts with the validity of electoral laws, registration or de-registration of the political party with the Election Commission, eligibility in the election, preparation of electoral rolls and the like. These issues have come to the Supreme Court in one way or the other in matters such as registration or de-registration of a political party, the right to use election symbols, qualification or disqualification of the voters, publication of electoral rolls, and authenticity of the fractions of the political organization or party.

Now, following the promulgation of the Interim Constitution, the Constitution and other governing laws envisage the following types of disputes and provide for complaint handling institutional mechanism.

- First, Pre election offences and misconducts
- Election period offences and misconducts
- Post election offences and misconducts

These offences and misconducts are handled by different institutions such as the Constituent Assembly Court established by the Constitution, the Court designated under Election (Offences and Punishment) Act, 2007, Election Commission, Returning Officer, Polling Officer and the Monitoring Team.

The Constituent Assembly Court is a court created to specifically hear cases relating to the election to the Constituent Assembly. The Court consists of three judges who are drawn from amongst the sitting Justices of the Supreme Court. The Interim Constitution accords the Constituent Assembly Court a status similar to the Supreme Court. In addition, the Constituent Assembly Court Act, 2007 makes legal provisions for the jurisdiction and procedures for handling such cases. The disputes relating to the following matters fall upon the jurisdiction of the court.

- Invalidation of the election of a member of the Constituent Assembly;
- Offences relating to the election of the members of the Constituent Assembly; and
- Disqualification of a member of the Constituent Assembly

In general, the jurisdiction of the Court is exercised collectively by all three judges of the Court. Any decisions and orders issued by the Court shall be final. No judicial review may be made against its decisions.

A survey of case law shows that following the election to the Constituent Assembly held in 2008, seventeen cases were filed to the Constituent Assembly Court and sixteen of them are already disposed off. Among these, four cases related to the disqualification of the member and remaining thirteen claimed the invalidation of election both on account of vote rigging and the opponent's involvement in election related offences. Out of the thirteen cases, in ten cases the petitioners prayed that the election be declared void on ground that the opponents had made unlawful influence on the voters or defamed the candidate or obstructed election campaign of petitioner or had made undue influence to employees during election time or received or gave ballot paper illegally and so on. The other three petitions claimed that the entire election process be declared void on account of making obstruction to the appointment of polling agents; irregularity and monopoly in the counting process, domination of one political party during the counting of votes and non-abidance to mandatory election procedures.

One such case is *Hit Bahadur Tamang versus Election Commission and Others*, where the petitioner claimed that election in the eight polling stations, where ballot papers without the signature of the Polling Officers were found to have been used, should be held void and re-election in these stations be conducted. He further claimed that the Polling Officer had done this intentionally to raise the prospect of his opponent winning the election; it violated the provisions of the Election Offences and Punishment Act 2007. In this case, the Constituent Assembly Court rejected the petition on the ground that the votes without the signature of Polling Officer in the ballot papers were already declared invalid on the course of counting, and it also judged that the numbers of the invalid

ballot papers did not make any difference on the whole result of that particular constituency.

All the four petitions seeking disqualification of a member of the Constituent Assembly pertained to the proportional electoral system. In this system, introduced for the first time in Nepal for the Constituent Assembly, the political party submits a closed list of candidates with the Election Commission prior to the conduct of election. And once the election is held, it, on the basis of the votes received during the election, sends the name of its candidate to the Commission for approval and seeks his/her declared elected. In the four petitions that the Constituent Assembly Court received, the petitioners challenged the selection of candidates by political party for the purpose of proportional electoral system and the approval given by the Election Commission to such selection on the ground that the political party as well as Election Commission did not follow the provisions stipulated by the Constitution, the electoral laws and the Charter of the concerned party. For instance in *Punnebajra Lama and Others versus Election Commissions and Others*, it was claimed that the decision of the Election Commission which declared four of the respondents elected on the basis of proportional representation should be quashed. In this case, it was contended that following the election to the Constituent Assembly, the President of the political party whom the petitioner belonged, had sent the name of these candidates to the Election Commission from the closed list without official endorsement by the said Party. Here, the CA Court took the view that it was an internal matter of the Party, and anybody challenging the decision should have the authority of the Party. Since the petitioner did not submit such authorization along with the petition, the Court considered this as an individual claim and hence dismissed the petition for the lack of *locus standi*

Besides the Constituent Assembly Court, another forum envisaged by law for handling electoral disputes is the Designated Court. This Court formed under Election (Offences and Punishment) Act, hears cases related to the election of state organs other than the election to the Constituent Assembly. This is in line with the practice of designating electoral tribunals to hear electoral disputes followed in Nepal.

Election is a process where in many instances on-the-spot decision is required. For this purpose, the Election - Offences and Punishment Act, vests the Returning Officer, Polling Officer and the Monitoring Team with the power to punish any person on offences such as taking arms and using arms during election period, creating obstacles on election campaign, trespass into restricted areas, obstructing the counting of votes, using vehicles exceeding in numbers permitted by the Commission and so on. The Polling Officers and the Returning Officers in special circumstances can also cancel or postpone the election of the polling stations. It is incumbent upon the said Officers to report to the Election Commission of the emergent situation and take its directives on the matter. The Commission has the final authority to cancel and order re-polling in some polling stations or the entire constituency.

Coming to the lessons learnt and the best practices, I would like to submit

that the democratic practices in Nepal are relatively new. But we have experienced many positive trends in the exercise of sovereign people's right to election. For instance, there is tremendous interest of the people in the election. This is corroborated by high turnout of the voters during the CA election (approximately 61% voters practice their voting right) and increasing participation of political parties and candidates.

Right from the beginning, Nepal emphasized on holding election by an independent body. The independence for the Election Commission and the involvement of judges and other officers of the Nepal Judicial Service for conducting election, and the creation of independent dispute settlement mechanism illustrates the emphasis to independence, impartiality and fairness of the electoral process.

In spite of the above being some positive trends, there are many areas where reform in policy, law and practice of election is required. Research have indicated the need to reform in matters such as maintaining law and order throughout the nation, voter education, capacity building of the human resource, autonomy of Election Commission including financial and security matters, reforms in preparing voters' list, monitoring of election process, strengthening of partnership among the Election Commission, the judiciary, monitoring agencies, especially the media and civil society, instant handling of criminal offences, and prompt dealing law-breakers and anti-social elements.

Finally, I am confident that the discussion being held here and the sharing of experiences of other countries will help to further reform the election process in Nepal to make it free, fair, participatory, inclusive and trustworthy.

I thank you all for your kind attention. Thank you.

SPEAKER 2

Hon. Igor Rogov Ivanovich
Chairman of the Constitutional Council of the Republic of Kazakhstan

"ROLE OF THE CONSTITUTIONAL COUNCIL OF KAZAKHSTAN IN MAINTENANCE OF THE CONSTITUTIONAL LEGALITY IN ELECTION PROCESS"

Interpreter

Honorable President, ladies and gentlemen, allow me to first off all express my greatest honors to all of our colleagues in Indonesia for all the hospitality for holding such as a great conference. We would also like to congratulate the Association of the Asian Constitutional Court Judges for which we will extremely proud of.

The Kazakhstan government system that monitors the election and the constitutional council has the authority to observe the process. The constitutional council monitoring of the holding and implementation of the law on election of the republic constitutional council also monitors the upholding of the principles of the constitutional to ensure the voters right. And one of the most important responsibilities in carrying out the constitutional authority is to ensure that election runs should be based on Act no 72 the Basic Law of Kazakhstan. In case of dispute concerning the ruling for the result of the presidential election lays in the hand of the constitutional council with the reference to the constitutional council the mechanism to realize the constitutional norms are stipulated in the constitutional of Kazakhstan concerning the election in Kazakhstan.

Within 10 days after the announcement of the result of the election Head of the Parliament, the Prime Minister as well as at least one-fifth of all deputies or representatives of the constitutional council will determine whether or not the election has been carried out accordingly and should there be any claim complaints the central constitutional commission will transfer all materials to the constitutional council to be determined for that and further to be acknowledged by them if the constitutional council finds that there are inaccuracy of holding the election the central commission for election whether or not there will be a re-election within 2 months. Based from here we can conclude cons council the arbitral in line with the holding up of the election we can say that besides the constitutional council of course there are other regular codes who can determine all to conduct the investigation towards the particular of the election and also the result of the election that was held. Besides that the constitutional council of Kazakhstan also has other authorities concerning in which the quality role to determine the validity of the result and the cc does not handle issues concerning aspect council especially in the following decision based on the law on election. Several rulings were made by the constitutional council relating to this question, among them the analysis about the principles, the requisite and the norms of the constitution that regulates how to do an election to analyze the impact of the ruling of the constitutional council of Kazakhstan and also laws on election. We need to know about the position is linked to the right of the citizen to choose the constitutional council, rule number 12/2003 provides formal interpretation of articles 10 and 12 of the constitution and questions concerning when a citizen has right and whose right has been taken from them and the obligation of the Kazakhstan citizens and also foreign residents and those without citizenship. The constitution says about that the institution of citizenship is a definition of sovereignty of an independent of the republic because it is in order of the constitution the citizen of Kazakhstan includes all citizens and its also the source of government and because of the authority through public referendum and through the election. And they also delegate the realization of this authority to the state structures.

Therefore the people of Kazakhstan has the series of rights and obligations that are stipulated by the constitution, laws and other standard rules, without citizenship those foreigners are not allowed to hold the position of president

and parliament and other formal positions in line with the preparation and the acceptance of the concerned law on the amendment of the constitution it has been noted by the legislators concerning the position and the decision of the constitution of Kazakhstan regarding the restriction towards the citizen to be elected and this is based on the changes of the principles in the establishment of the territorial district but at least the use of the electronic voting system and the assignments that are given to the expert in electronic voting system in voting location. It was also accepted concerning the establishment of electronic registration of the political parties and most probably in giving a regulation on election of the parliament and the role of the constitution in Kazakhstan could be seen at the process of the selection based on the constitutional law of Kazakhstan dated 2008. The process of certain disputes and violations of the legislation could be taken into consideration, could be taken to court based on Article 78 of the Kazakhstan constitution.

The court can determine or examine the results and apply the correct laws that are in place. They can also investigate other violation if there is a law if the court sees that there is a regulation that violates the people's rights then the regulations had violated the constitution. Therefore, this can guarantee no more violations towards the right of the citizen, political rights of the citizen. Therefore, the role of the constitutional council in the development of the Kazakhstan legislation is the constitutional duty of every subject in the process of election. Reform in the election system that has been carried out to fulfill the international standard has been carried out including the use of information technologies at elections was carried out within the limits of principles and ideas and legal position of the institution and the constitutional control of Kazakhstan.

Ladies and gentlemen, the election in no matter way maybe is the expression of will of the people and this is unique source of the government. The views of the people towards the constitution and is the obligation is a requirement to determine whether or not the result of the election is based on the demand of the democracy of Kazakhstan. Thank you.

Moderator

Dealing with the election conference, our two speakers do believe that healthy representative system can be established only when the election is free and fair.

Ladies and gentlemen, we still have two panelists. The first panelist is Hon. Khammy Xayavong, President of the Supreme People's Court of Lao People's Democratic Republic. The second speaker is Hon. Brigitte Bierlein, Vice President of Constitutional Court of Austria.

The next, it is time for Hon. Khammy Xayavong.

PANELIST 1

Hon. Khammy Xayavong
Chief Justice of the Supreme People's Court of
Lao People's Democratic Republic

"DEALING WITH ELECTION COMPLAINT IN THE LAO DPR"

Interpreter

Your Excellency, Chairman of the conference, distinguished guests, ladies and gentlemen,

First of all, I would like to express my thanks to the Constitutional Court of Indonesia, for inviting us to participate in this important conference and I am very pleased to have the mission to state about of election complaints in the Lao PDR.

As you may know, over centuries, the Lao people have been struggling for their independence. The Lao People Revolutionary Party eventually achieved the complete liberation of the country on December 2, 1975 with the foundation of the Lao PDR and establishes the Supreme People Assembly to be a representative of the Lao people throughout the country then the Supreme People Assembly changed is name to the National Assembly until now.

According to the Constitution of the Lao PDR, article 52 which provides that ***the National Assembly is the representative of the rights, powers and interests of the multi-ethnic group.*** Therefore**,** Lao people select the National Assembly member to be their representatives in the National Assembly.

The process of the election provided by the Election law, is responsible by the Election Committee the is provided into four levels:

1. National Election Committee;
2. Provincial election committee;
3. District election committee;
4. Committee at the level of polling units

Therefore, the election committees have the rights to resolve the request of citizens related to the election activity. In principle, the election committees at the level of the polling units have to resolve the complaints related to the election issue. For the complaint relating to the activity of the election committee, must be resolved by the upper election committee. Basically, the election committee at the level of polling unit shall deal with the requests or petitions that is proposed by the applicant. However, if the committee could not deal with such petition or request, the committee shall propose to the higher committee for considering.

The applicant also has the right to appeal the decision made by the committee. In case of the applicant is with the final decision of the election committee, he can bring the petition to be considered in the court. Due to the fact that the Lao PDR does not have the administrative court or constitutional court, so now the civil court has the rights of jurisdiction to consider the case relating

to the administrative relationship including the cases involving the mistake in the list of the person eligible for election, which the election committee was not able to solve.

This is my brief text about the system to resolve the election complaints in the last year. Thank you very much.

Moderator

Hon. Khammy Xayavong, thank you for your presentation.

Ladies and Gentlemen, I would ask the panelist in this part, Vice President of Constitutional Court of Australia, Hon. Brigitte Bierlein, it is your time to take the stand.

PANELIST 2

Hon. Brigitte Bierlien
Vice President of the Constitutional Court of Austria

"DEALING WITH ELECTION COMPLAINTS IN AUSTRIA"

Mr. Chairman Excellences, ladies and gentlemen,

First of all, I would like to thank the Constitutional Court of the Republic of Indonesia for inviting me to this highly interesting conference and for its generous hospitality. I also wish to thank the organizers for giving me the opportunity to briefly outline how the Austrian Constitutional Court deals with election complaints.

The jurisdiction of the Austrian Constitutional Court on electoral disputes is regulated by Article 141 of the Austrian Federal Constitution Act according to which the Court decides

- on the review of elections,
- on the loss of a seat, and
- on the legal challenges to the results of popular initiatives, consultations of the people and referenda.

1. The review of elections

All important elections held in Austria may be legally challenged before the Constitutional Court.

These elections are especially:

- the elections of the Federal President
- the National Council and the Federal Council
- the Provincial Governments and the municipalities
- the European Parliament
- the representative bodies of statutory professional associations and

The challenge may be based on any alleged illegality of the electoral procedure.

The Constitutional Court exercises its review power only within the limits of the alleged illegality.

Proceedings may only be initiated upon application. The application has to be filed with the Court within four weeks after the completion of the respective election, must request the annulment of the entire election or a certain part thereof, and has to give reasons in support of the annulment.

Elections may be legally challenged

- by electoral groups which have presented lists of candidates, or
- by any candidate who claims to have been unlawfully declared ineligible, or
- by the members of the electoral bodies in the case of elections to a Provincial Government or to a municipal authority entrusted with executive power.

An individual voter, however, is not entitled to challenge any elections.

The Constitutional Court has to allow a challenge if the alleged illegality has been proved and - this is very important - could possibly have had an influence on the election result.

The judgment allowing the challenge has to declare nil and void either the entire election or certain precisely identified parts thereof. As a consequence, the entire election or parts thereof have to be repeated.

2. Loss of a seat

Article 141 of the Federal Constitution Act also regulates the loss of an already legally acquired seat in general representative bodies, in the European Parliament, in a representative body of statutory professional associations and in municipal authorities entrusted with executive power.

The loss of a seat may either be pronounced by the Constitutional Court itself (direct proceedings), or by decree of an administrative authority (indirect proceedings).

As regards direct proceedings, the respective representative body or municipal authority may file an application with the Constitutional Court. The Court has to declare the loss of the seat provided the conditions required by law are met.

In indirect proceedings, the person whose seat has been declared lost may bring the case before the Constitutional Court, but also the respective representative body can do so. The Constitutional Court has to annul the administrative decree when the alleged illegality has taken place.

3. Legal challenge to the results of popular initiatives, consultations of the people and referenda

Apart from elections, there are three types of popular participation in Austria: so-called popular initiatives, consultations and referenda.

The Constitutional Court can decide on legal challenges brought against the alleged illegality of the results of such referenda.

I would also like to draw your attention to my handout, which covers what I have said in greater detail.

Mr President, ladies and gentlemen, thank you for your attention.

QUESTIONS AND ANSWERS

Question

Cambodian Delegation

This question is directed to the representative from Austria.

Can you elaborate what you mean by 'indirect proceeding'? Because look as if that according to your paper you have the direct proceeding that the representative body will bring the proceeding and the indirect proceeding the representative body also can bring the proceeding. Can you elaborate on this?

Answer

The last of the mandate, that's the first question, could happen because of a decision by the court if they are those who challenged or even those who are elected because of the cancelation of the election and the candidate can come to the constitution of court by stating that the loss of seat is not based on a legal ruling. The probability of lost of the mandate is regulated by the lower law when somebody who received the mandate was suddenly punished for the criminal act and is in prison for more than one year or other case when a member of parliament has been absent for more than 30days, this is the example that had happened in the past where the constitution of court had been entered the arena where there is member of parliament who has been charged for a criminal action but has not been not ruled given by the court and he ran to South America and there was a letter of arrest was issued, of course he was unable to be present at the parliament to carry out his duty as the member of the parliament. He then extradited to Austria and was punished in Austria and he lost his mandate. He further his lost of mandate case and has made it into legal proceeding because he said that his lost of mandate is not legal because he was considered to have conducted criminal act and he has lost his mandate.

Question

Indonesian Delegation

To Doctor Brigitte – Austria

In your paper page 2, I see your statement that the challenge may be based on any alleged illegality of the electoral procedure. May you can explain to me what you mean by 'any alleged illegality of the electoral procedure' as standard of review of the institutional court of the Austria.

Answer

Do you mean our work in the constitution of court in Austria? Do you mean how many cases that we work on?

During the election process there are mistakes that are made, for example,

when the ballot that needs to be filled in, that should include the party that need to be elected, and this ballot is not filled in correctly, according to the law, the person should cross out the name of the party that is elected and sometimes it is crossed is located between the two parties and we cannot see clearly which party that he has elected, in this case, we directly determine whether or not we can, this is a party or bipartite because it's closer to the a party and it more to the bipartite. And one way to determine that this is invalid and this often happen to remote communities where their vote are considered to be extremely important then we need to hold a re-election and I hope this can answer your question because I'm not certain about your question. Thank you.

END OF PART I - SESSION THREE

PART II

Moderator
Dr. Denny Indrayana, S.H., LLM. Ph.D
Academician of Gadjah Mada University, Yogyakarta, Indonesia

SPEAKER 1

Hon. Achmad Sodiki
Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia

"DEALING WITH ELECTION COMPLAINTS: AN INDONESIAN PERSPECTIVE"

A. Democracy and General Elections

There is no democracy without general elections. It is not possible to realize democracy defined as government administration by the state based on recognition of the people's sovereignty without holding general elections. In the context of a democratic state, general elections have at least three strategic functions. First, general election is a form of recognition that the people hold the supreme power in state administration. Secondly, general elections are the most viable mechanism for establishing state governance which is in accordance with the people's aspiration. Thirdly, general elections are also a control mechanism to prevent the rise of an excessively dominant power leading to the abuse of power. It also serves as a peaceful mechanism for putting to an end power. Therefore, a legal framework for general elections is necessary in order to guarantee that general elections are held in an honest and fair manner.

Such close relationship between general elections and democracy is quite evident in the democratization process in a country. A peaceful democratization process can only be achieved through general elections or at least, it must be

immediately followed with the holding of democratic general elections. The 1998 reform movement in Indonesia was immediately followed by the holding of the 1999 general election. Such general election was necessary to end the political crisis by establishing a new government with a democratic legitimacy. Without the democratic general election in 1999, the political and constitutional crisis would have continue.

In the further course of the Indonesian nation's development, the general election reform became a part of democratization process. A fundamental reform was conducted not only in the political party system, the election system, institution for organizing general elections, but also in the representative and presidential institutions. These fundamental changes were also introduced through the Amendment of the 1945 Constitution in 1999 until 2002, which was subsequently followed by amendments made at the level of laws, particularly those related to the organization of the 2004 and 2009 General Elections. The Constitutional Court (CC) of the Republic of Indonesia was also established based on the amendment to the 1945 Constitution, with one of its authorities being to hear and decide upon cases of dispute concerning the results of general elections.

B. Role of the Constitutional Court in the Development of General Election Law

For the purpose of materializing democratic general elections, Indonesia has developed general elections law in compliance with the principles of democracy and constitutional state. The general elections law covers various relevant legal aspects, among other things the Law regarding Political Parties, the Law regarding Legislative General Elections, the Law regarding Presidential and Vice Presidential Elections, the Law regarding Regional Government, as well as the Law regarding the Organizer of General Elections. The formulation of the general elections law is the main duty of law-making institutions, namely the House of Representatives and the President. Indonesia's general elections law has undergone several changes during the reform era in accordance with the general elections held, namely in 1999, 2004, and 2009, respectively.

In the course of its development, the general elections law has also been significantly affected by the demand made by the citizens through the decisions of the Constitutional Court, particularly those concerning the Judicial Review of Law (*Pengujian Undang-Undang/*PUU) and concerning Dispute Concerning the Results of General Elections (*Perselisihan Hasil Pemilu/*PHPU). The high level of citizens' participation and attention to the General Elections law are quite evident from the great number of petitions filed for judicial review of laws related to the General Elections law. Up to the present time, the Constitutional Court has received and decided upon 2 petitions for judicial review of the Law regarding Political Parties, 24 petitions for judicial review of the Law regarding Legislative General Elections, 8 petitions for judicial review of the Law regarding Presidential Elections, 17 petitions for judicial review of the Law regarding Regional Government related to Regional Head and Deputy Regional Head Elections, and 1 petition for judicial review of the Law regarding the Organizer

of General Elections. There have been several decisions of the Constitutional Court granting the petition filed, which has had a significant impact on the development of the general elections law in Indonesia. These decisions have been aimed at guaranteeing a democratic implementation of general elections in compliance with the direct, public, free, secret, honest and fair principles as provided for in the 1945 Constitution.

Several Constitutional Court's decisions affecting directly the development of general elections law include among other things the decision on the reinstatement of right to be nominated as candidate for former members of banned organization of the Communist Party of Indonesia, the decision guaranteeing the independence of the organizer of local general elections (KPU) by eliminating the requirement to be accountable to the Regional House of Representatives (DPRD), the decision allowing for the nomination of individual candidates in the local general elections, the decision on obligation to meet the requirement of domicile for the candidate members of the Regional Representatives' Council (DPD), the decision on treatment toward political parties during the transition from electoral threshold to parliamentary threshold, the decision on the use of Identity Card and Passport in general elections, the decision designating candidates-elect based on majority votes, and the decisions ordering re-voting or re-calculation of votes.

C. Constitutional Court and Dispute over the Results of General Elections

Law Number 10 Year 2008 provides for three types of dispute related to general elections, namely administrative violations, criminal violations related to General Elections and disputes over the results of general elections. Administrative violation is the violation of the provisions of the General Elections Law which does not constitute the penal provisions on General Elections and other provisions set forth by KPU. Criminal violations of the General Elections are violations against the penal provisions on General Election set forth in the General Elections Law.

In addition to administrative and criminal violations, another type of disputes includes disputes over the result of general elections. These occur in the event of discrepancy between the results of General Elections in the form of final stipulation of the results of vote calculation and the distribution of seats officially announced by the institution holding general elections on the other hand, and the calculation of general election participants on the other, or in the event of dissatisfaction of general election participants related to general elections results. This mechanism has been created to ensure that General Elections are actually held in an honest and fair manner by providing an opportunity to General Election participants to take legal action by filling their complaints about the results of General Elections stipulated by KPU. With this judicial mechanism, any dispute has to be resolved through legal action, rather than by using force, much less by violence which can jeopardize the entire process of democracy.

In the course of its development, disputes over the results of General

Elections filed with the Constitutional Court have not been limited to the determination of numbers of the results of General Elections acquired by General Election participants, but rather to the quality of the General Elections. The Constitutional Court also assesses the substance of the implementation of General Elections as to whether or not there has been any violation against the constitutional principles of general elections. The constitutionality of direct, public, free and secret principles as well as honest and fair principles is provided for in Article 22E paragraph (1) of the 1945 Constitution.

In deciding the cases of disputes over the results of general elections, the law has imposed a time limitation to the Constitutional Court. With regard to the cases of dispute over the results of DPR, DPD, and DPRD general elections, the Constitutional Court must decide upon the cases within 30 business days as of their registration. Furthermore, the cases of dispute over the results of President and Vice President election must be decided upon within 14 business days as of the time of registration. Similarly, the cases of disputes over the results of regional head and deputy regional head must also be decided upon within 14 business days as of the time of registration.

The handling of cases of disputes over the results of general election requires particular attention and concentration by both the panel of justices as well as the apparatuses of the Secretariat General and Registrar's Office of the Constitutional Court. Marathon hearings used to be held until late at night time in order that the Court could examine and decide upon cases in a fair manner within the deadline imposed by the law. Hearings of cases of disputes over the results of general elections were presided over by a panel of justices consisting of minimum 3 (three) justices. However, the decision was made by 9 constitutional justices at the plenary session.

In accordance with the judicial development of disputes over the results of general elections at the Constitutional Court, cases examined are not limited to the discrepancy in the calculation of the results of general election between the organizer of general election and general election participants. Hearings of the cases of dispute over the results of general election also examine violations related to general elections affecting the results of the general election itself. In fact, in several cases, examination was also conducted on the illegality of regional head and deputy regional head candidates. Therefore, this judicature does not only determine the correct calculation of general election results, but it also ensures that the general election undergoes a direct, public, free, secret, honest and fair process as the constitutional principles of the implementation of general elections. As a result of the above, the decisions of the Constitutional Court include an order to conduct a re-voting either due to one of the candidates' being declared as not meeting the requirement or to the fact that a systematic, massive and structured violation has been proven to have occured; or oder to conduct a re-calculation in the event of violation during the process of vote calculation. Therefore, implementing adjudication in disputes over the results of general elections has become part of the functions of the Constitutional Court in maintaining constitutional supremacy in the implementation of general

elections.

Now the last, because of the time constrain, I will not explain in this spcecial occasion our concern of court of Indonesia decision have made different implementation in general election between Yakuhimo society and literate tribul society in Papua and a literate modern society such as Jakarta and big cities. Constitution Court in Indonesia do not straigh to implement general election law as law in the book but also concider the value the custom of society, it means that constitution court of Indonesia also regard justice aspect and also logical aspect of society.

Another aspect is dead line dispute

Constitution of Court of Indonesia has been timing of political riots. That is very important because we Indonesia consists of many cultures, interests and politics, ignicities and variety of education background. Many people worry about the effect of the implementation of the general election. Fortunately, our people are aware of this concequences, people has major attitude and accept it. They accept it and observe Constitution Court of Indonesia decision. On my opinion, this is the biggest, one of the best Constitution Court of Indonesia contribution in developing democracy as our Indonesia society and people understand about democrazy. The democrazy is not product but also process.

Moderator

I cannot imagine Indonesian Election without Indonesian Constitutional Court. I think it is correct to mention that the two latest elections in 2004 and 2009 which is claimed to be one of the most democratic election in Indonesia is succesful and democratic. One of the key recipients is because the rules decision of the Constitutional Court. So it is very important. The latest decision I think in relation to the local Leader election, I think it's bupati or governor, when the court disqualified the winner because of money politics. It is very important decision because money politic is one of the biggest issues in Indonesia election, may be in other countries as well.

Moderator

Second speaker from Turkey. We will hear about Turkey experience, dealing with election disputes. Honorable Alparslan Altan, the judge of the Constitutional Court of the Republic of Turkey.

SPEAKER 2

Hon. Alparslan Altan
Judge of the Constitutional Court of the Republic of Turkey

"THE CONSTITUTION, THE CONSTITUTIONAL COURT AND THE ELECTION SYSTEM IN TURKEY"

Distinguished delegates, ladies and gentlemen,

I am very happy to participate in the 7th Conference of the Judges of the Asian Constitutional Courts on behalf of the Constitutional Court of the Republic of Turkey and to address to a distinguished group. I greet all of you with respect and I wish success in the Conference.

Election, as a term of political science and Constitutional law, implies that people and institutions that will rule the country should be determined by voters amongst a number of candidates. In other words, election can be defined as "the operation in which governed people are specified/ authorized by the governed.

One of the most important criteria to be taken into account whether a certain country is democratic or not is its election system. Any democratic election system should include some characteristics. General suffrage, one vote right for each individual, existence of more than one political party, presentation of their programs to voters, honest elections conducted in acceptable periods are some features of any democratic election system.

The right to vote has been restricted to certain sections of the community in the ancient Greek and Roman democracies as well as in some primitive societies. It was accepted that only the noble people, land owners and clergymen had the right to vote. The principles adopted by modern and democratic election systems which reflect the will of voters onto results of elections in a healthy way are quite different from the elections applied in the past.

Throughout history, being an elector has required some conditions, such as citizenship, age, gender, education, place of residence, race, land ownership and socio-economic status.

In this presentation, I am going to give some short information with regard to the basic principles of the electoral law in Turkey and the improvements experienced in this field. In addition, I am going to mention some judgments of the Turkish Constitutional Court, which have brought hard discussions in the country.

In our country, some general principles of election system have been adopted by the Constitutions. But, the details on determination of the electoral system have been left to the discretion of the legislative body.

According to the provision of the 6th paragraph of Article 67 of the Constitution, the electoral laws must strive a balance between fair representation and governmental stability.

This provision is a summary of the experiences Turkey has faces after

some elections and unstable government. Due to some political problems experienced in different periods, either the principle of governmental stability or the principle of fair in the representation has been taken alone in election law. A balance between these two principles has been desired to be set with this regulation.

According to the Constitutional Court which interpreted this provision in one of its judgments:

"The amended 6th paragraph of Article 67 of the Constitution specifies that the electoral laws shall be regulated in a way that electoral law strive a balance between fair representation and governmental stability. The purpose is that the will of the voters should be reflected onto the legislative body as properly as possible. Despite the fact that an ideal election system has not yet been found, the most harmonious one with the Constitution should be introduced according to the conditions of the country. The system which brings many representatives with a small number of votes and causes overrepresentation through providing too many representatives is not compatible with the principle of fair representation of the Constitution. The fact that the unjust systems, having been assumed to provide stability, have conclusions which block the social improvements significantly is expounded through scientific investigations. The domination of fair representation is the basic condition of stability in the government. Justice provides stability. The thought of stability alone creates instability if there is no justice. The principle of fair representation which the Constitution requires to be observed should be realized with the number of representatives, proportionate with votes.

On the other hand, the European Convention on Human Rights regulates the free election in the 3rd Article of the Protocol 1. According to this, the parties undertake to hold free elections at reasonable periods by secret ballot under the conditions which will ensure free expression of the opinion of people in the choice of the legislative. This article guarantees the right to elect in both the active sense and the passive sense and moreover, there is an obligation of the regulation of the election by the law. Although states have a large discretion, arbitrary restrictions are excluded.

Perhaps one of the most important obligatory conditions of a democratic government country is to ensure free election system. The legitimate ruling power, according to the democratic theory, is the power which obtains its source from public and which depends on the support and approval. A political ruling power which is not based on the consent and approval of the public is not deserved to be called as legitimate. Perhaps one of the most important means to obtain consent and approval of people relies on free election. In representative democracies, this support and approval is put forth with the free elections held at regular intervals. Thus, election gives the electors the opportunity to approve of the representatives to govern them, to renew their previous consent or to withdraw it as well.

In Turkey, a number of application have been made to the constitution board regarding election system with the allegation that delivered provisions where contradict to the constitution. I would like to mention some of them briefly.

National Threshold on General Election

Under the Turkish law, parties may not been seized unless they obtain nationally more than ten percent of the votes valid. The existence of such high threshold has been discussed and criticized in political world and legal framework.

The subject has been brought to the Constitutional Court and it has found this provision compatible with the Constitution. The Court has concluded to determine the threshold on national election system from the nature of the system and it is applicable as long as they do not reach extraordinary points and does not restrict the right to elect and to be elected.

Another important subject in terms of the electoral system in Turkey is related to whether the national threshold of ten percent is compatible with the system of European Convention on Human Rights or not. Two candidates have not been elected as members of parliament since their parties have not reached ten percents threshold. They applied to European Court with the allegation that such high threshold is not compatible with the provision of the commission.

The European Court of Human Rights has found in its judgment that to determine the threshold on general election in a country is not contrary to the European Convention on Human Rights.

European Court in its judgment states that indeed extreme diversity of the electoral system adopted by this contracting states and taking into account affected many countries using one or other variants of proportional representations in national threshold for election to parliament.

The court must accept, in present case the Turkey authorities are best placed to assist to choose an appropriate electoral system. I'm not proposed an ideal solution which would correct the shortcomings of Turkey electoral system. The European court did not find any violation in this issue.

The State contribution to the political parties in realization of the election race fairly is of great importance. For this reason, the Law on Political Parties specifies that the political parties which were conceded the right to participate in the last general parliamentary elections and the ones which went beyond 10 percent threshold of the country and the political parties which have a group in the Turkish Grand National Assembly – that is, which have at least 20 representatives- are provided state contribution. It is also considered that the political parties which get more than seven percent of the total eligible votes in the general parliamentary elections are provided the same amount of aid as the party which gets the least aid, commensurate with the total eligible votes in the general elections.

The specified amount of contribution is paid every year provided that it is distributed, commensurate with the number of total eligible votes of the political parties, declared by the High Electoral Commission. Contribution should be used only for the needs and activities of the party.

Some provisions regulating state contribution to the political parties have been brought before the Constitutional Court. The Constitutional Court has found

provisions on state contribution to the political parties are in accordance with the Constitution, since there is no prohibitory provision in the Constitution.

Election systems imply the methods to be taken into account in the determination of rulers. There are different election systems, but two main systems prevail. Proportional representation system highlights the principle of justice and majority electoral system highlights the principle of benefit. Moreover, mixed election systems constituted from some elements of these two election systems are also applied.

Other than the electoral system, that the historical, cultural, ethnical, ideological and social conditions of any country also influence the political stability and political parties.

The determination of the right electoral system in a democratic political system is of high importance both because of the right possession of national sovereignty and because of the combination of democratic systems. The adoption of an inappropriate electoral system not only blocks the healthy process of democracy but also turns the problems of representation into a jigsaw puzzle.

Thank you very much for your attention.

Moderator

Honorable Alparslan Altan, thank you for your presentation. I only notice one issue about the threshold. Indonesia also has this issue. Many many applications submitted before Indonesia Constitutional Court and as far as I can remember all threshold has been ruled as the constitution now. And it is not against the constitution but the national threshold power, we have changed electoral threshold, parliamentary threshold, now the parliamentary threshold is five percent. There is ongoing discussion to raise it to, like, five percent but of course many political parties rejected. The discussion is because there is argument that multi party system is not compatible with presidential system. That's one of the arguments.

Second speaker is our panelist from Egypt, Honorable Farouk Ahmed Sultan. He will share with us the Egypt experience, of course. Please, Honorable.

PANELIST 1

Hon. Farouk Ahmed Sultan

President of the Supreme Constitutional Court of Egypt

"ELECTION COMPLAINT"

Interpreter

I thank the Constitutional Court of Indonesia for the good effort in making this conference a success and conducting in a very good way. And also I'd like to thank and also congratulations. Also thank you for your invitation and also congratulate to the Commission of the Asian Constitutional Courts Association.

The Constitution of Egypt has granted in article 52 that every citizen has the right to vote in accordance with the law. And this cannot be obstruct and also obstruct too for the voting and also obstruct its … in a way. This is also to ensure the right of citizens in all legislative body because what is ensured is the voters and also the freedom of the voters to make the choice.

And how they can compete in general election is prerequisite that should be guaranteed in its execution and also to guarantee the neutrality that there should be no money politics that disturb this process or conduct this terrorist act so that they cannot conduct the voting. So there should be guarantee for all opportunity for the voters to take part in the election and also for the candidate to present their program so that the discussion among them.. this also be substance of the campaign where it has a result that there should be no pressure from outside and the contribution of the voters shows that this is the participation in process. And So there should be a balance between the right of the voters and the same right in the media. And there should be no pressure, money politics in the voting system.

And the freedom of the voting in 1973 and 1956 where it regulate the voting process has gone through several process that is in certain vocation. And this must be before that there should be a registration process of the name that is enabling each voter to enlist the name that they wish to vote for. And this can be possible by conducting follow up registration. In article 16 of the law that the head of the court can determine who will be the guardian of the process.

And number 2 is the process of holding the election. This is very important because this relates to incidents and also relate to regulation that is conducted by the voters in location in the ballot, polling boat to give the vote in certain areas or in any way threaten then to fulfill the invitation of a certain candidate or not allow them to give a vote or disturb the situation that make it impossible for the general election to be conducted.

Also to ensure the neutrality of the high commission in line with the law number 33 which says that there must be neutral and independency in line with the law number 205 where every citizen can conduct their right and each conduct the duty in line in accordance with the law and placing the agenda of the general election and assisting the dissemination of the information of the general election and also appointing and showing the voting of the general election and also proposing in all polling ballot and also to smoothen the campaign of the general election.

The article 11 of law number 38 the year 72 on the parliament bases all this principle includes the bases to not conduct action that depressed between religion and ethnic groups and this also goes for the symbols for the general election of other parties and the candidates and also independent candidates that support the general election. Receive reports and complaints on violence of the general election. To investigate on the what happen and also to announce the result of the general election and referendum and also give opinion on the general election and also to place or involve many NGOs in the execution of

the general election. And also administrative court, booth give the ruling in the violence in the general election after the general election.

We'll give an example, the ruling of an administrative Court number 2007 and 26 were at session which allows the civil organization to monitor the election with several levels under the governs of the organization of the general election. With the ruling which was made in 2005 it enables civil organization to monitor the procedure of the election committee with television cameras enabling them to follow the counting of the votes. If there is a violation and they are not sure of the result than the law in Egypt has the right to settle this dispute after the investigation is conducted by the appeal court.

And where the court has the authority to rule and the court can cancel this demand in 13 days since the appeal was made and the decision must be finalized 90 days after the petition. The result is then decided after 60 days after its petition to the court. And is not regarded as cancelled if majority of 2/3 of the Council regards so. And the constitution has finalized this saying that the authority in the general election case must not be more than the article that has been stated but is investigating when that is brought to the representative. It's not considered the legal authority and not reported legally did should have any supplement because of the procedure that does not fulfill overall.

Mr. Farouk Ahmed Sultan.

Moderator

Egypt, I think we just continue to the last panelist, Hon. Machmudov Mahkam who shares Tajikistan.

PANELIST 2

Hon. Makhmudov Mahkam
Chairman of the Constitutional Court of the Republic of Tajikistan

"ROLE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN IN THE PROTECTION OF SUFFRAGE OF CITIZENS"

Interpreter

Allow me as a representative of the Constitution Court of Tajikistan would like to say my thanks to Constitution Court in Indonesia to Chief Justice Mahmud MD, for conducting this good conference.

In 1991 Tajikistan have their opportunity to obtain the independence. In this case the first step that was taken by the government of Tajikistan is to make a constitution and divide the government into executive, judicative and legislative. And the Act of Judicative was conducted by into economic court and so on. So the court of Tajikistan is regarded as independent and place very important for all regarding the rights of citizens and also human rights.

This year the Constitutional Court has reach fifteen years of its establishment that I'm going to tell you of how the general election is conducted and many decisions or ruling that has been made in defending the political rights. In Tajikistan we have ensured the process of general election and it is stated at the age of 18 the citizens of Tajikistan has a right to take part in referendum and also a vote and follow the process of ruling in Tajikistan. The legislative authority is conducted by the parliament and also the lower chamber and also the upper chamber of parliament. The authority of the parliament is appointed for five years and the election of upper and lower chamber is conducted in 75 days after the general election is conducted.

The upper chamber is appointed 25 days after the deputy and the vice deputy is selected. The deputies are the representatives that are appointed for the lower chamber must at least between five years old and at least has been a citizen of Tajikistan for twenty five years and have a University Degree. The lower chamber is divided into 33 deputies and 41% is elected according to the mandate and 35% is elected, 22% elected through the public election and they are appointed for five years. The upper chamber has 35 members base on interest of several parties and if there's not approve or agree to follow it, the Republic of Tajikistan, the Commission of General Election, Central Commission for General Election calculates the total number of voters, votes and this is through a public voting. And if they have a reelection, well in the case, when for certain conditions where the first phase of the election is regarded invalid then we have the reelection. The reelection of Tajikistan is conducted in a free and open, transparent way and fair way. They must at least be 25 years old of age and 25 years being and has live in Tajikistan at least 10 years.

The post of the President of Republic Tajikistan was nominated by many hellions, by the different unions and also parties and is conducted after 50 days campaign and is appointed 30 days after the election. Examples there are many cases of complaints, settling dispute or resolving dispute in Tajikistan with regard to violation of rights of the citizen. For example at the organic level and regional level where the union violate the rights by not fulfilling the rights of the voters. This can also happen when the responsibility has been violated, in this case the rights of those who has been violated can complaint to the General Election Commission and then this will be handled by the commission for General Election and we should also note here that the court will also abide by the international principle of general election and also the international standard, where everyone, every individual have the right to elect and that cases will be considered by court in transparent and open way and the Referendum Commission as well as the General Election Commission will process this complain and the ruling of the judges will be lined. So the problems on complaints on the result of the complaint are also considered by general jurisdiction, General Court and also Constitutional Court. The ruling must be made 30 days after the complaint. The Constitution Court can also process this and must also rule in 30 days after the complaint has been made. And on disputes on organization that is done before the election on the counseling of the ruling is the fact shows that this need

further investigation then they must decide on the timeframe and the court must also rule in 2 months in such cases.

Republic of Tajikistan makes its decision or makes its ruling which has been complete made by ruling parties and also for citizen who feel that a right of voting has been violated and in concrete way or in another words this now on must be fulfilled and often times this is cost by. In many cases there are cultural factors that influence where in certain locations the election was conducted in the grey.

In the Republic of Tajikistan the incidents under my jurisdiction where we investigate into a complaint by the Islamic Awakening Party on the upper and lower chamber of Tajikistan on the 25th May 1999 on the Article 49 of the constitution. The Islamic Awakening Party of Tajikistan, we can say that the political party is functioning well in the Islamic Party is the only party that is registered in Tajikistan. And this complaint was made by the Islamic Awakening Party and it shows that the Constitutional Court can answer question such as this. And according to the vote of the members of the Islamic Awakening Party, on the appointment of representatives and the transfer of mandate from one representative to the next in according way of the list that has been put out by the party and in accordance to the law Tajikistan divided into upper and lower chamber. That is the banning or not allowing the general election this is not related to the members of general election but has been appointed by these parties that banned and relation to the candidates that was put for by the Islamic Awakening Party. So there was a dispute on the names of the representatives that was listed and they were arguing about Article. 57 about giving allowing the time limit that was allocated by the constitution. And in this case Tajikistan was following the international standard that is in Article 21 Duham, where everyone has the right to participate in the its government directly or indirectly to the representatives that was elected. The constitution Court studied parts of the constitution of Tajikistan and became material for argument on the election of the Representatives of the Parliament. And for the members who have already enter the chamber office the further time limit and in line with article 51 and 47 we have noted that these articles is not in contrast with the constitution of Tajikistan and that's resolve the dispute and no more complaint from the Islamic Party of Tajikistan. I would like to note that the important of the first rule of the violation of the rights of the citizen to vote, by looking at the number of the violation taking place and also the time and the limited time of the general election.

We could do it in collegial way and we have to look the facts of where the violation has taking place and the law doesn't permit the institutional legal system to take initiative but has to work for complaints. And we also have to determine the actuality of the place, and that is why the Constitutional Court also ensures the process of the general election.

Furthermore in terms of protecting the voting rights the law guarantees this right and implementing these decisions or these ruling in the Commission of Election. We must first of all make an investigation before bring it for the Constitutional Court

Once again I would like to thank you to all of you for your patience.

Moderator

Honorable Mahkam Makhmudov, Thank you for the presentation. According to the schedule we have to finish at 3.55, I've been told by my colleague that although we start late 10 minutes, but the basic principle that we have to finish on time. That is the basic principle in keeping the time limit. So we have now about less 10 minutes for Q&A and responses. Please.

QUESTIONS AND ANSWERS

Questions

Zulkifli:

Honorable Chairman, my name is Zulkifli, I am from Malaysia. I have a question and I address this question to honorable Deputy Chief Justice of the Constitutional Court of the Indonesia. In your paper, Deputy Justice, you mention that there are 3 types of disputes related to the general election. Namely, 1 - Administrative violations, 2 criminal violations and 3 disputes over the results of the general election and then mention also the criminal violations of the general election are held at the district court and handled by special judges. My question to you is this. What happens to a case or a candidate who has found guilty of criminal violations by the district court, and that conviction of that candidate has an impact on the result of the general election. That is my question. Thank you.

Interpreter (Indonesian-English):

Hon Achmad Sodiki, Indonesia. I would like to say this in bahasa Indonesia.

The candidate that conducts bribery or money politics the court has already implemented the decision that a candidate performs this action will be disqualified because the votes that he received that carried out in a dishonest way in an unfair manner. Therefore, he has violated the principles of democracy. Because the candidate in this case this is of 2 people which means that we cannot conduct reelection and those considers a winner is the second candidate. That's all from me

Moderator:

OK, second, question? The gentleman behind *bapak* from Malaysia. Raised his hand before? He has responses, please. No further response. *Ibu* from behind please. Please give your direct question to the panelist.

Ms. Valina Singka Subekti:

This is a very short question it is about the state contribution to the political parties. This is from Turkey he said that there is state contribution to political parties could you spell it more details, please. To political parties who gets more than 10% of the total eligible votes, how much money, I mean, how do you counted to the money, I mean. And also I would like to ask how about in

Spain? There is also state contribution to the political parties, also from Spain and Egypt, I think. Not Spain, Egypt, sorry.

Answers

Hon. Alparslan Altan:

Yes in Turkey political parties are contributed by the state. First of all in order to contribute to political parties all parties should reach 10% of votes. If any party gets more than 7% then this party being eligible to be presented in the parliament then those parties are also being contributed by state. In Turkey we have more than 60 political parties, I don't know the exact number of the parties in Egypt. Yes, 65 political parties we have, out of those political parties, four of them are contributed by the states. Of course, as it has been said before, this was received during the elections. I don't know if this has answered to your question.

Moderator:

Now to *Ibu* with the brown *jilbab*. Silakan ibu.

Ms. Sunny:

Thank you, I would like to use Bahasa.

First of all, I would like to direct my question to Mr. Sodiki. In Indonesia, at this time, there has been a lot of discussions about electoral disputes, and we can see that in the minutes of meeting, the petition towards this election must be petitioned 3 X 24 hours after the recapitulation, after the numbers have been counted. But sometimes we know that some of them, we consider that there have been some violations, especially in terms of money by the winner, but because of the limited time which is three days, sometimes those candidates who lost at the elections could not put forward their case to the court. What is the basis of the Constitutional Court. Why give a limitation of three days. This question is directed to the Constitutional Court of Idonesia. What is the time limit to put forward the petition after the election. Thank you very much.

Moderator:

Answer by the Indonesian. The others, maybe you can ask later on, because of the time limit.

Mr. Sodiki:

According to me, the limitation of 3 times 24 hours is based on the law and the constitution which is then adopted into the regulations of the Constitutional Court and therefore we are bound by the Constitution itself. So if you want to change it, then we need to change the Constitution as well. Of course, the time given for them is inadequate but the Constitutional Court have also prepared a method that could be used in which they can put a petition by fax. So they will not be left behind in preparing the evidences. This is one way that I could put forward the petition and that is through the use of technology.

Moderator

Question? And I have to say I am sorry that there are no other questions.

REVIEW AND CLOSING OF PART II SESSION III
Moderator : Dr. Denny Indrayana, S.H., LLM. Ph.D

This is the end of session three, part two. Within the election complaints, we have heard four countries' experience, I don't want to conclude anything, I have to 5 minutes to make a final remark, but I think it is better for me to give all of you to make your own conclusions. Of course there are some highlights which is the importance of how the court is dealing with the complaints in elections. It is very important. It is one of the pillars, a very important pillar in order to produce a democratic elections and we have discussed about thresholds, state contributions etc. and of course this experience may be different between countries, but for example in Indonesia, I think it is correct to argue that without the existing of the current constitutional court, the two latest elections in 2004 and 2009 will not be as democratic as we see right now. It is a very big contribution from the court for us to have a fair and democratic elections. Please give a big round of applause to all the speakers. Thank you for your attention.

C. CLOSING CEREMONY

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REPORT OF THE SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AT THE CLOSING CEREMONY OF THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

Wednesday, July 14, 2010

Bismillahirrohmaanirrohim,

Assalamu'alaikum warahmatullahi wabarakaatuh.

A very good evening and peace and prosperity to all of us.

- Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, **Prof. Dr. Mohammad Mahfud MD**. and Honorable Justices of the Constitutional Court of the Republic of Indonesia,
- Honorable Chief Justices and Justices of Constitutional Courts and Equivalent Institutions from friendly countries participating in the Conference,
- Distinguished Ladies and Gentlemen.

Let us praise and convey our gratitude to The One Almighty God for His blessings and guidance enabling us to attend all events held in **the 7th Conference of Asian Constitutional Court Judges** up to this evening's closing ceremony.

This is the second time in this conference that I find myself before an international gathering of judges. You must be aware that you are the most terrifying audience on earth. One gets the feeling that when addressing you, one is not there as a mere speaker... it is rather awkward. But I love doing it.

Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, Distinguished Ladies and Gentlemen

The series of events held in **the 7th Conference of Asian Constitutional Court Judges** were opened with the signing of the Declaration of the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions on Monday, the twelve of July 2010, at the Constitutional Court of the Republic of Indonesia's building. The declaration was signed by the delegates of the Constitutional Courts and Equivalent Institutions from **seven** founder countries, namely: **Indonesia, Republic of Korea, Malaysia, Mongolia, The Philippines, Thailand, and Uzbekistan**; and it was witnessed by all conference participants.

With the establishment of this Association, I hope that we can develop a closer relationship among Constitutional Courts and Equivalent Institutions in the Asian region in order to promote the development of democracy and the rule of law in the Asian region. This is consistent with the objectives of the establishment of the Association, namely to promote the protection of human rights, to guard democracy, to promote the implementation of the rule of law, to actualize the administration of an independent constitutional judicature as well as to establish cooperation and exchange experience among members of the Association.

Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, Distinguished Ladies and Gentlemen

As many as **sixty-five participants**, consisting of delegates from **twenty-six** countries, and **two** international organizations, as well as **eighty-þve observers from Indonesia,** including state institutions and university academicians have attended the 7th Conference of Asian Constitutional Court Judges opened by His Excellency the President of the Republic of Indonesia on the thirteenth of July, 2010.

For 2 days, delegates from **twenty-six** countries have presented various aspects related to their experience in arranging and practicing general election organization in their respective countries, including among others, general election system, issues and weaknesses identified in the rules and practice of general election organization and mechanisms for handling disputes related to general elections. These issues were further elaborated_upon in the process of discussion involving not only conference participants, but also conference observers.

We intend to compile the entire process of conference and paper presentations of the speakers and panelists in the form of conference proceedings which, Insya Allah, will be presented on Thursday, the fifteenth of July, 2010. We hope that all parties, particularly the Constitutional Courts and Equivalent Institutions from the countries participating in the conference, will be able to use the outcomes of this conference as inputs for the purpose of building and developing a constitutional democracy and the rule of law in the respective countries.

Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia, Distinguished Ladies and Gentlemen

We are fully aware that the organization of this conference has not been determined only by the preparations that we have made as the organizing committee, but also by the commitment of conference participants. Therefore, please allow us to express our deepest gratitude and to show our highest appreciation to all participants for their commitment and cooperation during the organization of this conference. We would also like to thank **the Konrad Adenauer Foundation**, as our partner in the organization of this conference.

Perfection only belongs to Allah. Accordingly, from the bottom of our heart, we would like to offer the delegates and all conference participants, our sincerest apologies for any weaknesses and shortcomings in the organization of this conference.

Please allow me to bid farewell to the Honorable Chief Justices and Justices of Constitutional Courts and Equivalent Institutions from friendly countries participating in the conference. I hope you have a very pleasant journey back to your homeland. Please convey our warm regards to your family members, colleagues and the people in your country.

Before I end my report, I would like to invite you once more to commit to your responsibility "Let us enforce the law even if the sky should crumble upon us".

Thank you.

Billahi taufiq wal hidayah,

Wassalamu'alaikum warahmatullahi wabarakaatuh.

SECRETARY GENERAL,

JANEDJRI M. GAFFAR

Konrad Adenauer Stiftung

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REMARKS AT THE FAREWELL DINNER

Clauspeter Hill
Director of Rule of Law Program, Konrad Adenaur Stiftung - Asia

- **Honourable Chief Justice Mohammad Mahfud, President of the Constitutional Court of the Republic of Indonesia,**
- **Honourable Chief Justices, Presidents, Chairpersons and Justices,**
- **Distinguished Participants, Ladies and Gentlemen,**

Thank you for allowing me to say a few words on behalf of the Konrad-Adenauer-Stiftung as the co-organizer and co-sponsor of this 7th Conference of Asian Constitutional Court Judges.

First of all, I wish to extend my sincerest congratulations to the founding members of the newly established "**Association of Asian Constitutional Courts and Equivalent Institutions**". Under the excellent leadership of Hon'ble Justice Lee, Dong-Heub of the Constitutional Court of the Republic of Korea, with great commitment of his Court and all other members of the preparatory committee we were able to complete the draft Statutes in only three sessions.

It was one of the most ambitious objectives of our Rule-of-Law Programme to see this association being formed. We started to gather judges from Constitutional Courts throughout Asia for the first time in 2003 here in **Jakarta** when the Mahkamah Konstitusi Republik Indonesia was just established. Already then, the judges developed a spirit of brethren, of colleagues who have to fulfil important functions in their respective states.

Meetings followed in Thailand, Mongolia, the Philippines and Korea where the idea of such an organisation was further developed. Last year we met again in Ulaanbaatar and now we came back to Jakarta to witness the birth of

this Association. I hope its members will actively engage in the exchange of information on their jurisprudence and in sharing ideas about their common concerns. Then, I am confident the membership will grow and Constitutional Review and Adjudication will play its important role in safeguarding the rule of law, citizens' rights and last but not least democracy.

One important issue in this context is the electoral system of each state. Quite a number of reports of important decisions by the courts in our last conference in Mongolia highlighted cases involving the review of election complaints. The issues raised extended from voters registration and drawing the boundaries of constituencies to conducting the balloting and the use of voting machines.

That is why we discussed about election laws in the various countries. There would have been many more aspects to discuss as the brief interventions have indicated. However, the presentations were inspiring and will give food for thoughts and exchanges in the future. The different views about the significance of electoral principles and their relation to other overarching values of a constitution would be worthwhile to explore in a separate seminar.

The Konrad-Adenauer-Stiftung is grateful for the opportunity to be part of this whole endeavour throughout the last years. As I said earlier, the promotion of the concept of Constitutional Review by specialised courts is one of the major objectives in our Rule-of-Law Programme not only in Asia but worldwide. The courts from other regions of the world like from Chile, Colombia, Egypt, Morocco, Mexico, Turkey and Venezuela who are present today are witness to that.

Last but not least, I wish to thank the organizing team both in the Constitutional Court of Indonesia and KAS office in Singapore for making this event unforgettable and successful. I look forward to our future cooperation to see the "Association of Asian Constitutional Courts and Equivalent Institutions" going from strength to strength.

Terima Kasih !

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REMARKS
SERGUEI KOUZNETSOV
HEAD OF THE UNIT OF REGIONAL COOPERATION PROGRAMME
VENICE COMMISSION OF THE COUNCIL OF EUROPE

Your Excellency President of the Constitutional Court of Indonesia
Distinguished Participants of the Conference,
Ladies and Gentlemen,

First of all I would like to thank the Constitutional court of Indonesia for the invitation to attend the 7th Conference of Asian Constitutional Court Judges. It has been a very interesting experience to participate in this important event.

It is a great pleasure and honour to address you tonight on the occasion of the closure of the 7th Conference of Asian Constitutional Judges.

The Venice Commission is a consultative body of the Council of Europe – which is different from the European Union - in the field of constitutional law in the broad sense. Its real name reveals its purpose: it is the *European Commission for Democracy through Law*. However, as it meets four times a year in Venice, it is referred to as the "*Venice Commission*".

The Venice Commission promotes the basic principles of democracy, the protection of human rights and the rule of law. These values are of course not only European, but truly universal ones and they are part of our common constitutional heritage.

The Commission's independent members give advice on draft constitutions and para-constitutional texts, such as laws on the constitutional court, minority laws or electoral legislation. This advice is given on request by the member states and the statutory bodies of the Council of Europe.

Since its establishment, the Venice Commission has been actively working not only in the field of legal advising on draft legislation but it has also played an important role in co-operation in the area of constitutional justice and elections.

The subject of the 7th Conference of Asian Constitutional Court Judges deals precisely with these two main areas of our work and we are grateful for the opportunity to participate in this meeting.

Constitutional courts and courts with similar jurisdiction have and will continue to play a special role for the Venice Commission and you may know that the Venice Commission has, since its outset, always supported the creation of these courts which are the independent guarantors of the constitution and fundamental rights and freedoms.

In fact, in nearly all Central and Eastern European countries, and in some non-European countries constitutional courts have been established with our assistance.

We work with Constitutional Courts to promote an exchange of information and experience between them and equivalent bodies, by organising seminars and conferences and by publishing the Bulletin on Constitutional Case-law and the database CODICES. In addition, the Venice Commission provides a confidential on-line forum for the courts where they can quickly request and exchange information relating to pending issues.

Since participation in Ulaanbaatar Conference in 2005, Venice Commission always had a close co-operation with "Conference of Asian Constitutional Court Judges", sponsored by the Konrad Adenauer Foundation, which also co-organises present event. From this meeting the Venice Commission strongly supported the initiative to establish Asian group as an Association.

We very much welcome that it was possible to finalise in April 2010 in Seoul the draft "Statute of the Association of Asian Constitutional Courts and Equivalent Institutions" and that this important document was signed at the beginning of this Conference.

The Venice Commission hopes to establish close relations with the Association and we would like to propose to conclude a co-operation agreement. We are sure that it would give an additional impulse to our future co-operation.

In 2005 the Venice Commission invited Asian courts to contribute to CODICES database and to participate in Venice Forum Newsgroup via liaison officers. A number of courts already have appointed such officers, for example, Indonesia, Korea, Mongolia, the Philippines and we invite other countries participating in this conference to do the same.

The Venice Commission co-operates not only with Constitutional Courts in Asia but also in Europe, Africa, Latin-America: we actively co-operate with associations of courts of Arab countries, French and Portuguese speaking countries.

In 2009 the Venice Commission and Constitutional Court of South Africa invited all partner courts to the 1st World Conference on Constitutional Justice in Cape Town. This event was highly successful.

In 2010 the 2nd Congress of the World Conference will take place in Rio de Janeiro on "Separation of powers and independence of constitutional courts and equivalent bodies" (16-18 January 2011). All member courts of the Association are cordially invited. Invitations have been sent but if a court did not receive please contact us and we will be happy to send you the invitation and all relevant materials. We hope to have a strong Asian presence during this event.

The declaration of the World Conference adopted in Cape Town set up a Bureau composed of the groups with the mandate to draft a statute for the conference. This draft statute will be discussed in Rio but we are looking forward to receiving comments from the courts in advance. We hope that members of the Asian Association will also become members of the World Conference.

I wish good luck and much success to Association of Asian Constitutional Courts and Equivalent Bodies.

Thank you very much for your attention.

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REMARKS
HIS EXCELLENCY MR. CHUT CHONLAVORN
PRESIDENT OF THE CONSTITUTIONAL COURT
OF THE KINGDOM OF THAILAND
AT CLOSING CEREMONY OF
THE 7TH CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES
AT RITZ CARLTON HOTEL, JAKARTA

The Honourable Chief Justice of the Constitutional Court of the Republic of Indonesia,

The Honourable Presidents and Chief Justices,

Justices,

Distinguished Participants,

Ladies and Gentlemen,

As the Seventh Conference of Asian Constitutional Court Judges is drawing to a close, I would like to take this opportunity, on behalf of all delegations to this Conference, to express our sincere appreciation to all concerned.

First of all, I wish to recall the presence of His Excellency the President of the Republic of Indonesia yesterday morning at the opening ceremony of the Conference. His opening remarks serve as an inspiration to us all in our ensuing deliberations. Our profound gratitude therefore goes to His Excellency in this regard.

Second, I would like to thank the Honourable Chief Justice of the Constitutional Court of the Republic of Indonesia, the Constitutional Court of the Republic of Indonesia as well as the Regional Office of the Konrad-Adenauer-Stiftung, Singapore, for organizing this Conference and for a very warm welcome and hospitality extended to all of us upon our arrival in the bustling city of Jakarta and during our stay here.

During the past two days, we have the good opportunity to exchange information and views regarding election law of the countries participated in this Conference. I trust that the process enables us to learn from one another almost every aspect of election laws, with a view to promoting free and fair election which is a very important element of representative democracy. So, I think the discussions throughout this Conference were very useful for all of us. As in all meetings, the cross fertilisation of ideas that ensue are for all to take away.

Last but not least, I wish to thank members of the secretariat for ensuring that the Conference runs smoothly and successfully. I commend them for the industry they have exerted in the execution of the Conference programme.

In closing, I hope that the prevailing atmosphere of friendship and goodwill among us will yield great benefits to our cooperation in the years to come. I wish to see all of you again in the next Conference of Asian Constitutional Court judges.

Thank you.

Constitutional Court of Korea

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

REMARKS
DONG-HEUB LEE
JUSTICE OF THE CONSTITUTIONAL COURT OF REPUBLIC OF KOREA

Honorable Presidents, Chairmen and Justices,

Distinguished Guests, Ladies and Gentlemen:

First of all, I would like to extend my sincere appreciation to the Constitutional Court of Indonesia for all the efforts and dedication that led to the successful completion of the final Preparatory Committee Meeting for the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions and the 7th Conference of Asian Constitutional Court Judges under the theme of "general election law."

Also, I would like to take this opportunity to thank the Konrad Adenaure Foundation for the unwavering support and cooperation for the development of constitutional adjudication in the region of Asia.

During the final Preparatory Meeting, we successfully carried out our important agendas including adoption of the finalized Statute of the Association and official launch of the Association. Looking back, we have come a long way towards establishing a regional body of constitutional adjudicative institutions in Asia, but I believe it was our concerted effort and enthusiasm towards the common goal that made it possible for us to yield today's fruitful outcome. As a chairperson of the Preparatory Committee, once again, I would like to thank all of the members of the Association for the attention and contribution so far.

As the first official stride taken by the Association of Asian Constitutional Courts, the Preparatory Meeting of the Board of Members will be held in Seoul, Korea around May 2011. During the Meeting, the exact date of the Inaugural Congress will be fixed. And, the Constitutional Court of Korea is considering to host the Inaugural Congress in sometime around May to July, 2012.

In addition, during the World Conference on Constitutional Justices to be held in Brazil, from January 16 to 18, 2011, a separate conference for countries related to the Association of Asian Constitutional Courts will be held on January 16, 2011, This would be a good opportunity for the interested countries to discuss the future activities of the Association including the Inaugural Meeting and expansion of membership.

Honorable Presidents, Chairmen and Justices,

Distinguished Guests, Ladies and Gentlemen:

I would like to close my remarks by expressing my gratitude to the Constitutional Court of Indonesia once again for successfully preparing for this meaningful Meeting and Conference.

Also, I wish the Association of Asian Constitutional Courts and Equivalent Institutions to have a continued success and hope all the happiness and prosperity with every one of you.

Thank you.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

CLOSING REMARKS OF CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AT THE CLOSING CEREMONY OF THE 7TH CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

Jakarta, 14 July 2010

Bismillahirrahmanirrahim,
Assalamu'alaikum Warahmatullahi Wabarakatuh,

Good Evening,
May peace and prosperity be upon us all.

- Honorable Chief Justices and Justices of Constitutional Courts and Equivalent Institutions from countries participating in this conference,
- Honorable Justices of the Constitutional Court of the Republic of Indonesia, and
- Distinguished Ladies and Gentlemen,

On this occasion, I would like to invite you to convey our gratitude to the One Almighty God for His grace and blessings enabling us to gather together in this magnificent forum in a healthy condition.

I am very happy and at the same time feel very honored that I can be here again today among the participants of the conference, in order to deliver my remarks in the closing ceremony of the 7th Conference of Asian Constitutional Court Judges.

During the recent days, since the 12th up to the 14th July 2010, the conference has been running in an uninterrupted manner, without any significant obstacles. Accordingly, it is appropriate for us today to feel relieved and joyful because we have been able to complete the entire series of events in this conference properly.

In this conference, we have agreed upon the "**Jakarta Declaration**" regarding the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions, which was signed by 7 countries on the 12th of July 2010 at the Constitutional Court of the Republic of Indonesia.

Distinguished Ladies and Gentlemen and participants of the Conference,

The conclusion of this Conference is not the end of our work. Rather than that, it is the initial step towards a much larger agenda in the endeavors for strengthening democratic values. This Conference would not have much significance without the commitment and concrete measures by all parties actively involved in this conference. This conference can only be considered as a successful one if the information, knowledge and experience shared here are used as important and useful inputs for supporting the uninterrupted implementation of the democratization agenda in each of the participating countries, and especially for providing assurance for the application of the principles of constitutional state through more democratic, just and fair general elections.

The greatest challenge that we are likely to encounter in the future is ensuring that the values of democracy are applied in every aspect of national life, which can be started with holding democratic general elections. The application of the values of democracy is significant, not only for protecting the people against various forms of injustice, but also for promoting the realization of improvement in the equitable welfare of the people.

Distinguished Ladies and Gentlemen,

In the face of such great challenges, we require accurate measures and strategies enabling us to address and overcome them. The 7th Conference of Asian Constitutional Court Judges has been the right momentum for us to expand our horizons and to gather plenty of information that are expected to trigger progressive ideas in determining our future actions and anticipating the many challenges of democratization, including consolidating democracy.

For democracy to function properly, both from the aspects of procedure as well as substance, the fundamental pre-requisites need to be fulfilled first, such as the organization of general elections that guarantee freedom to vote, awareness of citizens to participate, and comprehension of fair competition. Even though general election is not the only thing that matters in democracy, a democratic system requires free, honest, just and competitive general election.

Each country has a different level of understanding of democracy. A certain level of understanding of democracy is also likely to generate certain experience in upholding democracy. In practice, such level of understanding and experience, as conveyed by several speakers in this conference, will have a strong influence on the system, procedures and rules applied as a basis for the organization of general election in each respective country. It is therefore reasonable that each country has different systems, procedures and rules in the organization of general election. Such difference is caused by the differences in the philosophical and sociological conditions of each country.

Through this conference, we have converged various backgrounds, experiences and knowledge related to the application of the values of democracy and the handling of constitutional cases or other state administration practices,

including general election, the settlement of electoral disputes, as well as the extent of the role of Constitutional Courts or equivalent institutions in safeguarding general elections in order to assure that the values of democracy and the principles of constitutional state are applied properly.

I believe that this conference has generated a number of brilliant ideas and constructive recommendations for the improvement of the implementation of democratic general election in the future.

Distinguished Ladies and Gentlemen, Participants of the Conference,

In connection with the mechanism for the settlement of electoral issues, one of the interesting facts is that general election can become an indicator of the implementation of judicial system in a democratic life. The option to settle electoral disputes through court procedures, and avoiding violence, in addition to compliance with court decisions, indicate the existence of a relatively high level of legal awareness, both among politicians as well as among the people in general.

Legal settlement of electoral disputes at court is expected to become a strong support for the enforcement of the rule of law, considering that electoral disputes are sensitive and they are related to extensive public involvement, hence they can potentially affect the overall life of democracy. In this regard, we have to say that often times the problems do not lie in the politicians, but rather in the capacity of the court in examining and deciding upon cases in general elections.

The success of a court in handling electoral disputes will also contribute to determining the process of democratic consolidation in a country, thus creating confidence among all elements of the state in the rule of law as the principle of democracy that serves as a rule that must be complied with and they can help avoid violent solutions which are inconsistent with the values of democracy.

In addition to the foregoing, the settlement of electoral disputes, either in legislative election or executive election, conducted by a Constitutional Court or an equivalent institution as a judicial body, indicates public recognition of the role and independence of the court in conflict resolution, and at the same time it indicates the relatively better level of legal awareness among citizens.

The above-described matters reflect rather encouraging improvement in the development of law and judiciary in a country. This conference provided us with excellent opportunity to elaborate on various inputs that can be used to identify the best role that can be assumed by Constitutional Courts and equivalent institutions in resolving problems arising in general elections. In my view, the exchange of information in the conference has developed into an interesting discourse and has provided valuable input for the further strengthening of the role of Constitutional Courts and equivalent institutions in dealing with challenges in the organization of general elections in their respective countries.

In line with the above, this conference has provided affirmation of the importance of a serious implementation of every effort for the enforcement of General Election law through effective methods. The effective enforcement of General Election law is a pre-requisite for the realization of democratic general election. An effective mechanism for the settlement of General Election-related legal problems is required in order to maintain honesty and fairness in general elections.

Such mechanism is important, not only for maintaining the democratization of General Elections, but more importantly, for ensuring that such mechanism i sable to safeguard and protect the citizens' suffrage against manipulative actions committed by certain parties.

Therefore, the future challenge lies in formulating a mechanism for the effective enforcement of the General Election law which can project future problems. It is expected that such designed mechanism will not be limited to prioritizing certainty only with regard to the wording of the provisions of the law, but more than that, the substantive contents of the rule itself. In other words, we cannot allow the mechanism for the enforcement of General Election law to be merely procedural in nature. Rather than that, it has to be more substantive and it should not allow for any possibility of marginalizing justice.

We can certainly agree that general election practices to be organized in the future should be built and should be based upon an honest and fair system capable of maintaining stable and conducive conditions, thus capable of portraying a high quality of democracy. We genuinely wish to see that all debates, conflicts and disagreements end once the final results are known. Even if that is not the case, the settlement should be strictly based on the rule of law, without opening even the slightest opportunity for any effort to marginalize justice. By doing so, the expectations of the majority of people as holders of the highest level of sovereignty will be satisfied and at the same time they will be protected through the process of general elections with each of the phases thereof being protected and supervised properly.

Distinguished Ladies and Gentlemen,

The participants have been involved in in-depth dialogues and discussions about key issues faced in general elections. Finally, this conference is expected to provide positive and constructive inputs for the organization of more democratic general elections in the countries participating in this conference, and hopefully we can use it as a continuous forum for strengthening coordination and cooperation in support of the endeavors for the settlement of global issues of democracy.

To conclude my remarks, I would like to congratulate you for **the 7th Conference of Asian Constitutional Court Judges**. To all participants of the conference, I would like to express my heartfelt gratitude and the highest appreciation for your participation in the successful organization of this conference.

To all participants who will be leaving for your home countries, I bid you farewell and I pray for your safe journey to your destinations. I wish you good luck in the performance of your daily duties and success awaits us all.

By saying ***Alhamdulillahirabbil ëdamin***, I declare that **the 7th Conference of Asian Constitutional Court Judges** is officially closed. May the One Almighty God grant His perpetual grace and blessings to us all.

Thank You.

Wassalamu'alaikum warrahmatullahi wabarakatuh.

The Constitutional Court of

The Republic of Indonesia

Chief Justice



Prof. Dr. Moh. Mahfud MD



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

SUMMARY REPORT

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

The Ritz Carlton, Jakarta
12 – 15 July 2010

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

SUMMARY REPORT

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

The Ritz Carlton, Jakarta 12 – 15 July 2010

OPENING CEREMONY

1. The 7th Conference of Asian Constitutional Court Judges was held in Jakarta, Indonesia, on 12-15 July 2010.
2. The Conference was attended by representatives of Constitutional Courts and Equivalent Institutions from 26 countries and 2 observers.

   The List of Delegates appears in **Annex II.**
3. **Mr. Janedjri M. Gaffar**, Secretary General of the Constitutional Court of the Republic Indonesia, presented a report of the organization of the Conference. In his report, he noted that the Conference is aimed to exchange views and share experiences concerning the election law and systems not only among countries in Asia but also countries from other regions such as America, Middle-East, Africa and Europe. He also explained that in order to reach wider audience, the Conference is broadcasted alive through video conference facility in 33 provinces including their universities and video streaming through the Indonesian Constitutional Court Website.
4. **Hon. Prof. Mohammad Mahfud M.D.**, Chief Justice of the Constitutional Court of the Republic of Indonesia, in his remarks welcomed all participating honorable judges and delegates to Jakarta. He further stated that the theme of the Conference of the election law is of most relevant with the

present conditions of many countries in Asia in which undergo transition to democracy. It is hoped that the exchange of views in the Conference will not only enhance cooperation and understanding among countries in Asia and beyond but also to promote the quality of election which in turn enhance the quality of democracy. He then reiterated the role of Indonesian Constitutional Court to ensure the election law is implemented properly through the adjudication disputes regarding the national and regional election results.

The remark appears in **Annex A2.**

5. The Conference was officially opened by **H.E. Dr. Susilo Bambang Yudhoyono**, President of the Republic of Indonesia. He, while applauding the signing of the Jakarta Declaration of the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions on 12 July 2010, stated that the theme of "General Election Law" is relevant and forward-looking in relation to the dynamic of democracy currently happening in many parts of the world. He then presented his views regarding the need of comprehensive, firm and consistent detail and clear election laws in order to support credible elections as a formal decision making process. He also expressed the need to develop a credible election commission and high participation of the people in election processes. He further reiterated the election is in the real sense of the implementation of rule of law as well as the exercise of democratic values, freedom, equality and people's participation in formal political process.

6. He closed his remarks by conveying that after experiencing various ups and downs of electoral processes and democracy since 1945, it can be said that democracy and elections in Indonesia, while still observing universal criteria, are nurtured by local values (home-grown). In that process, he appreciated the role of the Constitutional Court in ensuring the quality of democracy through its functions in adjudicating challenges regarding various aspects of elections.

The remark appears in **Annex A3.**

SESSION ONE: CONCEPTS OF ELECTORAL SYSTEMS IN COMPARISON

7. Session One focused on exchange of views on issues that could benefit from attention in the different concepts of election systems adopted by states. These concepts cover a broad range of state practices, being those in federal and unitary states, common law and statutory law countries, and countries in transition or in different stages of development. Session one was divided into two parts, each part consisting presentation by speakers and discussion by panelists.

A. Part I

8. Part I of Session One was moderated by **Hon. Justice Harjono** of the Constitutional Court of the Republic of Indonesia.

9. **Hon. Dong-Heub Lee**, Justice of the Constitutional Court of the Republic of Korea, presented that election is an important means for the people to execute their political rights. In the Republic of Korea (RoK), the constitutional court guarantees the people's political rights based on the doctrine of popular sovereignty. The Election System of the RoK practices the basic principles common to the democracy practices of other democratic States, such as the right to vote for citizens reaching a certain age, the freedom of choice, the principle of one person – one vote, the obligation to vote directly and personally, and most importantly the assurance of non-discrimination. The types of the elections prescribed in the Public Official Election Act, which is the basis of the Election System in the RoK, are the presidential election, the election for the National Assembly members and the local elections for heads of local governments and members of local councils.

10. Restrictions are used for certain aspects of the election systems, such as in the campaign process, to avoid corrupt practices, and other detailed restrictions such as the time for campaign, expenses used, restrictions of subjects, and the need for the citizens to carry out their voting rights in the Country, which means if any citizens are abroad, even for vacation, they cannot practice their right to vote. Other restrictions are put upon the system, all to ensure a transparent and clean Election Process.

11. **Hon. Tun Zaki Tun Azmi**, Chief Justice of the Federal Court of Malaysia, highlighted the statement made by the President of the Republic of Indonesia who said that fair and properly regulated election is the foundation of democracy. He gave explanation on the electoral system in Malaysia in which the Election Commission has the function to monitor and regulate the election as independent body. He explained that any person eligible for election as a member of the Legislative Assembly of a State may be nominated as a candidate for election. The nomination can be submitted to Returning Officer on the nomination day, afterwards followed by campaign activities which cease at midnight before the polling day and election on polling day in which the announcement of the candidate obtaining the majority votes is also given at the same day. If there is dissatisfaction with the decision of the election, an election petition can be submitted to Election Court. He further elaborated that in Malaysia election offences are divided into four categories, i.e. offences by any person, offences by election officers, offences of promoting feelings of ill-will of hostility and offences related to the obligation to maintain the secrecy of election. Meanwhile corrupt practices are also part of election offences such as personating, treating, undue influence, bribery, and other form of corrupt practices. If a candidate is proven to conducted election offence then his candidacy

is avoided. He concluded by saying that the existing election laws and regulations ensure a free and fair election as well as transparency of the election process in Malaysia.

12. **Hon. Chalermpon Ake-Uru**, Justice of the Constitutional Court of the Kingdom of Thailand, presented an overview of Thailand's electoral system as applied in the general election of members of the House of Representatives. Rules regarding the election of members of the House of Representatives are stipulated in the Constitution of the Kingdom of Thailand. Thailand adopted a direct universal suffrage which means that every citizen, except those who are excluded by law, can directly participate in the vote and elect his or her representatives without the involvement of intermediaries.

13. For purposes of overseeing the election process, the Kingdom of Thailand has established the Election Commission as an independent constitutional organ. The Election Commission consists of a Chairperson and other four Commissioners appointed by the King with the advice of the Senate from persons of apparent political impartiality and integrity. The Election Commission is the organ that control and hold, or arrange for an election or selection of members of the House of Representatives, senators, members of a local assembly and local administrators, including powers and duties to conduct investigations and inquires for finding facts or giving decisions on problem or disputes arising under the laws referred to above.

14. **Hon. Jose Antonio Viera-Gallo Quesney**, Justice of the Tribunal Constitucional de Chile, presented that the electoral system in Chile was established after the revolution. He explained that Chile has a long tradition since the 1970s. The democracy system in Chile was reestablished in 1990. The election is used to vote for president, parliamentary, municipal or district level. The election is conducted by using simple majority; meanwhile council members are elected by proportional system. The electoral justice system is comprised of a tribunal and regional electoral courts. They are responsible for verifying, in general, that elections are conducted according to law. He elaborated that congressional elections are governed by the "controversial" binomial systems, in which parliamentary election are based on the election of two candidates per district or other constituency, if dealing with representatives or senators. He further explained that in Chile electoral system has two problems which is less participation of young people to vote and the controversial "binomial" system of election for the parliament. In order to address those issues, the concept of binomial systems has been widely discussed since its creation in 1990. Meanwhile the electoral system will soon be significantly amended by the automatic enrollment of voters and also to allow Chileans who settled abroad to vote at consular posts overseas. He expressed his hope that by the current effort, the youngster's participation to vote can be boosted.

15. **Hon. Claudio Ximenes,** President of the Tribunal de Recurso Timor-Leste, stated that Timor-Leste is a unitary form of a state with the legal system based on civil law. Since its independence in 2002, there were two presidential, parliamentary and traditional leaders' elections. He then described the rules concerning general elections, elections of the president, parliament, control over the elections, and administrative regulations concerning the election processes. The basic principles of all elections are universal, free, equal, direct, secret and periodic. Registration of voters is compulsory. The principle of proportional representation is used elect officials. On the other hand, the election of President is held separately from the election of members of parliament. Presidential election is held directly and until one of the candidates obtains more than half of the votes. However, the Prime Minister is not elected through an election; rather he/she is designated by the party or coalitions of parties which hold the majority in the Parliament.

16. Moreover, according to the Constitution, control over the elections is carried over by two institutions, namely the Supreme Court of Justice and the National Electoral Commission. The Supreme Court has the mandates to, inter alia, verify the legality of political parties as well as to order their registration of dissolution, to verify the legal requirements for presidential candidates, to validate and proclaim the results of election processes. However, such a Supreme Court has yet been established in Timor-Leste. According to the Constitution, the present highest judicial organization (i.e. Court of Appeal/Tribunal de Recurso) will assume the responsibility of the Supreme Court until it is established. Administrative measures regarding the election including the law establishing the National Electoral Commission, law on the election of the President, law on the election of the National parliament and Penal Code that includes what is called in Timor-Leste "electoral crimes."

17. **Hon. Pemamiththa Abraham Ratnayake**, Justice of the Supreme Court of Sri Lanka, explained the concept of electoral system in Sri Lanka as stated in the Constitution. Sri Lanka recognizes the presidential, parliamentary, provincial councils and local authorities' elections. The President is elected at a separate election. The election for 225 parliament members is conducted under proportional representation system in which the voters will vote for the party and indicate preferences for not more than three candidates nominated by the same recognized political party or independent group. For the parliamentary election, Sri Lanka is divided into 9 provinces and each of the provinces has electoral districts. Members of parliament are elected from the provinces, electoral districts and 'National List'. The latter are elected by the Commissioner of elections according to the total votes of their parties or independent groups they represented.

18. Furthermore, the elections are conducted by the Election Commission which consists of five members appointed by the President on the recommendation of the Constitutional Council. The Supreme Court of Sri Lanka has the

jurisdiction over cases challenging the election of the President, while the Court of Appeal has the jurisdiction regarding cases related to the elections to the members of parliament.

19. During the discussion, issues were raised on the limitation of a candidate's campaign expenses, and whether a candidate may receive funding from third parties, particularly in RoK. Hon. Dong-Heub Lee responded to the question posed to him by explaining that receiving funds from third parties are allowed with certain restrictions in RoK. However the actual limit was not provided. In principle, he explained that the funds for the election campaign are provided solely by the Government.

20. Other issue was raised concerning the time frame needed by the election committee to process questions or challenged-results of the election, and also whether the reply to the question/challenge can be appealed. Hon. Chalermpon Ake-Uru responding to the issue answered that in Thailand there exist a mechanism to challenge the results of an election which must first pass the first stage of settlement through the Election Commission. He did not specify the exact amount of time needed for the Election Commission to process the challenge, but stated that it does not take very long. On the possibility to appeal or / challenge the result of the Election Committee, it was explained further that it could be made in front of the court of law.

21. Hon. Harjono concluded Part I of this Session by thanking everyone for their participation.

    The complete presentation of speakers and panelists appears in **Annex I.A1 – I.A5.**

B. Part II

22. Part II was moderated by **Prof. Hikmahanto Juwana**, S.H., LL.M., Ph.D., Academician of University of Indonesia.

23. **Hon. Jamsran Byambadorj**, Chairman of the Constitutional Court of Mongolia, presented an overview on current situation of the electoral system in Mongolia since 1990 when the people chose a democratic path of development. The ratification of the new Constitution of 1992 marked Mongolia's entry into a new democratic stage and was followed by fundamental changes in social regime, political structure, and the whole society. The 1992 Constitution had also been the foundations of a truly democratic electoral system that includes electoral rights, distribution of ballots, the procedures for organizing and conducting elections for the State Great Hural, the President, and the local self-governing organizations, which are elected by their residents. It is based on the democratic principles of democracy, justice, freedom, equality, assurance of national unity, and rule of law. The Constitutional Court, as the defender of the Mongolian

Constitution, plays an important role. In the past period, the Constitutional Court had discussed with its middle bench 8 times and 2 times with its full bench disputes relating to Constitutional violations of some articles of the Election Law, and has declared void articles violating the relevant articles of the Constitution of Mongolia.

24. It is necessary to legalize the right to recall members of the State Great Hural at any time based on the conclusion of the Constitutional Court, in cases of gross violations of the Election Law, such as illegal receipt of donations, cash and other gift hand-outs with purpose of influencing votes, organizing casting of numerous votes by one elector, voter fraud, conspiracy with members of the electoral committee with purpose of issuing false election results, and deliberately distorting vote counting. Such violations should be proven in ordinary court before being discussed by the Constitutional Court. To do so, the court needs to be provided with an opportunity to review all processes and documents related to the election. It should be noted that, although the court should have this right, the current Election Law generally precludes this right.

25. **Hon. Jose Portugal Perez**, Justice of the Supreme Court of the Philippines, stated that Elections and other democratic institutions were primarily imported into the Philippines from Western models. The emergence of institutions such as the secret ballot, referendum, political parties and legislature were products of American colonialism. The Supreme Court declared that the party-list system is a social justice tool designed not only to give more law to the great masses of our people who have less in life, but also to enable them to become veritable lawmakers themselves, empowered to participate directly in the enactment of laws designed to benefit them. It intends to make the marginalized and the underrepresented not merely passive recipients of the State's benevolence but active participants in the mainstream of representative democracy.

26. The electoral system in the Philippines also provides a mechanism for absentee voting. The system allows citizens residing abroad to vote even if they are recognized as immigrants by the country of their residence. This is affirmation that the Philippine government constantly advances electoral reforms to make Philippine elections truly democratic. In terms of the quality and social inclusiveness of elections, the major institutions in the national and political arena are still dominated by the economic and political elites. The political clans and dynasties have successfully maintained their dominance in national and local politics by adapting to the changing contours of the social, economic and political terrains.

27. **Hon. Raouf Guliyev**, Secretary General of the Constitutional Court of Azerbaijan Republic, presented that the competence of Constitutional Court connected to approval of parliamentary elections have certain limitations and the judicial investigation of Constitutional Court is confined to establishing whether the relevant documents meet the requirements

of legislation. Constitutionally, the Constitutional Court is attributed to judicial power and thus the modes of its functioning are characterized as judicial ones.

28. In this sense it would be relevant to note that the legislation of Azerbaijan does not recognize Constitutional Court as a political body. That means that the Constitutional Court is the highest constitutional body of justice and adjudicates on the issues of correspondence to Constitution and checking of legality. The intervention of Court into political processes and making the statements which carry the political nature does not conform to its constitutional status. Bearing in mind of this aspect, one should note that in its decisions the Constitutional Court does not establish the democratic nature of elections or their correspondence to modern standards, but checks the conformity of protocols of district electoral commissions to the requirements of Electoral Code. In other words, the decision of Constitutional Court concerning the approval of electoral results is not political but legal assessment. As to presidential elections, the role of Constitutional Court is limited only to declaration of results which are submitted by Central Electoral Commission.

29. **Hon. Dato Seri Paduka Hj. Kifrawi bin Dato Paduka Hj. Kifli**, Chief Justice of the Supreme Court of Brunei Darussalam, presented the electoral system in Brunei whereby the supreme executive authority is vested to the Sultan of Brunei under the Constitution. In the exercise of the executive authority, the Sultan is advised by Members of the Council of Ministers and the Privy Council, whom are also members of the Legislative Council. Brunei is currently in the process of establishing an election law to enable them to elect the 15 members of the Legislative Council that consists of 45 people. The other 30 members of the Legislative Council are appointed directly by the Sultan based on the merit of the candidate. The 15 members would then represent the 4 Districts in Brunei through general election, but until the law is in force, they are appointed by the Sultan upon recommendation by a Selection Committee, selected from all village leaders of the 4 Districts, which are elected by the people of their respective villages.

30. In addition, the Sultan shall have the power to make laws for the peace, order, security and good government of Brunei Darussalam. In exercising this legislative power, the Legislative Council debate Bills and if passed by the Legislative Council, the Bill would become law with the approval of the Sultan.

31. **Hon. Chao Hick Tin**, Vice President of the Supreme Court of Singapore, delivered a presentation about the electoral system in Singapore which is basically the Westminster model of parliamentary democracy with the executive power being exercised by the Cabinet headed by the Prime Minister. In Singapore, the President is Head of State, but is not person who has the general direction and control of the government. However,

the President of Singapore is an elected office, in contrast with the system in Malaysia and Republic of Korea. He also noted that Singapore uses a unicameral system of Parliament democracy.

32. Singapore possesses unique features in their Parliamentary system of Government that they are willing to share experiences with other nations. This distinctive feature comprises among others the "first past the post" rule, i.e. the candidate with the greatest number of votes wins the election. Singapore Parliamentary elections could also be distinct through the Group Representative Constituency (GRC), which is a constituency represented by 3 to 6 Members of Parliament, usually with larger electoral divisions in terms of population and physical area. Another unique feature of Singapore Parliamentary system is the inclusion of non-elected Member in Parliament that consists of Non-Constituency Member of Parliament (NCMP) and the Nominated Member of Parliament (NMP).

33. The Conference further discussed the modalities of having multi-party in the Parliamentary system. Some delegations raised the complexities of general election, parliamentary and electoral threshold. In Indonesia for instance, the problem persists pre-2004 when Indonesia did not adopted the "electoral threshold" policy for political parties eligible to compete in the election. Hon. Jose Portugal Perez further explained the situation in Philippines where they also have a wide range of political parties in one term of their Parliament. He stated that in Philippines the major political party out-voiced the smaller ones. It is also similar with Azerbaijan where Hon. Raouf Guliyev mentioned that formally Azerbaijan had the proportional majority system but since the new law was enacted, it had changed the Parliamentary system to how it is today.

34. Another issue was raised by the delegation of Thailand concerning whether the unique election model in Singapore today would cause problems in the future. Responding to the issue, Hon. Chao Hick Tin replied that until today the Parliamentary system in Singapore was never challenged, given the fact that each candidate should still be nominated, either by business association, political parties or other entity in Singapore, and then the nominee would then have to go through the election committee to be assessed for the eligibility of the candidature.

35. Prof. Hikmahanto Juwana concluded Part II of this Session saying that every jurisdiction has their own electoral systems that may not be the same with one another. Therefore every country should continue to develop dialogue to exchange views and experiences in order to seek a better development in the future if required.

The complete presentation of speakers and panelists appears in **Annex I.A6 – I.A11.**

SESSION TWO: TYPICAL PROBLEMS AND SHORTCOMINGS IN LAW AND PRACTICE

36. Session Two elaborated legal regulations and practices relating to electoral issues. These issues cover the appointment of electoral districts, registration of voters and voter's lists, dealing with voting by mail and of citizens residing overseas, fair competition between candidates, transparency in vote counting, financing election campaigns, allocation of elected members of parliament, and other related issues.

A. Part I

37. Part I of Session Two was moderated by **Prof. Jawahir Thontowi**, S.H., Ph. D, Academician of Islamic University of Indonesia, Yogyakarta.

38. **Hon. Mohammad Achargui**, President of the Constitutional Council of Marocco, delivered a presentation on the role of the Moroccan Constitutional Council in ensuring fair elections. He briefed three main points, namely basic constitutional principles, fair competition, and voters' freedom. In terms of basic constitutional principles, he stressed that the Council endeavors to uphold the principles of fair competition and equal opportunities, non-discriminatory and multi-party system. Specifically, non-discriminatory refers to the notion that the candidates for elections do not necessarily have to affiliate themselves to a certain political party.

39. In terms of ensuring fair competition, the Constitutional Council plays an important role in deciding the validity election, equal opportunities in every phase of the elections (preparation, campaign, vote casting and announcement of the results) and the respect for the freedom of voters. He provided instances of decision of the Council on those matters, including obligation to burn the ballot papers after counted, rule on prohibition of money politics, and government's obligation to provide condition to implement the Council's decision in order to ensure fair election.

40. **Hon. Rudolf Mellinghoff**, Justice of the Federal Constitutional Court of Germany, delivered a presentation concerning election systems in modern time. For electoral law, it will not be possible to ignore this development and therefore he addressed his presentation on the permissibility of voting computers in democratic elections. In Germany, the Constitutional Courts have to deal with the use of electronic voting device, so-called voting computers. The public nature of elections is the fundamental precondition of a democratic formation of the political will since it ensures the correctness and the traceability of the election events. He elaborated that in a representative democracy, the election of the people's representation constitutes the fundamental act of legitimation. The casting of votes in the parliamentary elections is the essential elements of the process of the formation of the political will. He stressed that the possibility

to examine whether the election complies with the electoral principles under constitutional law can ensure that there is no deficiency in the transfer of state authority to the representatives of the people, which the first and most important element of the unbroken chain of legitimation from the people to the bodies and office-holders entrusted with state duties. The confidence of the people to ensure that the election takes place "before the eyes of the public" is necessary for the functioning of democracy and for the democratic legitimacy of state decisions.

41. He further explained on the ruling of Federal Constitutional Court, that voting computers which record the voters' votes in electronic form and ascertain the result of the election electronically only meet the constitutional requirements if the essential steps in the act of voting and on the ascertainment of the results can be checked by the citizen reliably. He also mentioned that special precautions should be taken into account for error possibilities in the usage of voting machines, such as the incidents on the usage of "non-authorized computer" that happened in Ukraine Election in 2004 and also in the falsified database as happened in Albania and Georgia.

42. **Hon. Mauricio Gonzales Cuervo**, President of the Constitutional Court of the Republic of Colombia, stated that the role of the Constitutional Court in intervening the effort to extend the terms of office of the president for the third time. In 2002 when the effort to extend the terms of office of the president for a second period was supported by the parliament, the Court deemed it constitutional since it was in line with the will of the people as shown in the election results. However, when there is a second effort to allow the president to be elected for the third term, the constitutional court deemed it unconstitutional. This decision is based on the consideration that if the term of president is re-extended, it will concentrate the power in the hands of certain elites group and these efforts were prone of money politics.

43. Several delegations then raised the issue of effectiveness and fairness of electronic voting, particularly in the experience of Germany. Hon. Rudolf Mellinghoff responded the question by saying that before applying electronic voting in Germany, several studies was conducted in the Netherlands and Ireland specifically to test the system from hacker or third party intervention. The result of the studies show that there still exists a possibility of intervention, therefore another counter-measure should be undertaken, that is to develop a verification process of the vote results. Using electronic voting, Hon. Rudolf Mellinghoff continued, has also helped to ensure that the result of the election provides transparent and expeditious results to the public.

44. Prof. Jawahir Thontowi concluded this session by stating that computers are indeed useful but human intuition is better to rely upon, and that

the use of high technology computers is possible as long as there is a proper mechanism to verify it and not completely relying upon it.

The complete presentation of speakers and panelists appears in **Annex I.B1 – I.B3.**

B. Part II

45. Part II of Session Two was moderated by **Dr. Sigit Riyanto**, S.H., LL.M., Academician of Gadjahmada University.

46. **Hon. Bakhtiyar Mirbabev**, Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan, mentioned that the Electoral System of the Republic of Uzbekistan has been democratized under the President Islam Karomov's administration into a unique system that underlines the rights of the voters. To be able to cast a vote, an Uzbekistani must be eighteen years of age, and to be eligible to be elected as member of the Senate of the Oliy Majlis, an Uzbekistani must be twenty five years of age. Uzbekistanis who are serving their time in prisons and clinically proven as mentally unwell have no rights to cast a vote.

47. Furthermore, the elections are held in a multiparty based system and in a way that is general, equal, direct and guaranteed in a secret ballot. The voters' rights are safeguarded prior to the elections up until the pronouncement of the elections result, and the general publicity is a way of preserving the transparency. The democratic and free election for every citizen is one of the pledges stated in the Constitution of the Republic of Uzbekistan, and also in the Election Legislation. These guarantees are also stated in other laws, which are categorized into two groups, the Laws dedicated directly to the elections, and the Laws that do not regulate the elections but oblique affecting the elections. The Constitution and election legislation of the Republic of Uzbekistan are a solid foundation for the free and democratic elections and serve as guarantee for the rights of the citizens to participate in the management of public affairs to come up with a democratic and strong civil society.

48. **Hon. Penn Thol**, Member of the Constitutional Council of Cambodia, in his presentation mentioned that although the Constitutional Council of Cambodia does not belong to the Judiciary Power, it has the competence to act as a court in examining and deciding on litigations related to the Legislative elections. To facilitate a fair competition among candidates, the Law of the Elections and its amendment law stipulate that political parties and candidates may utilize the media and public facilities to generate votes. For the purposes of elections, the media will not charge the National Elections Committee in publicizing the electoral work or in educating the citizens, especially the first time voters, everything they need to know about the elections.

49. The Law of the Elections of the Members of the National Assembly and its Amendment Law regulate the vote counting transparency. The polling station commission shall record the numbers of voters who have cast their votes as well as the unused ballots. It is also responsible in making sure that the procedure of the counting is on the right track. The aforementioned Laws also regulate the candidates and political parties' financial resources, financial transparency, also electoral campaign expenditures. Every political party runs for the election shall only possess one account for the funding flows related to the elections.

50. **Hon. Constancio Carrasco Daza**, Justice of Electoral Tribunal of the Federal Judiciary of Mexico, highlighted the substantial changes in Mexico's election concerning the reduction in financing and time of campaign and control access for the radios and television for political parties during campaign period, and restriction on negative propaganda. Therefore Mexico views the establishment of a Constitutional Court that determines whether the elected president is valid or not valid should not be a political one, but rather a legal one.

51. On the case of an election court, it was established through the higher chamber of a court, with the authority to guarantee the political right of the citizen and to guarantee the political rights so that it will not violated by the election commission. It is founded that the guarantee to provide rights for the citizen can be seen through the court house whereby voters are protected through the implementation of the control mechanism and the competence of the election court. He concluded his presentation by stating that democracy could not be illustrated without election, and that the political rights of citizens are guaranteed by the law to ensure neutrality of the election itself which remain important.

52. **Hon. Arcadio Delgado Rosales**, Justice of the Supreme Tribunal of Justice of Venezuela, delivered a presentation relating to the political rights in Venezuela. He stated that the political process derives from the process that is related straight from the old Constitution to the new Constitution of 1999. Venezuela does not follow the Anglo Saxon system, but rather chose the European Continental system where they adopt a Presidential system in the government. Distribution of power thus is separated into executive, legislative, and judicative power. Based on the new Constitution, Venezuela is a new social democratic where everyone is represented by the people who are mandated by their political right through general election. He further underlined that elections relating to the constitutional rights in Venezuela are accounted for and guaranteed of its transparency, including the availability of verification of the electronic system used.

53. The Conference then discussed issues raised by some delegations regarding how to guarantee the impartiality of judges, registration of voters, complaints by the citizens when they are not enlisted as voters, and sanctions that could by implied should offences occur. Some delegation

also raised the issue of establishing an electoral tribunal in developing countries in order to have an independent electoral court. In response to these issues, each speaker mentioned the existence of a mechanism and regulation in each country to limit and control the power of the constitutional council or commission, generally through the Supreme Court.

54. The Moderator concluded Part II of this session by noting that the constitution already provides the fundamental rights of the people, including their political rights; however the implementation of such rights was never an easy task. Moreover, in order to keep-up with the development of democracy and to maintain the rights of the people, improvements to the electoral system should be made from time-to-time.

The complete presentation of speakers and panelists appears in **Annex I.B4 – I.B7.**

SESSION THREE: DEALING WITH ELECTION COMPLAINTS

55. Session Three discusses lessons learnt concerning relevant provisions and existing practices in dealing with election complaints either by the supreme or constitutional courts, ombudsman, election commission or parliamentary committees.

A. Part I

56. Part I of Session Three was moderated by **Prof. Dr. Saldi Isra**, S.H., MPA., Academician of Andalas University.

57. **Hon. Khil Raj Regmi**, Justice of the Supreme Court of Nepal, briefly explained the electoral system in Nepal based on the 2007 Interim Constitution. Nepal has a mixed system of first-past-the-post and proportional representation currently fill up the 601- seats Constituent Assembly. A healthy representatives system can be established only when the election are free and fair. The Interim Constitution provides for the appointment of the Election Commissioners by the President on the recommendation of the Constitutional Council. Election Commission conducts, supervises, directs and controls the election to the Constituent Assembly, and also to hold any referendum under the constitution and elections to the local authorities. He explained that Nepal has also used the services of the lower court Judges and Officers of the Nepal Judicial Store Service for the conduct of election. They are deployed as Returning Officers with the permission from Judicial Council and the Judicial Service Commission respectively.

58. In dealing with the election related complaint, following the promulgation of Interim Constitution in 2007, complaint handling Mechanism for offences and misconducts was divided into three timeframe, pre-election, election period and post election. These offences and misconducts are handled by different institutions such as the Constituent Assembly Court, Election Commission, Returning Officer, Polling Officer and the Monitoring Team. He emphasized his explanation on the Constituent Assembly Court, it consist of three judges with status similar to the Supreme Court. The Constituent Assembly Court decides the disputes of invalidation of the election of a member of Constituent Assembly, offences relating to the election of the members of the Constituent Assembly, and disqualification of a member of the Constituent Assembly. Any decision and order issued by the Court shall be final, and no judicial review may be made against its decisions. He further explained that beside Constituent Assembly Court, another forum that envisaged by law to handling electoral disputes is the Designated Court that hears cases related to the election of state organs other than the election to the Constituent Assembly. If disputes occurs on the location of the election, the Returning Officer, Polling Officer and the Monitoring Team has the power to punish any person on offences such as taking arms and using arms during election period, creating obstacles on election campaign, trespass into restricted areas, obstructing the counting of votes, using vehicles exceeding in numbers permitted by the Commission and so on. The officer shall report to the Election Commission and takes its directive on the matter. The Commission has the final authority to cancel and order re-polling in some polling stations or the entire constituency. Nepal emphasized on holding election by an independent body. The independence for the Election Commission and the involvement of judges and other officers of the Nepal Judicial Service for conducting election, and the creation of independent dispute settlement mechanism illustrates the emphasis to independence, impartiality and fairness of the electoral process.

59. **Hon. Rogov Igor Ivanovich**, Chairman of the Constitutional Council of the Republic of Kazakhstan, stated that in the election system of the Republic of Kazakhstan, a special council is appointed with the purpose to observe the election legislation, namely the Constitutional Council. The Council carries out within the powers of the Government to ensure that the current legislation is in conformity with the country's Basic Law, and also provides an exact and steady observance of the principles accepted and applied based on the election legislation. In case of any disputes arising from the election process, it is within the competence of the Constitutional Council to resolve such dispute. During the procedure, the President or member of the Parliament involved in the election dispute will be suspended from the registration or continuing process of the election. If a reference of a case is accepted, then all materials and data related to the case will be transferred to the Central Election Commission, where the final decision will be made.

60. Therefore, it can be concluded that the Constitutional Council is the arbitrator of an ultimate authority to settle occurring disputes concerning constitutionality of the elections in the Republic of Kazakhstan. The Republic of Kazakhstan views General elections as a form of expression from the will of the people, shaping the government today. That is why the maintenance of the specified constitutional requirements in the Republic of Kazakhstan is essential.

61. **Hon. Khammy Xayavong**, Chief Justice of the Supreme People's Court of Lao People Democratic Republic, in his presentation noted that Article 52 of the Constitution of the Lao PDR provides that the National Assembly is the representative of the rights, powers and interests of the multi-ethnic people. Therefore**,** the people select the National Assembly member to be their representatives in the National Assembly, through the process of Election. The election processes begin after the National Assembly Standing Committee appoints the Election Committees which the appointment is then promulgated by a presidential Decree at least 120 days before the election. The National Election Committee then will propose to all organization of the party and state and other organizations a nomination list of their candidates to the election committee as consideration to approve. Then the National Election Committee will make an official announcement of the name of candidates at least 60 days before the election.

62. If complaints arise relating to the elections, the National Election Committee has the authority to resolve the complaint. In cases where the voters disagree with the final decision of the Election Committee, then they have the right to appeal such decision to a higher level of the Election Committee (Administrative Appeal). Due to the fact that the Lao PDR does not have the administrative court or constitutional court, then the civil chamber in the people court has the rights to consider the case relating to the administrative relationship of the cases involving the mistake in the list of person eligible for election, which the election committee was not able to resolve. Besides complaints relating to the decision of the Election Committee, voters may also have the right to propose the dismissal of members of the National Assembly if he or she found to be unworthy or to have engaged in disgraceful behavior. Such process is carried out to maintain the stability of Lao PDR.

63. **Hon. Brigitte Bierlein**, Vice President of the Constitutional Court of Austria, stated that the Austrian Constitutional Court's jurisdiction on electoral disputes comprises three different types of powers: the review of elections, decisions on the loss of a seat, decisions on challenges of the results of popular initiatives, consultations of the people or referenda. Elections which can be reviewed or challenged are the election to the Federal President, elections to general representatives bodies, elections to the European Parliament, elections to the constituent authorities (representative bodies) or statutory professional associations, elections to

the *Land* governments and elections to municipal authorities entrusted with executive power (mayor, municipal executive board). The electoral challenge may be based on any illegality of the electoral procedure. Those who can challenge the elections include the candidates, electoral groups and member of electoral bodies. The challenge has to include clear request(s) and reason(s) whether to annul the entire or a certain part thereof an election. There are three types of decision in this regard, namely (i) to declare void the election of a particular person if the Court finds that a non eligible person had been declared eligible with the election process is still considered legal, (ii) to decide whether election of a person/persons become nil and void if the Court finds that an eligible person has been unlawfully declared ineligible, and (iii) to decide the illegality during an election procedure as well as whether this illegality, if so decided, will influence the election result.

64. Furthermore, she conveyed that the Court's decisions of the loss of a seat apply only to seats in general representative bodies, to Austrian seats in the European parliament, to seats in a constituent authority of statutory professional associations and to seats in municipal authorities with executive power. Declaration on the loss of a seat by an administrative authority could also be challenged before the Constitutional Court. In terms of challenge of the results of popular initiatives, consultations and referenda, the Hon. Bierlin stated that only alleged illegality of the procedure can be claimed as reason for the challenge to those people.

65. Some delegations raised the issue of indirect proceedings in election disputes process and alleged illegality of electoral procedure in Austrian election system. It was understood that indirect proceedings refer to the lost of mandate. The lost of mandate is regulated by a lower law when somebody who received a mandate is suddenly punished by for a criminal act or there are members of Parliament who are absent consecutively for 30 days. While alleged illegality of the electoral procedure refers to the any doubt on the validity of the procedure taken during election process such as the doubt on the tick on the ballot. In this regard, the Constitutional Court will decide what steps should be taken, including whether to re-count the votes or repeat the election.

66. Prof. Dr. Saldi Isra concluded this session by thanking all the speakers and panelist for their presentations and contributions.

The complete presentation of speakers and panelists appears in **Annex I.C1 – I.C4.**

B. Part II

67. Part II of Session Three was moderated by **Dr. Denny Indrayana**, S.H., LL.M., Ph.D., Academician of Gadjah Mada University.

68. **Hon. Achmad Sodiki**, Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia, presented a paper on Indonesian perspective in dealing with election complaints. The Constitutional Court (CC) of the Republic of Indonesia was also established based on the amendment to the 1945 Constitution, with one of its authorities being to hear and decide upon cases of dispute concerning the results of general elections at the first and final instances. After the enactment of Law number 10/2008 on Legislative General Elections, Indonesia recognizes three types of dispute related to general elections, which are administrative violations, criminal violations, and disputes over the results of general elections. In order to address these types of violations, Indonesia established the General Election Supervisory Board and the General Election Supervisory Committee which play a central role in exercising supervision and receiving reports from the public.

69. In cases of criminal violations on general elections, the case are brought upon the district court and handled by special judges. This court comprises two levels: the first level is the district court, and the appellate court for appeal. If this difference incurs loss to the general election participants, the affected general election participants may take legal action by filling a petition with the Constitutional Court for a case of dispute over the results of general elections. The Constitutional Court has the authority to decide dispute over the results of general elections based on the Constitution. In accordance with the judicial development of disputes over the results of general elections at the Constitutional Court, cases examined are not limited to the discrepancy in the calculation of the results of general election between the organizer of general election and general election participants.

70. **Hon. Alparslan Altan**, Judge of the Constitutional Court of the Republic of Turkey, delivered a presentation to explain the basic principles of the electoral law in Turkey and the improvements experienced in this field. Some principles of election system in Turkey have been adopted by the Constitutions of 1961 and 1982. But, the details on determination of the electoral system have been left to the discretion of the legislative body. Election systems imply the methods to be taken into account in the determination of rulers. The purpose of election systems that we examine in its narrow sense, as the methods benefited to convert the votes taken by the electors to chairs is to provide the political participation in the way that it can involve the principles of benefit (stability) and justice. There are proportional representation system which highlights the principle of justice and majority electoral system which highlights the principle of benefit (stability). Moreover, mixed election systems constituted through the extraction of some elements of these two election systems are also applied.

71. He later concluded by stating that the determination of the right electoral system in a democratic political system is of high importance both

because of the right possession of national sovereignty and because of the processing of the system. The adoption of an inappropriate electoral system not only blocks the healthy process of democracy but also turns the problems of representation into a jigsaw puzzle.

72. **Hon. Farouk Ahmed Sultan**, President of the Supreme Constitutional Court of Egypt, in his presentation stated that guarantying the freedom of voters in casting their votes, and ensuring their free will to choose from among candidates of the elections campaign is of the fundamental terms for the validity of the elections. Consequently, the electioneering shall not be affected by external influences that make the contribution of the citizens is of no sense. The candidates shall particularly have equal rights and opportunities to access the media. By exercising the Political Rights Law, Egypt has established a balloting process consisting of two stages: the registration of voters, and the stage of carrying out the electioneering. Egypt also established a high committee of elections which is distinguished by its impartiality, integrity and independence to monitor the phase, and seeks to accomplish, among others, setting out rules of preparing the schedules of election, develop general rules for the organization of electioneering, and receive reports and complaints of violations of the provisions governing the process of election.

73. There is no doubt that the Egyptian judiciary in exercising this constitutional duty does not only show its immunity and independence, but it also enhances the confidence and trust that all ranks of Egyptians give to such system, in a way that firmly establishes a general feeling among the public and also among special ranks that the judiciary supervision over the elections is a major guarantee to the transparency and integrity of the electoral process.

74. **Hon. Mahkam Makhmudov**, Chairman of the Constitutional Court of Republic of Tajikistan, delivered a presentation on the role of the Constitutional Court in the protection of citizen suffrage. He stated that after the acquisition in 1991, Tajikistan has planned a course for development of democracy and civil society. Acceptance of the Constitution and division of the power on legislative, executive and judicial were the first steps to be developed. The legal regulation of election is fixed in the Constitution of the Republic of Tajikistan and a number of laws that regulates the course of elections concerning elections of the Supreme Assembly and the Presidential election.

75. The presidential elections in Tajikistan are carried out by citizens of Tajikistan on the basis of general, equal and direct suffrage at ballot. Thus, promotion of candidates is carried out according to requirements of the Constitutional Law of the Republic of Tajikistan. Citizens having a previous conviction which is not extinguished or is not removed in the order established by the law cannot be proposed as candidate to the Presidential election. The judicial protection of the citizen suffrage

is recognized by certain characteristic that features the right of state to recognize the rights and freedom of the citizen leaning against strong fastening Constitution and laws. Moreover, judicial consideration of selective disputes is regulated by a civil procedural right. The court of law can consider selective dispute and make the decision not later than in a month from the date of a filing of application. It is important to notice that the dominant role in maintenance of restoration of the broken suffrages is played by the election committees resolving a considerable quantity of electoral conflicts in the operative form that is very important in the conditions of limited time of election campaign.

76. The Conference then further discussed the issue that was raised concerning the crime committed by a candidate to general elections in Indonesia. Hon. Achmad Sodiki responded by saying that in the case of such event, a candidature to the general election is annulled due to the fact and findings that the candidate has committed crimes and won his/her election unfairly. Other issue was raised concerning State's contribution to political parties in Turkey. Hon. Alparslan Altan clarified it is true that the political parties in Turkey are contributed by the State when the said party obtained more than 7% of the eligible vote. From 65 political parties in Turkey, 4 amongst them are contributed by the State.

77. Dr. Denny Indrayana concluded Part II of this session saying that the importance of how the court deals with complains is very important in order to produce a democratic election. This experience may differ between countries; therefore it should be continued to be discussed among countries.

The complete presentation of speakers and panelists appears in **Annex I.C5 – I.C8.**

CLOSING SESSION

78. **Mr. Janedjri M. Gaffar**, Secretary General of the Constitutional Court of the Republic of Indonesia, presented a report to the Conference stating that the two-day conference was attended by sixty-five participants from twenty-six countries and two international organizations, and eighty-five observers from Indonesia. He also touched the Jakarta Declaration on the Establishment of the Association of Asian Constitutional Court and Equivalent Institutions which was signed just before the Conference. During the Conference, all participants have engaged in fruitful discussions in sharing best practices and experiences on issues of general election system, issues and weaknesses identified in the rules and practice of general election organization and mechanisms for handling disputes related to general elections. He concluded that the records and proceedings of the conference will be distributed to all participants as a contribution for them to promote a better democracy in their respective countries.

The report appears in **Annex C1.**

79. **Mr. Clauspeter Hill,** Director of the Konrad Adenauer Foundation, as the co – organizer of the Conference, delivered his remarks congratulating the founding members of the newly established Association of Asian Constitutional Courts and Equivalent Institutions. It was one of the most objectives of the Rule of Law Programmer to see this association being formed after idea was first mentioned in 2003. He was confident that the membership of the association will grow and Constitutional Review and Adjudication will play its important role in safeguarding the rule of law, citizen's rights and democracy. The KAS is grateful for the opportunity to be part of the whole endeavor since last year. He wished to thank the organizing team both in the Constitutional Court of Indonesia and KAS office in Singapore for making this event unforgettable and successful.

    The remark appears in **Annex C2.**

80. **Mr. Serguei Kouznetsov**, representing the Venice Commission, which is a consultative body of the European Commission, explained the nature of their work in the legal field, including in the area of constitutional justice and elections. He further stated the Commission's commitment to continue to work with constitutional courts, for instance by providing the confidential online forum where constitutional courts from anywhere could exchange information. Therefore, the Venice Commission fully supported the establishment of the Association of Asian Constitutional Courts and Equivalent Institutions.

    The remark appears in **Annex C3.**

81. **Hon. Chut Chonlavorn**, President of the Constitutional Court of the Kingdom of Thailand, and **Hon. Dong-Heub Lee**, Justice of the Constitutional Court of Korea, in their remarks both expressed firstly, their gratitude to all the Parties involved in the Conference, such as the Constitutional Court of the Republic of Indonesia, Konrad Adenauer Stiftung (KAS), and also the presence of the President of the Republic of Indonesia for opening the Conference, has inspired all participants. They continued by stating how the Conference has brought beneficial aspects for the development of democracy, and has broaden knowledge that would be useful for election practices back in their respective countries. In conclusion, they wished that the good will and friendship yield among all members could be maintained, especially for future cooperation, and hoping to meet all of the participants in the next Conference.

    Their remarks appear in **Annex C4 and C5.**

82. **Hon. Prof. Mohammad Mahfud M.D.**, Chief Justice of the Constitutional Court of the Republic of Indonesia, on his closing remark stated his gratefulness for the success of the 7th Conference of the Asian Constitutional Court Judges and also for the signing of the Jakarta Declaration on the Establishment of the Association of the Asian Constitutional Court and

its Equivalent Institutions. He also emphasized that this is only the beginning of a long work toward a larger agenda for strengthening the democratic values. The real challenges lie ahead to ensure that the values of democracy are applied in every aspect of a nation's life. This conference has generated many brilliant ideas also constructive recommendation for a better democracy in the future. Particularly, he hoped that from this Conference, Indonesia would be inspired in dealing with electoral issues from a better perspective and as democratic as possible. The Constitutional Court should be the focal point in concluding any disputes regarding the elections and that the elections should not be just a procedural matter, but rather something substantial. His concluding speech officially closed the Conference.

The remarks appear in **Annex C6.**

83. The Conference thanked the Constitutional Court of the Republic of Indonesia as the host of the 7th Conference of the Asian Constitutional Court Judges for their excellent arrangements and hospitalities extended to all delegates.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

ANNEX I
PAPERS OF CONFERENCE

SESSION ONE
CONCEPTS OF ELECTORAL SYSTEMS IN COMPARISON



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

ELECTION SYSTEM IN KOREA
Concepts and Cases

Dong-Heub Lee
Justice of Constitutional Court of Republic of Korea

I. Introduction

In a country based on the doctrine of popular sovereignty and representative democracy, election system, in which political consensus among the people becomes the very source that gives legitimacy to the creation and exercise of state power, is the core principle for organizing the country's ruling system and the essential means to realize the representative democracy. Therefore, in order to make people properly exercise their sovereign power to achieve the country's interests as a whole as well as individual interests and thereby guarantee popular sovereignty, democratic election system should be established and well maintained.

The Constitution of Korea declares the doctrine of popular sovereignty by stipulating that "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people (Article 1, Section 2)." The Constitution also guarantees the people's franchise and provides constitutional basis for election process by stipulating that all citizens shall have the right to vote and the right to hold public office under the condition as prescribed in the Act (Article 24, 25); the National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens (Article 41, Section 1); and the President shall be elected by universal, equal, direct and secret ballot by the citizens (Article 67, Section 1). Moreover, the Constitution guarantees freedom of expression in the election process by prescribing "all citizens shall enjoy freedom of speech and the press and freedom of assembly and association" (Article 21, Section 1), and equal opportunity in election campaign stating that

"election campaigns shall be conducted under the management of the election commissions at each level within the limit set by Act and equal opportunity shall be guaranteed" (Article 116, Section 1). The Constitution also specifies the establishment of the National Election Commission for the purpose of fair management of elections (Article 114, 115).

In order for the election system to properly operate and sufficiently carry out its role in democracy, free and equal opportunity to participate in the election process should be guaranteed to all citizens. For this reason, the National Assembly should legislate election law constitutionally guaranteeing the people's freedom of election and equal opportunity to participate in elections. Even so, the balance between freedom of election and its restriction should also be reasonably tuned depending on the country's level of political and social development, the maturity of citizens' civic consciousness, the past and present election culture and other economic and cultural conditions. Therefore, our country, where absolutely fair and clean election culture has yet to be settled down despite more than 60 years of experience in elections, still has some legal provisions of election law that restrict the freedom of election in order to secure fairness in elections.

Accordingly, many constitutional complaints or motions to request for a constitutional review of statute have been filed against the provisions of election law in which the two important values, guarantee of the freedom of election and fairness in elections, conflict. As a result, the area of election law is one of the fields where the Constitutional Court of Korea has most actively engaged since its establishment in 1988. The Constitutional Court of Korea, in principle, has maintained strict standard of review with respect to the freedom of election, but at the same time, equally paid attention to the issue of fairness in elections. Therefore, the Constitutional Court has rendered a decision of unconstitutionality in many election cases and as a consequence, contributes to guarantee the people's political freedom and right to equality and lays the groundwork for realizing the doctrine of popular sovereignty.

For today's presentation, firstly, I would like to provide an overview of Korea's election system in general. And in the second part, important cases regarding election law decided by the Court over the past 22 years will be presented, specifically in relation to right to vote, eligibility for election and freedom of election campaign.

II. Overview of Election System in Korea

A. Basic Principles of Election

1. Universal Ballot
   In principal, every citizen reaching a specific age has the right to vote without discrimination on social status, race, religion, gender, education, property, etc.
2. Equal Ballot
   Every person is entitled to one vote. No one is allowed plural votes because they are superior in social status, education, property, etc.

3. Direct Ballot
   Eligible voters can participate in the voting process directly and personally.
4. Secret Ballot
   The principle of voting that ensures no one will know which political party or candidate the voter has chosen so that voter can exercise the privilege of voting in a free and fair way without (being placed under) external interferences like bribery, intimidation, nepotism, etc.
5. Free Election
   The Election Law obliges voters to faithfully participate in elections and exercise their privilege, but there is no penalty against non-participation.

B. Types of Elections

The types of the elections prescribed in the Public Official Election Act are the presidential election, the election for the National Assembly members and the local elections for heads of local governments and members of local councils. Regarding election campaign period, in every election, election campaigns are allowed from the day after the closing date of candidate registration to the day before the Election Day and no campaign whatsoever is permitted on the Election Day.

1. Presidential Election
   The presidential election is held every five years and the official campaign period lasts for 23 days. As Korea adopts the simple majority representation system, or so called "First Past the Post" system, the candidate with the majority of support from voters wins the election.
2. National Assembly Election
   The National Assembly election is held every four years and the official campaign period lasts for 14 days.
3. Election for Local Councils and Heads of Local Government
   The elections for heads of local governments and members of local councils are held every four years and the official campaign period lasts for 14 days.

C. Right to Vote and Eligibility for Election

1. Right to Vote

A national of nineteen years of age or above has the right to vote in presidential election and the National Assembly election. A national who is nineteen years of age or above and is registered as a resident in the district under the jurisdiction of the local government concerned as of the record date of the voters list has the right to vote in local elections.

A Korean national who is residing abroad and nineteen years of age or above has the right to vote for the election of President and the proportional member of the National Assembly, even without being enrolled in the list of reporters of domestic domicile or registered as a resident by reporting his/her place of domestic residence. In this case, if such a Korean national residing abroad intends to vote overseas for the above mentioned elections, he or she shall file

an application for registration of an overseas voter with the National Election Commission through embassies.

If a Korean national residing abroad is enrolled in the list of reporters of domestic domicile or registered as a resident, he/she has the right to vote even for the election of local constituency members of the National Assembly as well as the election of President and the proportional member of the National Assembly. In this case, if such a Korean national residing abroad intends to vote overseas, he/she shall make a report of an overseas absentee to the head of the competent local governments in writing through embassies.

The Public Officer Election Act used to restrict the voting rights of Korean nationals residing abroad on the condition of enrollment in the list of reporters of domestic domicile. In 2007, however, the Constitutional Court held the provision incompatible with the Constitution as it violated the voting right of nationals residing abroad. Pursuant to the Court's decision, the provision was amended.

A Korean national residing abroad who is enrolled in the list of reporters of domestic domicile or registered as a resident also has the right to vote for the elections of members local council and heads of local governments election. But in this case, in order for such a person to cast a vote, physical presence within the territory of Korea is required.

According to Article 34 of the Immigration Control Act, any person who is registered in a foreign register of local autonomy concerned as a foreigner for whom three years have passed since the acquisition date of qualification for permanent residence have a right to vote in local elections.

However, a person falling under any of the following, as of the Election Day, shall be disfranchised: 1) A person who is declared incompetent; 2) A person who is sentenced to imprisonment without prison labor or a heavier punishment but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted; 3) A person who commits an election crime, who commits the crimes referred to provisions of the Public Officer Election Act/the Political Fund Act, or who commits the crimes in connection with the duties while in office as the President, a member of the National Assembly, a member of local council, and a head of local government and certain periods of time have not passed since one million KRW or more of fine is sentenced and the sentence was finalized; and 4) A person whose right to vote is suspended or forfeited according to a court ruling or other Acts.

2. Electoral Eligibility

For the president election, a national who is forty years of age or above and who has resided in the country for five years or longer as of the Election Day is eligible for election to the Presidency.

For the National Assembly election, a national of twenty-five years of age or above is eligible to stand for a member of the National Assembly.

For local council and heads of local governments election, a national who has

registered as a resident in the district under jurisdiction of the local government concerned for sixty consecutive days or longer as of the Election Day and is twenty-five years of age or above is eligible to stand for elections for the relevant local council members and the head of the local government.

However, a person falling under any of the following, as of the Election Day, is ineligible to stand in election: 1) A person who has no voting franchise; 2) A person who is sentenced to imprisonment without prison labor or a heavier punishment and whose sentence is not invalidated and; 3) A person whose eligibility for election is suspended or forfeited according to a court ruling or pursuant to other Acts.

D. Election Districts and Full Number

1. Election District

Election districts are units of district into which the whole electorate is divided for electoral purposes. In the elections of President and heads of local governments administrative districts coincide with electoral one, so that there is little dispute, but in the elections of the National Assembly, Si(city)/Do(province) councils, district delimitation is an all-important issue.

At present, the elections of the National Assembly and Si/Do councils adopt the small electoral district system, and those of the autonomous Gu(district)/ Si(city)/Gun(county) councils also adopt the medium electoral district system.

2. District Delimitation

District delimitation, which is a system to realize the principal aims of election, requires certain standards. Overall consideration must be given to things like administrative districts, population, living districts, transportation, geographical features and various other elements concerning politics, economy, geography, and society. Delimitation must be done on the principle that it should serve to equalize the value of each vote and should not be unjustly partial towards any political group(no Gerrymandering).

3. Total Number of Members

The total number of members for the National Assembly, Si/Do council, and local council members consists of the number of constituency members and proportional members.

(1) Total number of National Assembly members

About the full number of National Assembly members, the Korean Constitution only designates the bottom line of 200, saying that a law should decide the exact number. According to this, it is provided in the Public Officer Election Act that the full number of the National Assembly members, for local constituency members and proportional representatives combined, is 299. There are 245 constituency members who are elected on the single-member constituency base and 54 proportional members whose seats had been

allotted according to the proportion of votes each political party had gained.

(2) Total number of Si/Do council constituency members
The full number of Si/Do council constituency members varies with the number of autonomous Gu/Si/Gun of a Si/Do and the number of local constituencies for the National Assembly. Currently, there are 761 Si/Do council members nationwide, 680 being for local constituency members, and 81 for proportional representatives.

(3) Total number of autonomous Gu/Si/Gun council members
The elections of autonomous Gu/Si/Gun council members also adopt the medium electoral district, and the full number of the members is made in the range of 2 and 4. Currently, there are 2,888 autonomous Gu/Si/Gun council members nationwide, 2,512 being for local constituency members, and 376 for proportional representatives.

E. Registration of Candidate

If a person is to stand for an election, he or she needs endorsement by a political party or electors. To be specific, a person needs endorsement by a political party or a certain number of electors to stand for president, National Assembly, head of a local government, Si/Do council or autonomous Gu/Si/Gun council.

1. Party-Endorsed Candidate
If a member of a political party stands as a candidate for an election, the application for registration must be accompanied by the endorsement letter signed and sealed by the representative of the endorsing party.
The application for registration of a proportional member candidate must be accompanied by the list of candidates whose ranking is decided by the endorsing political party. Besides, when a political party endorses candidates for the election of proportional representative National Assembly members and proportional representative local council members, more than half of the candidates endorsed should be female, and odd-ranking candidates must be female in the list of candidates.

2. Independent Candidate
If a person who is not a member of a political party stands as a candidate for the presidential election, the National Assembly members for a local constituency, the head of a local government, council members for local constituency members, he/she must be endorsed by a certain number of electors (for example, the numbers of endorsement required for presidential election ranges from 2500 to 5000, and for National Assembly election, from 300 to 500) who have registered as residents of the constituency concerned.

3. Candidate's Deposit
A person who applies for candidate registration is to deposit a specific amount of money for the main purpose of preventing the election from being flooded with candidates and heating up, and guaranteeing the sincerity of

the candidates. (For example, 500 million KRW is required for presidential election and 15 million KRW is required for National Assembly election. But the Constitutional Court held that the provision of the Public Official Election Act stipulating 500 million KRW as the required amount of deposit for president election does not conform to the Constitution and ordered temporary application until the legislature revises it.)

F. Election Campaign

1. Definition
   Election campaign refers to performing a directly or indirectly necessary and effective act for obtaining votes or for making another person be or not be elected in a specific election.

2. Restrictions on Election Campaign
   (1) Reasons for Restriction
   Freedom of election is a constitutional principle latent in the electoral system of a democracy and it means the freedom of a voter to form his/her views and realize them. Nevertheless, election must be prevented from becoming corrupt from money, abuse of government power and slander, and it is necessary to minimize socioeconomic losses and side effects that might be incurred by allowing limitless election campaign. Accordingly, the Korean election law places certain restrictions on freedom of election campaign to harmonize two constitutional ideas, that is, freedom of election campaign and equal opportunities for it.

(2) Details about Restrictions on Election Campaign
   In Korea, we eliminated the comprehensive way of restricting and prohibiting election campaign and, instead, switched to the individual way when we made the Act on Elections for Public Offices and Prevention of Electoral Malpractices in 1994. In spite of this, there are a certain restrictions on the time, subject, method and cost of election campaign.

   1) Restrictions on Time
      Election campaign is only allowed from the day after the end of candidate registration to the day before the Election Day. Only, in order to guarantee the equality of election campaign, we have the preliminary candidate system, that is, a preliminary candidate can do campaigning within limited scope provided in the law after notifying to the Election Commissions within jurisdiction in writing, for example, in the case of a preliminary candidate for the National Assembly, from the 120th day before the Election Day and from the 240th day before the Election Day in the case of a preliminary candidate for presidential election.

   2) Restrictions on Subjects
      The Public Official Election Act proclaims that everyone can electioneer freely, but then enumerates separately those who cannot engage in an election campaign, including public officials, disfranchised people, minors, foreigners, etc.

3) Restrictions on Methods
The Public Official Election Act places a variety of restrictions on the election campaign method, and typical examples under the restriction are as follows:
First, interruption of the conduct of election campaign: for instance, disturbing debates and interviews, and taking advantage of status for electioneering. Second, bribery and contribution: for instance, bribing an elector, candidate, and elected person, newspaper and broadcasting company, and contributing. Third, unfair conducts: for instance, election campaign by private organizations, establishment of a similar institution, meetings of a native society and relatives' society, and illegal use of a newspaper or broadcast. Fourth, disturbance of electors' peaceful daily life: for instance, night campaign speeches, door knocking, procession and indiscreet use of a loudspeaker. Fifth, disturbance of social order and public morals: for instance, slandering a candidate, and publicizing a false rumor.

4) Restrictions on Expenses
Korea adopts the administrative total amount restriction system by which the election commission determines the total restricted amount of expenses for a relevant election. Meanwhile, in order to make the system of restricting election expenses effective, exceeding the restricted amount election expenses by more than 0.5 percent becomes an independent election crime and is punished. If an election campaign manager, accountant in charge of an election campaign office or accountant for a preliminary candidate commits election crime and is sentenced to the imprisonment or fine exceeding three million KRW, the election of the candidate concerned becomes invalidated.

3. Aspects of Election Campaign

As I mentioned earlier, although freedom of election campaign is the right guaranteed in the Constitution, there are individual items of restriction and prohibition on subjects, times, and methods for the sake of fairness of election and equality of opportunity. Therefore, in reality, there are not many possible ways of election campaign and the followings are the types of election campaign allowed by the Public Official Election Act:

(1) Election campaign using mass media including first, broadcast advertisement allowed only in the presidential election and the election for proportional representative National Assembly members; second, newspaper advertisement allowed only in the election of president, proportional representative National Assembly members and Si/Do governors; third, broadcast speech of candidate allowed in all elections; and forth, broadcasting profile of candidates of elections for President, National Assembly and head of local governments
(2) Campaign rallies in which candidates make a speech or interview at an open place
(3) Interview and debate hosted by press agencies, supervised by the Election Debate Broadcast Committee, policy debate supervised by the Election Debate

Broadcast Committee and interviews or debates hosted by organizations except government related ones

(4) Election campaign using prints including propaganda printed materials, election campaign bulletin and written campaign promises, all of which should meet a certain standard designated by the Public Official Election Act

(5) Election campaign using electronic communication including internet homepage and using telephones from 6am to 11 pm; especially for election campaign using telephone, according to the Public Official Election Act, any person entitled to make an election campaign may make the election campaigns by means of telephone during the campaign period only through a direct conversation between the sender and receiver with the consent of the receiver after asking whether or not receiving the campaign messages. Even though one can install a temporary telephone for electioneering in an office, home, election campaign office and the liaison office for election campaign, it is against the election law to use the programs of automatically creating a contact place of receiver, such as the telephone number by mixing the numerals, symbols or letters and other technical apparatuses.

(6) Election campaign by utilizing facilities such as signboard, tablets and handing placard

(7) Election campaign by persons related to election campaign affairs

G. Public Management of Election

Public management of election means either that election campaign is controlled by State to prevent election abuses that could be caused by a let-alone policy towards election campaign, or that election expenses are paid by State to guarantee equal opportunities for election campaign among candidates and reduce the election expenses with the ultimate purpose of embodying fair elections. Under the general idea of public management of election, the Korean Constitution makes it clear that election campaign should be carried out under the supervision of the election commission at each level within the limit set by Act and equal opportunity should be guaranteed (Article 116, Section 1). The Constitution also declares the principle of public management of election in holding election campaign and defraying election expenses in Article 116, Section 2 saying that "except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates."

1. Public Management
   The classic example of public management is that the election commission posts and sends printed matter like propaganda posters. If direct management of election campaigns by an election managing body is expanded, however, this might lead to some negative aspects like uniformity of election campaigns and restrictions on candidates' free electioneering.

2. Public Funding
   If a candidate obtains a certain number of votes and becomes qualified to get the deposit money back, the state or the local government fills the expenses spent on the election campaign which include

expenses spent on propaganda posters and campaign bulletins, broadcast and newspaper advertisements, broadcast speeches, rent of campaign vehicles and loudspeakers, allowances for electioneers. Furthermore, the state or local government also pays the expenses spent on posting and sending posters and bulletins, interviews and debates supervised by the Election Debate Broadcast Committee, and witnesses' allowances and meals at the voting and ballot counting. Thus, the election commission corrects the inequality of opportunity and unfairness that might be caused by discrepancy among candidates in financial power.

H. Election Litigation

The Korean Constitutional Court does not have jurisdiction over the election disputes. In cases of presidential elections and general elections of the National Assembly, when there is a dispute over the validity of an election itself or the validity of electoral results, a lawsuit can be directly filed with the Supreme Court.

On the other hand, in cases of local elections, when there is a dispute over the validity of an election itself or the validity of electoral results, firstly, a petition can be filed with the election commission, and secondly, if there is an objection to the decision on the petition rendered by the election commission, a lawsuit can be filed either with the Supreme Court or with appeals court (High Court): i) for Si/Do governor election and proportional Si/Do council member elections, the Supreme Court; and ii) for district Si/Do council member, autonomous Gu/Si/Gun Governor elections, and autonomous Gu/Si/Gun council member elections, appeals court (High Court).

Meanwhile, when the issues as to whether an Act or Statute related to election violates the Constitution or infringes on people's fundamental rights become the contested subject matters of election disputes, the Constitutional Court may conduct a constitutional review of the related Act or Statute. And recently, some suggest that given the characteristics of election dispute, it is more desirable that the Constitutional Court has the jurisdiction over the election disputes since national election is a democratic process which grants governmental power to its relevant authority under the Constitution.

III. Important decisions by the Constitutional Court

A. Restrictions on Right to Vote

1. Restriction on Age
   The Court held that the provision of the former Public Official Election Act which limits the right to vote to nationals of twenty years of age or above does not infringe on people's right to vote or the right to equality (9-1 KCCR 674, 96 Hun-Ma89, June 26, 1997). Meanwhile, the provision at issue was

revised in 2005 so as to give the right to vote to nationals of nineteen years of age or above.

2. Restriction on Korean Nationals Residing Abroad
In *Right to Vote of Nationals Residing Abroad Case* (19-1 KCCR 859, 2004Hun-Ma644, 2005Hun-Ma360(consolidated), June 28, 2007), the Constitutional Court held that the provisions of the Public Official Election Act providing that 1) voters need to be registered as residents in order to be able to cast their votes for the presidential election, National Assembly election, local election, and national referendum and 2) registering for absentee ballots is allowed only for Korean national living in Korea, thereby denying any possibility that Korean nationals abroad and Korean national staying overseas even for short period of time are able to exercise their right to vote, are not compatible with the Constitution, as the provisions violate the right to vote and the right to equality of Korean nationals aboard, as well as the principle of universal election.

3. Absentee Vote
In regards to the provision of the Public Official Election Act which does not provide any way to vote for the sailors who stay on the ship for a long time, the Court rendered a decision of incompatibility with the Constitution, as it violates the sailors' right to vote (19-1 KCCR 899, 2005Hun-Ma772, June 28, 2007).

4. Restriction on Prisoners
In *Restriction on Prisoner's Right to Vote Case* (157 KCCG 2035, 2007Hun-Ma1462, October 29, 2009), the Court, in an opinion of 4(constitutional):5(unconstitutional), denied the constitutional complaint against the provision of the Public Official Election Act which stipulates that "a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated shall be disfranchised." The court opinion states that the standard of "a sentence of the imprisonment without prison labor or a heavier punishment" is important enough to justify such restriction on the fundamental rights.

5. Problems on Population Disparity in Electoral Districts
In *National Assembly Election Redistricting Plan Case* (13-2 KCCR 502, 2000Hun-Ma92, 2000Hun-Ma240 (consolidated), October 25, 2001), the National Assembly Election Redistricting Plan was declared to be incompatible with the Constitution, as the division of districts for the National Assembly Election which exceeds the permissible maximum deviation of population in an electoral district, which is 50%, (or in other words, the maximum ratio between the most populous district and the least populous district would be 3:1.) is beyond the limits of legislative discretion and therefore, violates the complainant's constitutional right to vote and the right to equality.

Regarding the division of districts for Si/Do council election and autonomous Gu/Si/Gun council election, the Court has adopted a little more relaxed standard of permissible limits on population disparity by setting it at 60% (in

other words, the maximum ratio between the most populous district and the least populous district would be 4:1) (19-1 KCCR 287, 2005Hun-Ma985-1037, 2006Hun-Ma11(consolidated), March 29, 2007; 21-1(A) KCCR 482, 2006Hun-Ma14, March 26, 2009).

6. Election of Proportional Representatives
In *One-Person One-Vote Case* (13-2 KCCR 77, 2000Hun-Ma91, 2000Hun-Ma112, 2000Hun-Ma134 (consolidated), July 19, 2001), the Court held that the Public Official Election Act which permits only "one vote for each voter" in the electoral district violates the Constitution as long as a separate vote for a political party is not allowed, while the election system implements both the majority representation system and the proportional representation system based on party nomination. Such practice is contrary to the democratic principles which call for the accurate reflection of people's opinions and guarantee people's freedom of choice in public election and the principle of direct election as well as in violation of the right to vote for proportional representatives and the right of equality of people voting for independent candidates. Pursuant to the Court decision, the provision was amended to stipulate that in the election of the National Assembly members, the election of the Si/Do council members and the election of the autonomous Gu/Si/Gun council members, it shall be one vote per person at each election of local constituency members and of proportional representative members.

B. Restriction on Eligibility for Election

1. Restriction on Age
In *Requirement of Twenty-Five Years of Age or Above to be Elected as Assemblyperson Case* (17-1 KCCR 547, 2004Hun-Ma219, April 28, 2005), the Court found constitutional the provision of the Public Official Election Act, which limits the right to be elected as an assemblyperson to nationals of twenty-five years of age or above, as it is within the realm and limit of legislative discretion, not excessive to the degree of violating the essential aspect of the complainant's basic rights such as to hold public office.

2. Restriction on Korean Nationals Residing Abroad
In *Right to Vote of Nationals Residing Abroad Case* (19-1 KCCR 859, 2004Hun-Ma644, 2005Hun-Ma360 (consolidated), June 28, 2007), the Constitutional Court rendered a decision of incompatibility with the Constitution regarding the provision of the Public Official Election Act which stipulates that in order to be elected in local election, a candidate needs to be registered as a resident in the local district concerned. The Court held that since the provision at issue practically prevents Korean nationals abroad living in Korea who cannot register as residents according to the Resident Registration Act from being elected as a member of local council, it violates their right to hold public office.

3. Restriction on Criminals
In *Restriction on Election Law Violator's Eligibility for Election Case* (20-1(A) KCCR 98, 2004Hun-Ma41, January 17, 2008), the Court upheld the provision of the Public Official Election Act which prevents election law violator from running for public election for five years from when he/she was sentenced

to a fine of one million KRW or more, on the ground that the provision at issue restricting eligibility for election does not infringe upon the right to hold public office in violation of the principle against excessive restriction.

4. Restriction on Succeeding Seats for Proportional Representatives
In *Prohibition of Succeeding Local Council Seats Reserved for Proportional Representation in the Event of Vacancies Occurring from Election Crimes Case* (21-1 (B) KCCR 850, 2007Hun-Ma40, June 25, 2008), concerning the provision of the Public Official Election Act providing that vacancies in the office of a proportional representative local council member, in principle, should be filled by the next eligible candidate on the relevant party list except for ones arising from invalidation of election due to election crimes, the Court held unconstitutional the aforementioned exception, on the ground that it infringes on the right of the next eligible candidate to hold public office, violating the principle of representative democracy and the principle of least restrictive means.

In *Prohibition of Succeeding National Assembly Member Seats Reserved for Proportional Representation in the Event of Vacancies Occurring Within 180 Days Prior to the Term Expiration Date Case* (21-1 (B) KCCR 928, 2008Hun-Ma413, June 25, 2009), the Court ruled that, the provision of the Public Official Election Act providing that a vacancy in the seat of the National Assembly reserved for proportional representation should, in principle, be succeeded by the next eligible candidate on the roll of proportional representative National Assembly members but that the same will not apply to vacancies occurring within 180 days prior to expiration of terms is against the Constitution, on the ground that the proviso infringes on the next eligible candidate's right to hold public office. Pursuant to the Court's decision, the provision was revised in January 25, 2010 so that the 180 day limitation is now replaced by "within 120 days."

5. Restriction on Candidates
(1) Prohibition of Holding Another Position
In *Time Limit for Resignation for the National Assembly Election Case* (15-2(A) KCCR 516, 2003Hun-Ma106, September 25, 2003), the Court held unconstitutional the provision of the Public Official Election Act providing that a head of a local government who runs for election to be a member of the National Assembly in the local district should resign from the local government position no later than 180 days prior to the election, on the grounds that requiring resignation from the office of the head of local government far sooner than what is normally required for other public officials, which is 60 days, is discrimination against the head of local government with no reasonable ground in relation to other public officials and it also violates the right to hold public office of the head of local government, running afoul of the principle of proportionality.

(2) Restriction on Local Government Officers' Elected Term
In *Local Government Officers' Elected Term Limit Case* (18-1(A) KCCR 320, 2005Hun-Ma403, February 23, 2006), the Court held constitutional

that the three consecutive term limit on the head of local government to be elected as provided in the provision of the Local Autonomy Act, on the ground that the provision does not infringe on the right to hold public office of the head of local government.

6. Restriction on Deposit

In *Deposit Money in National Assembly Election Case* (13-2 KCCR 77, 2000Hun-Ma91, 2000Hun-Ma112, 2000Hun-Ma134 (consolidated), July 19, 2001), the Court declared unconstitutional the provisions of the Public Official Election Act which requires a candidate for the National Assembly election to make a deposit of 20 million KRW when submitting the application for candidate registration and provides grounds for the return and forfeiture of election deposit. In this case, the Court stated that the deposit requirement of 20 million KRW is excessive considering the economic conditions of average citizens and therefore, will prohibit potential candidates from running for office only for the reason that he or she cannot raise the deposit money. Therefore, the provisions at issue violate the right of equality and the right of potential candidates to hold public office, and it violates the voters' freedom of choice. Meanwhile, pursuant to the Court's decision, the provisions at issue in this case have been amended and now the election deposit, in the case of National Assembly election, is 15 million KRW.

In *Deposit Money in Presidential Elections Case* (20-2(B) KCCR 477, 2007Hun-Ma1024, November 27, 2008), the Court decided that the provision of the Public Official Election Act which requires the applicants to pay 500 million KRW as deposit money upon registration of presidential candidate is not compatible with the Constitution, on the grounds that it imposes extremely excessive burden on individuals, which is an unreasonable discrimination in offering the opportunity to exercise the right to hold public office according to the amount of candidates' assets. This, therefore, infringes the complainant's right to hold public office.

C. Freedom of Election Campaign

1. Restriction on Subject

(1) Public Officers

In *Petition to Invalidate the Notice of Compliance Request for President's Duty of Impartiality toward Election Case* (20-1(A) KCCR 139, 2007Hun-Ma700, January 17, 2008), the Court held that 1) President's political remarks during a campaign season violate the provision of the Public Official Election Act which prohibits public officials, etc from acting in a manner which may influence election result; and 2) the National Election Commission's Notices of request for compliance with President's duty of impartiality toward election and the Public Officials Act as the basis of the Notices do not violate the Constitution, as it balances between the public interest of fair election and the restriction on freedom of expression.

In *Prohibition against Election Campaign Planning by Public Officials Case* (20-1(B) KCCR 270, 2006Hun-Ma1096, May 29, 2008) the Court decided

that the application of the provision of the Public Official Election Act, which bans the "act of participating in the planning of an election campaign or in the implementation of such planning" of public officials, even to public officials who do not take advantage of their positions, infringed upon the freedom of political expression and equality rights, and thus violated the Constitution. Pursuant to the Court's decision, the provision is revised in 2010 to apply only to act taking advantage of public official's status.

(2) Proportional Member Candidate

In *Prohibition of Campaign Activities against Proportional Member Candidate Case*(18-2 KCCR 212, 2004Hun-Ma217, July 27, 2006), the Court held that the provisions of the Public Official Election Act which do not allow the candidates for proportional members of the National Assembly to conduct the campaign activities which are otherwise allowed for the candidates for constituency members of the National Assembly do not violate the freedom of election guaranteed to the proportional member candidates or the political parties concerned.

2. Restriction on Time

(1) In *limitation on Election Campaign Period Case* (13-2 KCCR 263, 2000 Hun-Ma212, August 30, 2001), the Court upheld the provision of the Public Official Election Act limiting an election campaign period and punishing campaign activities done before the campaign period, on the ground that considering the purpose and manners of restriction, common election activities in Korea and practical necessity, restriction of the election period is necessary and reasonable and does not excessively restrict the freedom of election campaign.

(2) Restriction on Premature Electioneering

Regarding premature electioneering, the Court held constitutional the provision of the Public Official Election Act which limits election campaign period and punishes any person who prematurely carries out election campaign before the designated period, on the ground that the provision does not infringe on the freedom of campaign election (20-2 KCCR 750, 2005Hun-Ba32, October 30, 2008).

3. Restriction on Methods

(1) Election Campaign Using Prints, Text Messages, UCC etc.

1) Prints

Regarding restriction on printed documents, the Court held that the provisions of the Public Official Election Act which prevent anyone from distributing name cards from 180 days prior to the Election Day to the Election Day, except when a candidate does so during the campaign period, with the intention of influencing the election and punish such violation do not infringe on the freedom of election campaign and the right to equality (20-2 (A) KCCR 750, 2005Hun-Ba32, October 30, 2008).

2) Text Messages
Regarding restriction on election campaign sending text message through mobile phone, the Court held that prohibition of sending text messages to voters, pursuant to the provision of the Public Official Election Act banning unlawful distribution of documents or the like which contains the contents of supporting, recommending or opposing a political party or candidate from 180 days prior to the Election Day to the Election Day with the intention of influencing the election, does not violate the principle against excessive restriction and therefore does not violate the freedom of election campaign. Despite the majority of five justices rendered a decision of unconstitutionality, the provision held constitutional as the Court failed to meet the quorum requirement of more than six justices to render a decision of unconstitutionality (21-1(B) KCCR 599, 2007Hun-Ba24, May 28, 2009).

3) UCC (User Created Contents)
Regarding restriction on UCC, the Court, in an opinion of 3(constitutional):5 (unconstitutional) held that prohibition of distributing 'UCC', pursuant to the provision of the Public Official Election Act banning unlawful distribution of documents or the like which contains the contents of supporting, recommending or opposing a political party or candidate from 180 days prior to the Election Day to the Election Day with the intention of influencing the election, does not violate the principle against excessive restriction and therefore, does not violate the freedom of election campaign (20-2(A) KCCR 750, 2005Hun-Ba32, October 30, 2008).

4) Real Name Verification Process
In *Real Name Verification of Internet News Site Case* (161 KCCG 595, 2008Hun-Ma324, 2009Hun-Ba31 (consolidated), February 25, 2010), the Court held constitutional the provisions of the former Public Official Election Act that impose the duty on the Internet News Site to implement technical measures to identify the real name of the one who posts message expressing support for or opposition to political parties or candidates on the message board or chat room of its homepage during the election campaign period and to delete messages posted without the verification of real name, not in violation of the rule of clarity, the principle against prior censorship and the principle of the least restrictive means.

(2) Interview and Policy Debates
Regarding restriction on interviews and policy debates, the Court held constitutional the provision of the Public Official Election Act which requires 5/100 or more of support rate averaging the results of public opinion poll as a condition for participating in interviews and policy debates by the Election Debate Broadcasting Committee, as it does not violate the freedom of election campaign and the right to hold public office (21-1(A) KCCR 708, 2007Hun-Ma 1327, March 26, 2009).

(3) Rejection Campaign
In *Rejection Campaign by the Citizen's Alliance Case* (13-2 KCCR 263, 2000 Hun-Ma121, Aug. 30, 2001), the Court upheld the provision of the Public Official Election Act prohibiting a rejection campaign including

the one launched by a third party with no objective to win an election. The Court states that although a rejection campaign by a third party without direct interest in the outcome of an election is different from a rejection campaign by candidates against their opponents in that it is not launched for the purpose of winning an election but for the public good of preventing the election of an unfit candidate, there is essentially no difference between them as both have the same methods and effects. Therefore, it is inevitable to regulate such activities regardless of the intention to win an election and there is a balance between the restriction imposed on the freedom of expression and the public interest of managing a fair election.

(4) Support and Recommendation from Party
In *Party Affiliation of Candidates for Local Election Case* (15-1 KCCR 7, 2001 Hun-Ka4, Jan. 30, 2003), the Court declared unconstitutional the provision of the Public Official Election Act which prohibited a candidate in the local council election from revealing the fact that he/she was supported or nominated by a political party, as it restricts the candidates' freedom of political speech and violate the principle against excessive restriction, failing to strike a balance between the public benefit derived from the ban on expression of party affiliation and the negative effects of the ban.

(5) Receipt of Illegal Contribution
In *Imposition of Penalty against Receipt of or Demand for Illegal Contribution Case*(21-1(A) KCCR 337, 2007Hun-Ka22, March 26, 2009), the Court held that the provision of the Public Official Election Act, which punishes a person who receives or demands contribution by uniformly imposing penalty equivalent to 50 times of the amount or the value of foods or goods given to him/her and provides no possibility of a reduction, does not conform to the Constitution as it violates the principle against excessive restriction. Reflecting the Court's decision, the provision was revised in 2010 and "penalty equivalent to 50 times of the amount or the value of foods or goods" was replaced by "penalty of not less than 10 times and not more than 50 times of the amount or the value of foods or goods."

4. Restriction on Expenses

(1) In *Excluding Perspective Candidate for the National Assembly Election from Receiving Political Fund Case* (13-2 KCCR 174, 99Hun-Ba92, August 30, 2001), the Court held constitutional the provision of the former Political Fund Act which excluded a prospective candidate for the National Assembly election, who has yet to be registered with the competent election commission as a candidate, from being the one who may receive political fund, as it does not violate the principle of equality and therefore, not infringe on the right to hold public office.

(2) In *Trade Union's Political Contributions case* (11-2 KCCR 555, 95Hun-Ma154, November 25, 1999), the Court held that the provision of the Political Fund Act allowing political contributions by other social organizations, especially management but bans political contributions

by labor union was in violation of the labor union's right to equality, and therefore unconstitutional. Pursuant to the Court's decision, the provision was revised to prohibit foreigners, foreign or domestic corporations or organizations from contributing any political funds.

D. Others

1. Subsidy to Political Parties
   In *Allocating Proportion of Country Subsidy to Political Parties Case* (18-2 KCCR 242, 2004Hun-Ma655, July 27, 2006), the Court held constitutional the provision of the Political Fund Act, which differs in the proportion of country subsidy to political parties depending upon whether such party is formed as a negotiating one as it does not amount to notably change the competitive dynamics among political parties, thereby not leading up to the lack of reasonableness.

2. Report on Parliamentary Activities
   In *Reporting Parliamentary Activities Before the Election Campaign Period Case* (13-2 KCCR 174, 99Hun-Ba92, August 30, 2001), the Court held that the provision of the Public Official Election Act which allows a National Assembly member or a local council member to report his/her parliamentary activities before the commencement of the election campaign period does not violate the Constitutions.

3. Listing Order of Candidate's Name on Ballot Paper
   Regarding this, the Court declared constitutional the provision of the Public Official Election Act which stipulates the listing order of candidates on the ballot paper based on the number of the representatives belonging to the political party, such as the candidate from majority party as of the voting day first, the candidate from minority party later, and the independent candidate latest, and also declared constitutional the provision which lists candidates for the municipal election on the ballot paper in alphabetical order when a political party nominates more than one candidate in the same electoral district, as they do not infringe on the complainant's fundamental rights including the right to equality (19-2 KCCR 412, 2006Hun-Ma 364-587-791(consolidated), October 4, 2007).

IV. Conclusion

It is deep-rooted idea that election is the essence of democracy and the ultimate democratic device, and therefore, it may not be exaggerating to say that the rise and fall of the Parliamentary politics solely depends on the election system itself. The Constitutional Court of Korea has played a pivotal role in the development of election law in the country. In many cases related to election, the Court has been rendering well balanced decisions between the freedom of election and its fairness, staying vigilant at any excessive restriction on the election by applying strict standard of review in order to practically secure people's right to vote and right to hold public office, while carefully considering the fact that fairness in election process is also equally important public interest we have to pursue.

Reflecting such stance the Constitutional Court of Korea has taken, in recent years, legislative restrictions on the freedom of election seems to be somewhat relaxed in Korea, such as expanding the freedom of election campaign via introducing the system of preliminary candidate. Due to the improvement of election culture and public awareness in election system and the technological development, it is expected that in the near future, the Court will deal with cases containing new constitutional arguments about the restrictions or limitations stipulated in the election act.

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

CONCEPT OF ELECTORAL SYSTEM IN COMPARISON

Tun Zaki Tun Azmi

Chief Justice of the Federal Court of Malaysia

Introduction

[1] This paper lays down the laws governing election, disqualification of elected members as well as the penalties under the laws relating to election in Malaysia.

[2] Malaysia is a federation comprising of 13 states headed by the Yang Di-Pertuan Agong (His Majesty The King) who is a constitutional monarch. The Yang Di-Pertuan Agong acts on the advice of the Cabinet in the exercise of his functions. The system of the Government in Malaysia is closely modeled on that of Westminster Parliamentary system. Malaysia has a written constitution that spells out the function of the three branches of Government namely; the Executive, Legislative and Judiciary. In United Kingdom where there is no written constitution, it is the fundamental principle of English constitutional law that Parliament is supreme and that it may do anything it wishes. It can pass any law as it pleases so long as it conforms with the necessary legislative procedure. Unlike in the United Kingdom, in Malaysia, the Federal Constitution is supreme, and not Parliament.

[3] Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.[1]

[4] Government is formed by election. Elections are contests for the highest stakes in national politics and the electoral system is made up of a set of predetermined rules for conducting elections and determining their outcome. The constitution sets out the framework and legal principles governing election. These are enshrined in Part VIII of the Federal Constitution entitled "Elections"[2].

[1] Article 4 (1) of the Federal Constitution.
[2] Article 113 to 120 of the Federal Constitution.

[5] In Malaysia we have the House of Parliament which comprises of the Upper House (Senate) and the Lower House (House of Representatives). A part from that, we also have the State Legislative Assembly in each of 13 states. The members of the House of Representatives and State Legislative Assembly are elected. This paper will discuss the concept of electoral system in Malaysia.

Concept of Electoral System In Malaysia

[6] Since independence in 1957 Malaysia has maintained a multi-party election system. This means that any of the currently registered political parties can, upon obtaining the majority of seats, form the government. This is done on the basis of first-past-the-post system and is based on a single-member territorial constituency, where only one candidate is to be voted in anyone constituency. It is a simple procedure for translating votes into seats since the party with the highest number of seats win.[3]

[7] In general, there are two types of elections. Firstly, the general election. It is held consecutively without any exception once every five years as stipulated by the constitution.

[8] In Malaysia, our Parliament unless sooner dissolved shall continue for five years from the date of its first meeting and shall then stand dissolved[4]. Whenever Parliament is dissolved a general election shall be held within sixty days from the date of the dissolution and Parliament shall be summoned to meet on a date not later than one hundred and twenty days from that date[5]. This applies equally to the States Legislative Assembly.

[9] General elections are held after the dissolution of the Parliament or a State Legislative Assembly or after a period of 5 years when they are automatically dissolved.

[10] Secondly, we have by-election. It is held whenever there is a casual vacancy in the House of Representatives or a State Legislative Assembly which may be due to the resignation of an elected representative, the death of an elected representative, the annulment of the decision of the election by an Election Court or the loss of eligibility of the elected representative.

[11] A by-election has to be held also within a period of sixty days from the date established by the Electoral Commission to fill a vacancy.[6]

Legal Framework of Electoral System In Malaysia

Overview

[12] In facilitating the implementation of elections in Malaysia, the legal framework has been established for the conduct of election. A number of laws and regulations have been enacted governing both the electoral process and the electoral mechanism.

[13] The legal framework for elections in Malaysia is provided by the **Federal Constitution, State Constitutions, Elections Commission Act 1957, Elections**

[3] See Elections in Malaysia by Election Commission Malaysia at page 3
[4] Article 55 (3) of the Federal Constitution
[5] Article 55 (4) of the Federal Constitution
[6] See Elections in Malaysia by Election Commission Malaysia at page 13.

Act 1958 (Act 19), Election Offences Act 1954 (Act 5), Elections (Conduct of Elections) Regulations 1981, Elections (Registration of Electors) Regulations 2002 and Elections (Postal Voting) Regulations 2003.

[14] All these laws and regulations are directly related to the conduct of elections. In addition to these, there are several laws which are not directly related to the electoral process per se but nevertheless play an important role in the smooth running of the elections. Among these are the Police Act 1967, Sedition Act 1958, Official Secrets Act 1971 and Internal Security Act 1960.

Establishment of Election Commission

[15] The Election Commission of Malaysia is constituted under Article 114 of the Federal Constitution.

[16] General powers and duties of Election Commission are clearly provided in the **Election Act 1958**[7]**.** Election Commission shall -

(a) exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls, and shall enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder;

(b) have powers to issue to election officers such directions as may be deemed necessary by the Commission to ensure effective execution of Part VIII of the Constitution and this Act and any regulations made thereunder;

(c) have power to administer any oath required to be taken under this Act and any regulations made thereunder; and

(d) execute and perform all other powers and duties which are conferred or imposed upon it by this Act and any regulations made thereunder.

The Electoral Process

[17] The conduct of general elections and by-elections in Malaysia involves sub-processes, namely the issuance of writ, nomination of candidates, election campaign, polling, counting and official tallying of votes and the declaration of the results of the election.

Issuance of Writ

[18] For the purposes of every general election and a by-election, the Election Commission shall issue writs addressed to the returning officer of each constituency for which a member is to be elected.[8]

[19] The writ is the instrument issued by the Election Commission authorizing the returning officer to conduct the by-election on a date as specified in the writ.[9]

[20] On the issue of a writ in accordance with the provisions of section 12 of the Elections Act 1958, the Election Commission shall publish a notice

[7] Section 5 of the Election Act 1958.
[8] Section 12 of the Elections Act 1958.
[9] Hashim Hj Jasin v. Pegawai Pengurus Pilihanraya Mohd Daud Abdul Hamid & Ors [2008] 5 CLJ 387.

thereof in the Gazette and such notice shall specify the date on which candidates for election are to be nominated, which in these Regulations is referred to as the' "day of nomination", not being less than four days after the date of the publication of such notice, and the date or dates on which the poll will be taken in the event of a contest (referred to in these Regulations as the "polling day"), not being less than seven days after the day of nomination.[10]

Nomination of candidates

[21] Any person eligible for election as a member of the Dewan Rakyat, or of the Legislative Assembly of a State, in accordance with the provisions of the Federal Constitution, or the Constitution of a State, as the case may be, may be nominated as a candidate for election.

[22] On Nomination Day, the Returning Officer will receive nomination forms from prospective candidates or their proposers or seconders or from any two or all three of them.

[23] After the consideration of any objections received, the Returning Officer will announce the candidates who are eligible to contest. In the event that only one candidate is eligible to contest, the Returning Officer will announce that the candidate has won the seat uncontested.

Election Campaign

[24] Section 2 of the Election Offences Act provides :-

"campaign period in relation to an election means the period during which any candidate or his election agent is allowed to hold election campaign in the candidate 's constituency, being the period commencing from the time the returning officer declares that a poll will be taken in the constituency for which he is appointed and ending on the expiration of the day before polling day"

[25] After the conclusion of the nomination process, candidates or their representatives can start their campaign. Campaign activities must cease at 12.00 midnight on the day before the polling day.

[26] A candidate or his election agent may, during the campaign period, display, furnish or distribute election campaign materials to members of the public in the constituency in which the candidate seeks election but only if he[11]

(a) holds a permit to do so issued to him by the State Elections Officer, subject to such terms and conditions as the State Elections Officer may determine; and

(b) has paid to the State Elections Officer a deposit of five thousand ringgit in the case of an election to the Dewan Rakyat and three thousand ringgit in the case of an election to a Legislative Assembly.

Polling Day

[27] Polling day is the day beginning after 12 midnight on the day before, until the close of the poll. Voting normally is from 8.00 a.m and ends at 5.00 p.m.[12]

[10] Section 3 (1) of Elections (Conduct of Elections) Regulations 1981.
[11] Section 24B (4) of the Election Offences Act.
[12] See Elections in Malaysia by Election Commission Malaysia at page 16.

[28] Public notification will be issued on important matters pertaining to the election such as[13] :

(a) the date of poll
(b) the location of polling station
(c) the duration of polling in each polling station
(d) the location of the counting and tally centre

[29] Voting is carried out at the various gazetted polling stations. Each polling station is presided over by at least one Presiding Officer who will exercise general control and supervision over all matters pertaining to the conduct of the poll at the station. The Returning Officer may appoint one or two polling clerks to assist the Presiding Officer in conducting the poll.[14]

[30] To ensure the secrecy of the poll, only the following persons are allowed to remain in a polling station ;[15]

(a) presiding officer/officers and polling clerks and guides
(b) polling agents of candidates; and
(c) any other persons authorized by the Election Commission.

[31] Voting is by secret ballot. A voter cast his vote for one candidate only by marking a cross against the name of candidate of his choice in the ballot paper. The marked ballot paper is then folded and inserted into the ballot box. If two papers are to be marked in simultaneous election for Parliament as well as the State Legislative Assemblies, each of the ballot papers is dropped into separate boxes designated "PARLIMEN" and "NEGERI".[16]

[32] On polling day, electors whose names appear on the Electoral Roll will be able to vote at the Polling Centers established in a constituency.

[33] The electoral rolls for the time being in force shall be prima facie evidence for the purpose of determining whether a person is or is not entitled to vote at an election in any constituency.[17]

[34] In a general, the Election Commission has determined that polling shall be from 8.00 am to 5.00 pm throughout the country. However, there are areas where polling time is shortened due to security reasons and difficulties in communication especially in Sabah and Sarawak. This is in line with **Regulation 11 (5) of the Election (Conduct of Elections) Regulation 1981.**

[35] Each polling centre normally has one or more polling stations. Each polling station is headed by a Presiding Officer and assisted by two to four assistants. Absent voters and those who are eligible to vote by post are allowed to vote earlier, that is before the polling day. However, all the marked ballot papers must reach the office of the Returning Officer by 5.00 pm on polling day.[18]

Declaration of result

[36] After tallying the votes, the Returning Officer for a constituency will announce the candidate obtaining the majority of votes and confirm him

[13] Ibid, page 17.
[14] Ibid, page 17.
[15] Ibid, page 17.
[16] Ibid, page 18.
[17] Section 14 of the Elections (Conduct of Elections) Regulations 1981.
[18] See Elections in Malaysia by Election Commission Malaysia at page 18.

as the elected representative for that constituency. Any party not satisfied with the decision of the election can submit an election petition to the Election Court.[19]

Election Petition

[37] The result of an election can be challenged in the court of law via the filing of an election petition. In the last general election which was held on 8th March 2008 a total of 20 election petitions were filed. The procedures to be adopted in an election petition are provided for in the Election Offences Act 1954.

[38] In ***Dr Shaþe Abu Bakar v. Pegawai Pengurus Pilihanraya N 26 Bangi & Ors***[20], the Court held that where a person is declared elected to either House of Parliament or to the Legislative Assembly of a State, his election may be challenged or questioned by way of an election petition and the law applicable would be the Election Laws and not the common law or equity. Election Law is a special law and there is no place for consideration of equity or common law principles, it is wholly statutory.

[39] Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the Gazette.[21]

[40] The Courts have insisted on strict compliance, and failure to comply with the rules in filing the petition would render petition liable to be dismissed by the election judges.

[41] In ***Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor***[22], it was held by the court that the time to present the petition is as short as twenty-one days and if amendments are sought to be made beyond this period the case is time barred and hence the court ought not to allow such amendment.

[42] No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.[23]

[43] In ***Election Commission, Malaysia v. Abdul Fatah Haron***[24], the respondent Abdul Fatah bin Haji Haron in this appeal before the Supreme Court was one of the two candidates in the Kelantan state election for the state constituency of Bukit Tuku held on 3 August 1986. He lost the election. On 1 October 1986 he filed an election petition in the Kota Bharu High Court *vide* Kota Bharu Election Petition No. 33-1-86 challenging the validity of the election of the other candidate, one Zakaria bin Botok. In the petition he claimed that the said Zakaria bin Botok was not duly elected or returned and that he was the one who was duly elected and ought to have been returned. The hearing of the said election petition was fixed in April 1987 but was postponed because the said Zakaria bin Botok passed away on 31 March

[19] Ibid, page 19.
[20] (2005) 5 CLJ 349
[21] Section 38 (1) of the Election Offences Act.
[22] (1979) 2 MLJ 143.
[23] Article 118 of the Federal Constitution.
[24] [1987] 2 CLJ 193.

1987. On 2 April 1987 the secretary to the Dewan Negeri Kelantan wrote to the secretary to the Election Commission informing the Commission of the death of the said Zakaria bin Botok.

[44] On 13 April 1987 the respondent filed a civil suit against the Election Commission in the High Court in Kuala Lumpur asking for a declaration that the Election Commission cannot lawfully call for nominations on 18 April 1987 with a view to holding a by-election for the Bukit Tuku constituency before finalisation of the Kota Bharu Election Petition No. 33-1-86. On the same day the respondent filed an ex parte application by summons-in-chambers for an interim injunction to restrain the Election Commission from calling for nominations on 18 April 1987 with a view to holding the said by-election. The learned Judge granted the application with liberty to apply.

[45] On 23 April 1987 the Election Commission applied to discharge the interim injunction but the application was refused by the learned Judge. Hence the appeal.

[46] It was held by the Supreme Court that the law has also prescribed the period during which a by-election should be held. Article XLVI(5) of the Constitution of the state of Kelantan requires that a casual vacancy shall be filled within sixty days from the date on which it occurs. Therefore it is a clear intention of the legislature that the by-election should be concluded according to the time frame prescribed. Any controversial matter arising out of the election should be brought up only after the election is over so that the election proceeding may not be unduly hampered or protracted. If a person is dissatisfied with the election he should bring his complaint before an election Judge by way of an election petition. Such complaint should not be made an issue before any Court while the election is in progress. Therefore it is not a question of the Court having no jurisdiction but that the Court should decline to exercise its jurisdiction so as not to hinder the democratic process.

[47] An election petition may be presented to the High Court by any one or more of the following persons:[25]

(a) person who voted or had a right to vote at the election to which the petition relates;
(b) person claiming to have had a right to be returned or elected at such election; or
(c) person alleging himself to have been a candidate at such election.

[48] With regard to relief which may be claimed, Section 35 of the Election Offences Act provides :-

"All or any of the following reliefs to which the petitioner may be entitled may be claimed in an election petition:

(a) a declaration that the election is void;
(b) a declaration that the person was not duly elected or ought not to have been returned;

[25] Section 34 of the Election Offences Act 1954.

(c) a declaration that any candidate was duly elected and ought to have been returned ; and

(d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny."

[49] The trial of every election petition must be completed within six months from the date of presentation of the petition.[26]

[50] In addition, notwithstanding any other law to the contrary, an appeal against the determination of an Election Judge shall be heard and decided upon by the Federal Court within six months from the date of presentation of the appeal[27].

[51] The new section 35A of the **Election Offences Act 1954**, which came into effect on **16 January 2003 by Act A 1177/02** providing that election petition shall be completed not later than six months from the date of the presentation of the election petition evince an intention and places importance that for both Parliamentary and State Election there shall be a quick decision as to who shall be entitled to sit as an elected representative of the voters as delay would create doubt and difficulties in administration.[28]

Election Offences In Malaysia

[52] In Malaysia, election offences can be found in a specific legislation, namely the **Election Offences Act 1954 (Act 5) (Revised-1969).**

[53] This Act is sub-divided into seven parts: **Part I (Preliminary and Interpretation); Part II (Electoral Offences); Part III (Corrupt Practices); Part IV (Elections Agent, Elections Expenses and Illegal Practices); Part V (Excuse for Corrupt or Illegal Practice); Part VI (Grounds for avoiding Elections) and Part VII (Election Petitions).**

[54] Based on the **Election Offences Act 1954,** the election offences can be divided into three broad categories.

Electoral offences.

[55] Electoral offences are stipulated in **Part II of the Election Offences Act**[29]. They are divided into four categories, i.e. offences by any person, offences by election officers, offences of promoting feelings of ill-will or hostility and offences related to the obligation to maintain the secrecy of election.

[56] In **Re Tanjong Puteri Johore State Election Petition**[30]**,** it was successfully alleged that there had been discrepancy of votes, a violation of the secrecy principle in the counting of the postal ballots and impropriety in the dispatch of ballot boxes. In fact non-compliance with any election law can be the basis for an election petition.

Corrupts practices.

[57] Corrupt practices are provided for Part III of the Election Offences Act

[26] Section 35A of the Election Offences Act.
[27] Section 36 B of the Election Offences Act.
[28] Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors [2009] 3 CLJ 221.
[29] Section 3 to 6 of the Election Offences Act.
[30] (1988) 2 MLJ 111.

1954.[31] Among these are personation, treating, undue influence, bribery and other forms of corrupt practices. The following are some of the cases under part III of the Election Offences Act.

[58] In ***Wong Hua She v. Ding Kuong Hiing***[32], it was alleged that the offence of treating was committed by TPK by holding the luncheon gathering on 25 February. It was not disputed that the luncheon was sponsored by TPK for some 500 people. On appeal the Federal Court agreed with the learned election judge that to prove treating under section 8 the appellant need to establish beyond reasonable doubt that food was provided with the intention of influencing the voters to vote for a candidate or not to vote a candidate at an election. The learned election judge found as a fact that there was no such evidence before the court. Quoting from Schofield's Election Law, vol. 1, Shaw & Sons, 2nd edn (1996), which referred to Tewkesberry Law (1857) 20 Dig 88, 677 it is stated that:

"For to prove treating to be corrupt it is necessary to prove that some person has been thereby corrupted and induced by such treating to vote for the sitting member".

[59] The Federal Court found this statement of the law equally applicable to the case having regard to the provision of our section 8 of the Election Offences Act. Since there is no such evidence before the court, the Federal Court held that the learned election judge had rightly ruled that the appellant failed to establish the offence of treating under section 8.

[60] The case ***Mohd Nazri Hj Din v. Datoí Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors***[33] , Federal Court relates to the offence of bribery that it was observed that all the three complaints also have a common defect. In the first complaint there is no statement that the 37 persons who have been identified are registered voters. This means that none of the persons to whom the promise was made have been identified. In the case of the second complaint the distribution of the sacks of rice was done in front of the 37 named persons. There is also no statement that the sacks of rice were also given to them. This means that none of the persons to whom the gift was made have been identified. The third complaint merely states that the promise was made in front of the 37 named persons and not to them. Again this means that none of the persons to whom the promise was made have been identified. Thus in all the three complaints the promise or gift, as the case may be, was not made to any particular voter or voters but to a crowd and no distinction was made between the voters who were favourably inclined towards the first respondent and those who were not.

[61] The facts pleaded in respect of the three complaints thus do not disclose the commission of an offence under s. 10(c) of the Election Offences Act 1954. The result is that they do not comply with the requirements of r. 4(1)(b) and r. 4(4)(3) of the Election Petition Rules 1954 as the facts pleaded are insufficient to sustain the prayer. The appeal is therefore dismissed with costs.

[31] Section 7 to 11 of the Election Offences Act.
[32] (2009) 3 CLJ 475.
[33] [2009] 3 CLJ 221.

Illegal practices.

[62] Illegal practices are provided for in **Part IV of the Election Offences Act**.[34] These include illegal practices related to payment of expenses through election agent, prohibition of certain expenses, expenses in excess of the maximum, illegal practices related to certain expenditure and restriction of political propaganda on nomination day.

IMPLICATION OF CONVICTION IN MALAYSIA

[63] In Malaysia, implication of conviction can be seen in **Section 31 (1) of the Election Offences Act 1954. It provides** :

"The election of a candidate at any election is avoided by his conviction for any corrupt or illegal practice at such election."

[64] **Section 31 (2) of the Act** further provides a process after a conviction. It states as follows :-

"Within fourteen days after the Sessions Court declared its verdict on a candidate who commits any corrupt or illegal practice at an election, the Sessions Court Judge or the Registrar of the Sessions Court will certify the Court's determination–

(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, a local authority under the jurisdiction of the Federal Government or of any other election that the Election Commission may be authorised to conduct; or

(b) in the case of any other election, to the State Authority."

[65] In addition to criminal sanction, another sanction would also apply to election law offender.

Section 3 (1) of the Election Offences Act :

"shall be liable, on conviction, to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand ringgit or to both such imprisonment and fine and, subject to any provision to the contrary in any written law relating to any election, shall until the expiration of five years from such conviction be incapable of being registered or listed as an elector or of voting at any election or of being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction".

[66] Furthermore, similar provisions are also found in **Section 7 to Section 11 of the Election Offences Act** which provide sanctions for corrupt practices.

[67] **Section 11 of the Election Offences Act** provides for the punishment and the incapacities following a conviction for corrupt practice. Subsection (2) of the act provides :

"(2) *Every person who is convicted of a corrupt practice shall, subject to any specific provision to the contrary in any written law relating to any election, by conviction become incapable of being registered or*

[34] Section 12 to 27 of the Election Offences Act.

listed as an elector or of voting at any election or of being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction:
Provided that such disability shall cease on the expiry of five years from such conviction."

[68] Section 27 of the Election Offences Act provides :-

"(1) Every person who commits an illegal practice shall, on conviction by a Sessions Court, be liable to a fine of five thousand ringgit and, subject to any specific provision to the contrary in any written law relating to any election, shall by conviction until the expiration of five years from such conviction become incapable of being registered or listed as an elector or of voting at any election under this Act or of being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction.

(2) A prosecution for an illegal practice shall not be instituted without the sanction of the Public Prosecutor."

[69] **Election Offences Act 1954** specifies five grounds on or under which an election may be declared void.

Section 32 reads as follows:

"(a) that general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those before enumerated or not have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement being convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) that the candidate was at the time of his election a person disqualified for election."

[70] In ***Audrey Karen Barry v. Datuk Dr Yee Moh Chai*** [35], it was held that under s. 11(1)(c) of the Election Offences Act 1954 it is a corrupt practice for any person to print, publish, distribute or posted up or causes to be printed, published, distributed or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the name and address of its printer and publisher. If found guilty of such an act the person is liable to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit.

[35] [2010] 3 CLJ 660.

[71] It is obvious that Malaysian legal framework provides a broader consequence for committing election offences. In addition to the criminal sanctions, the Election Offences Act provides further law renders a person disqualified from candidacy for a period of 5 years from the date of conviction.

Conclusion

In Malaysia, the electoral system and its mechanism are governed by a number of laws, regulations and decided cases. The Election Commission as a body responsible for the conduct of election plays a crucial role in safeguarding the democratic process of the country through a fair and just election. In this regard, I am proud to say that the judiciary had over the years played an important role as a final arbiter over any dispute relating to election.

To conclude, I would say that the existing election laws and regulations ensure a free and fair election as well as transparency of the election process in Malaysia. The process ensures a speedy declaration of election results and the formation of a new government in the country.

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

ELECTORAL SYSTEM IN THAILAND

Chalermpon Ake-uru
Justice of the Constitutional Court of Thailand

I Introduction

Free and fair elections are an essential component of representative democracy, the form of government that many countries practice nowadays. Through the electoral process the people of the country express their will in designating their representatives to serve as members of the legislative or executive branch of government.

Just as a soccer game needs rules as well as a referee and linesman, so an election requires a system of electoral rules as well as an election management body. The electoral system as "the set of procedural rules governing the expression of votes cast in a given election and their conversion into seats" (a definition adopted by Pierre Garrone) is thus important. Its function is to translate the will of the people into seats in the legislature or the offices of the executives, as the case may be.

In Thailand, members of the House of Representatives, 76 out of 150 members of the Senate which together form the National Assembly or Parliament of Thailand and public offices in the local government are elected. In this connection, the most important election is the general election of members of the House of Representatives.

In this paper, I will attempt to give an overview of the electoral system in Thailand as applied in the general election of members of the House of Representatives for the purpose of comparison with the system of other countries.

II Rules regarding elections

Rules regarding the election of members of the House of Representatives are stipulated in the Constitution of the Kingdom of Thailand B.E. 2550 (2007) section 93 to 98 and the Organic Act on Election of Members of the House of

Representatives and the Installation of Senators B.E. 2550 (2007). The text of the Constitution section 93 to 98 (translated into English) appears in the Annex.

Thailand adopted a direct universal suffrage which means that every citizen, except those who are excluded by law, can directly participate in the vote and elect his or her representatives without the involvement of intermediaries. The election is by secret ballot and the forms of ballot paper used are exclusive to each election basis.

The House of Representatives consists of 480 members, 400 of whom are from the constituency based election and 80 of whom are from the proportional based election. The term of the House is 4 years but it can be dissolved before that period. So, in Thai general election, the voters have two ballots: one to select their MPs for their constituency and the second to choose whichever political party they prefer most.

a) Constituency based election

With regard to a constituency based election, a province will be divided according to the population census and provincial division into constituencies by which each constituency will have not more than 3 MPs. In case that not every constituency can have 3 MPs, the constituency having 3 MPs will be designated first and the remaining constituency will have not less than 2 MPs. In case where a province has 4 MPs, it will be divided into 2 constituencies having 2 MPs each. This is in fact a case of the multi-member constituency.

An eligible voter will have the right to cast the member of votes corresponding to the number of MPs in such constituency. The first 3 or 2 candidates, as the case may be, that obtain the most votes are declared elected.

b) Proportional based election

As for a proportional based election, the whole country will be divided into 8 clusters of province. Each cluster will be regarded as one constituency and will have 10 MPs. A voter can choose only one list of a political party. Calculation of the number of MPs on the proportion basis will be like this:

- Suppose that in the cluster there are 7 political parties and these 7 political parties receive votes as follow:

1. Monday Party	2,600,000	votes
2. Tuesday Party	1,450,000	votes
3. Wednesday Party	800,000	votes
4. Thursday Party	500,000	votes
5. Friday Party	350,000	votes
6. Saturday Party	200,000	votes
7. Sunday Party	100,000	votes
Total	6,000,000	votes

- Average votes per 1 Mp equal to total votes of every party divided by 10. So, 6,000,000 votes divided by 10 is 600,000 votes.
- The number of seats each party will receive is the total votes each party receives divided by average votes per 1 MP, i.e. 600,000.

The result will be as follows;

Parties	Votes received	Average vote	No. of seats	Additional seats from fraction
Monday	2,600,000	4.33	4	4
Tuesday	1,450,000	2.42	2	2+1
Wednesday	800,000	1.33	1	1
Thursday	500,000	0.83	0	0+1
Friday	350,000	0.58	0	0+1
Saturday	200,000	0.33	0	0
Sunday	100,000	0.17	0	0
Total	6,000,000		7 seats	10 seats

III Election Management Body

We now turn to the referee and linesman in elections. According to the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Election Commission was established as an independent constitutional organ. The Election Commission consists of a Chairperson and other four Commissioners appointed by the King by the advice of the Senate from persons of apparent political impartiality and integrity. They are selected by the Selection Committee and approved by the Senate. Their term of office is seven years and they can serve for only one term. The text of the Constitution section 229 to 241 (translated into English) concerning the Election Commission appears in the Annex.

The Election Commission is the organ that control and hold, or arrange for an election or selection of members of the House of Representatives, senators, members of a local assembly and local administrators, as the case may be, including the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner.

The Chairperson of the Election Commission has charge and control of the execution of the Organic Act on Election of Members of the House of Representatives and the Installation of Senators, the Organic Act on Political Parties, the Organic Act on Election Commission, the Organic Act on Referendum and the law on election of members of local assemblies or local administrators. He is also the political party registrar. The Election Commission also has the powers and duties to conduct investigations and inquires for finding facts or giving decisions on problem or disputes arising under the laws referred to above.

To assist in the work of the Election Commission, an Office of the Election Commission was also established as an agency having independence in personnel administration, budget and other activities as provided by law.

Moreover, the Election Commission has provincial branches, called Provincial Election Commission. These Provincial Election Commissions are appointed by the Election Commission. Most of the Election Commission's work is done at the provincial level, for example, preparing and checking the voter lists, identifying polling stations, recruiting and training polling station committees, determining and organizing a place for counting votes, etc. However, just before and during elections of the members of the House of Representatives the Election Commission has the power to appoint temporary positions, such as the constituency directors and to ask for assistance from government officers, personnel of state agency, state enterprise or local government or other state officials to perform all acts necessary for organizing an election.

The top priority mandate of the Election Commission are, of course, to organize, supervise elections and regulate other activities connected with elections, such as election campaigns and activities of political parties, candidates and persons having the right to vote so as to ensure that the elections proceed in an honest and fair manner.

One distinctive feature is the power of the Election Commission to conduct an investigation and inquiry in the case of complaints that an election has been carried out improperly or unlawfully. This has to be done forthwith and at the completion of the proceedings the Election Commission must pass a decision. If the Election Commission pass a decision to hold a re-election or suspend the right to vote before the announcement of the result of the election such decision will be final. If, after the announcement of the result of the election, the Election Commission is of the opinion that a re-election must be held or the right to vote of the member of the House of Representatives must be suspended, a complaint will be submitted to the Supreme Court of Justice for decision.

So, we can see that the Election Commission has an adjudicative power with regard to improper or unlawful elections insofar as the re-elections are concerned. In the past, the previous election law referred the complaints, objections, petitions to the court of justice. But the proceedings usually took so much time as not to be able to cope with the deteriorating situation of electoral frauds. However, adjudication of criminal offences remain within the jurisdiction of the court.

Like the referee in the soccer game, the Election Commission has two effective measures at its disposal to deal with cases of electoral frauds. They are:

a. Yellow Card

This is to be given to a candidate when frauds are found to be committed by other persons to help the candidate win the election. A re-election or a by-election will be called, but the person given a yellow card can stand in the new round of election.

b. Red Card

This is to be given to a candidate when frauds are found to be committed by himself or herself, or his or her spouse or children or close relatives with his or her support, or collusion or connivance. If the candidate gets a red card, his or her right to vote is suspended for one year which means that he or she cannot be a candidate in an election within that period.

IV Conclusion

An electoral system as applied in each country has to be in conformity with the socio-political and cultural landscape of that country. As a set of procedural rules it needs an impartial and independent election management body to implement it effectively so that the goal of free and fair election could be attained.

ANNEX

Provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007)

Section 93 The House of Representatives consists of four hundred and eighty members, four hundred of whom are from the election on a constituency basis and eighty of whom are from the election on a proportional basis.

The election of member of the House of Representatives shall be by direct suffrage and secret ballot, and the ballot to be used in an election shall be varied upon the election basis.

The rules and procedure for the election of members of the House of Representatives shall be in accordance with the organic law on election of members of the House of Representatives and the Installation of Senators.

In the case where the office of a member of the House of Representatives becomes vacant for any reason and an election of a member of the House of Representatives has not been held to fill the vacancy, the House of Representatives shall consist of the existing members of the House.

Subject to section 109 (2), in the case where there occurs, during the term of the House of Representatives, any cause resulting in the members elected from the election on a proportional basis being less than eighty in number, such members shall consist of the existing members.

In the case where there occurs, during the general election, any cause resulting in the members of the House of Representatives elected from the election being less than four hundred and eighty in number but not less than ninety-five per cent of the total number of members of the House of Representatives, such members is deemed to constitute the House of Representatives. In this case, the acquisition for the fulfillment of the total number of members of the House of Representatives shall be completed within one hundred and eighty days and the new coming members shall hold office for the remaining term of the House of Representatives.

Section 94 In the election of members of the House of Representatives on a constituency basis, the person having the right to vote shall cast ballot for the equal number of members of the House in each constituency.

The determination of the number of members of the House of Representatives in each constituency and the determination of constituencies shall be as follows:

(1) the determination of the ratio of the number of inhabitants to one member shall be made by reference to the division of such number of inhabitants throughout the country as evidenced in the census announced in the year preceding the year of election by the number of four hundred members of the House of Representatives;

(2) any Changwat with inhabitants below the number of inhabitants per one member under (1) shall have one member of the House of Representative. Any Changwat with more inhabitants than the number of inhabitants per one member shall have an additional member of the House of Representatives for every such number of inhabitants as representing the number of inhabitants per one member;

(3) upon the number of members of the House of Representatives of each Changwat being obtained under (2), if the number of members of the House of Representatives is still less than four hundred, any Changwat with the largest fraction remaining from the determination under (2) shall have an additional member of the House of Representatives and the addition of the members of the House of Representatives in accordance with such procedure shall be made to other Changwat in respective order of fractions remaining from the determination under (2) until the number of four hundred is obtained;

(4) in a Changwat where the number of members of the House of Representatives to be elected is not more than three, the area of that Changwat shall be regarded as the constituency and in a Changwat where the number of members of the House of Representatives is more than three, the area of such Changwat shall be divided into constituencies and, for this purpose, each constituency shall have three members of the House of Representatives;

(5) in a Changwat which is divided into many constituencies, if there is unable to have three members of the House of Representatives in all constituencies, the area of such Changwat shall be firstly divided into the constituency with three members of the House of Representatives and the rest constituencies shall have not less than two members of the House of Representatives and in a Changwat where the number of members of the House of Representatives to be elected is four, the area of such Changwat shall be divided into two constituencies and each constituency shall have two members of the House of Representatives;

(6) in a Changwat which is divided into more constituencies than one, the boundary of each constituency shall be adjoining and the number of inhabitants in each constituency must be closely apportioned.

The counting of votes shall be conducted at the polling station and the result of the vote-counting shall be reported to the constituency for calculation of total votes-counting in that constituency and the result of the total vote-counting shall be announced publicly at any single place in that constituency as designated by the Election Commission, except that in the case where necessity arises in a particular locality, the Election Commission may otherwise prescribe the counting of votes, the calculation of total vote-counting and the announcement of the result of the total vote-counting in accordance with the organic law on election of members of the House of Representatives and the Installation of Senators.

Section 95 An election of members of the House of Representatives on a proportional basis is an election for members of the House of Representatives from the lists of candidates prepared by political parties whereby the person having the right to vote in each constituency shall cast ballot for one political party preparing the list of candidates for such constituency.

A political party may submit the lists of candidates for the election on proportional basis for some or all constituencies.

In the case where there occurs to the submitted list of candidates for the election on proportional basis of a political party, whether on or before an election day, any cause resulting in the remaining candidates being less than the number of candidates as specified in the submitted list, the remaining candidates

are deemed to be candidates of such political party and, in this case, it shall be deemed that the House of Representatives consists of the remaining members.

Section 96 The determination of the constituencies for the election of the members of the House of Representatives on a proportional basis shall be as follows:

(1) the country shall be divided into eight groups of Changwat and each group of Changwat shall be regarded as one constituency having ten members of the House of Representatives;

(2) in grouping of Changwat, the boundary of each Changwat in each group shall be adjoining and the number of inhabitants in each group must be closely apportioned by reference to the division of such number of inhabitants throughout the country as evidenced in the census announced in the year preceding the year of election and the whole area of each Changwat shall be in on constituency.

Section 97 The preparation of the lists of candidates prepared by a political party for the election of the members of the House of Representatives on a proportional basis shall be as follows:

(1) the lists of candidates for each constituency shall consist of candidates in equal number of members of the House of Representatives to be elected on a proportional basis in each constituency and placed in numerical order and shall be submitted to the Election Commission before the date an application for candidacy in an election on the constituency basis commences;

(2) candidates under (1) shall not be candidates in an election both on the constituency basis and on proportional basis of any political party and, in preparing the list of candidates, regard shall be had to opportunity and approximate proportion between women and men.

Section 98 The determination of the proportion of candidates in the list of candidates of each political party as being elected in each constituency shall be conducted by accumulating the votes received by each political party in each constituency as basis for reckoning the proportion of candidates to be elected of each political party which shall be reflected to the result of the accumulation of the votes as aforesaid, the votes received by each political party and the numbers of members of the House of Representatives to be elected on a proportional basis in such constituency. The candidates named in the list of candidates of each political party shall be regarded as being elected in accordance with the result of reckoning by numerical order as specified the list of candidates of each political party under the rules and procedure as prescribed in the organic law on election of members of the House of Representatives and the Installation of Senators.

The provisions of section 94 paragraph three shall apply mutatis mutandis to the counting of votes for the election of members of the House of Representatives on a proportional basis, provided that the Election Commission prescribes to conduct the preliminary calculation of total vote-counting at Changwat.

Section 229 The Election Commission consists of a Chairperson and other four Commissioners appointed, by the King with the advice of the Senate, from persons of apparent political impartiality and integrity.

The President of the Senate shall countersign the Royal Command appointing the Chairperson and Commissioners under paragraph one.

Section 230 An Election Commissioner shall have the qualifications and shall not be under any prohibition as follows:

(1) being of not less than forty years of age;
(2) having graduated with not lower than a Bachelor's degree or its equivalent;
(3) having qualifications and not being under any of the prohibitions under section 205 or section 205 (1), (4), (5) and (6);
(4) not being a judge of the Constitutional Court, an Ombudsman, a member of the National Counter Corruption Commission, a member of the State Audit Commission or a member of the National Human Right Commission.

The provisions of section 207 shall also apply mutatis mutandis to the Election Commissioner.

Section 231 The selection and election of Chairperson and Election Commissioners shall be proceeded as follows:

(1) there shall be a Selective Committee of seven members consisting of the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, a person selected at a general meeting of the Supreme Court of Justice and a person selected at a general meeting of the Supreme Administrative Court as members to be in charge of the selection and nomination of three persons, who have the qualifications under section 230 and suitable to be Election Commissioners, to the President of the Senate upon their consents. The selection resolution shall be passed by the votes of not less than two-thirds of the total number of the existing members of the Selective Committee. In the case where there is no member in any position or a member is unable to perform his duty and the number of the remaining members is not less than one-half thereof, the Selective Committee shall consist of the remaining members; provided that the provisions of section 113 paragraph two shall apply mutatis mutandis;

    Persons selected by the Supreme Court of Justice and the Supreme Administrative Court at their general meeting under paragraph one shall not be judges and shall not be members of the Selective Committee for other Constitutional organisations simultaneously.
(2) the Supreme Court of Justice shall, at its general meeting, consider and select two persons who have qualifications under section 230 and suitable to be Election Commissioners for making nomination to the President of the Senate upon their consents;
(3) the selection under (1) and (2) shall be made within thirty days as from the date when a ground for the section of persons to be in such office occurs. In the case where it is unable to make nomination within specified period, or unable to make nomination in the complete number within the period specified in (1), the Supreme Court of Justice shall, at its general meeting, make selection to obtain the complete number within fifteen days as from the date of the expiration of the nomination time under (1);
(4) the President of the Senate shall convoke the Senate for passing a resolution, by secret ballot, approving the nominated persons under (1), (2) and (3);

(5) in the case where the Senate approves the nomination, the proceedings under (6) shall be proceeded, but in the case where the Senate disapproves the nomination, whether wholly or partly, it shall be returned to the Selective Committee or the Supreme Court of Justice, at its general meeting, for reselection. In such case, if the Selective Committee or the Supreme Court of Justice, at its general meeting, disagrees with the Senate and reaffirms its resolution unanimously or by the votes of not less than two-thirds of the general meeting of the Supreme Court of Justice, as the case may be, the proceedings (6) shall be proceeded, but in the case where the reaffirmation is not passed unanimously or by the votes of less than the required number, the reselection shall be commenced and it shall complete within thirty days as from the date a ground for the selection occurs.

(6) the person approved under (4) or (5) shall meet and elect among themselves to be Chairperson of the Election Commission and, then, notify the President of the Senate of the result. The President of the Senate shall tender to the King for further appointment.

Section 232 Election Commissioners shall hold office for a term of seven years as from the date of their appointment by the King and shall serve for only one term.

The Election Commissioners who vacate office upon the expiration of the term shall remain in office to continue to perform their duties until the newly appointed Election Commissioners take office.

The provisions of section 209 (1), (2), (3), (5), (6), (7) and the disqualifications and the prohibitions under section 230 shall also apply mutatis mutandis to the vacation of office of Election Commissioners.

Section 233 Members of the House of Representatives, senators, or members of both Houses of not less than one-tenth of the total number of the existing members of the two Houses have the right to lodge with the President of the National Assembly a complaint that any Election Commissioner is disqualified or is under any of the prohibitions or has acted in contravention of any of the prohibitions under section 230 and the President shall refer that complaint, within three days as from the date of receipt of the complaint, to the Constitutional Court for its decision.

When the Constitutional Court has passed a decision, it shall notify the President of the National Assembly and the Chairperson of the Election Commission of such decision.

The provisions of section 92 shall also apply mutatis mutandis to the vacation of office of Election Commissioners.

Section 234 In the case where the Election Commissioners have vacated office en masse at the expiration of term, the selective process under section 231 shall be taken within ninety days as from the date of the vacation.

In the case where Election Commissioners vacate office for any reason other than the expiration of term, the selection process under section 231 shall be completed within sixty days as from the date in which the reason has occurred, and the approved person shall serve only for the remainder of the term of the replaced Commissioners.

Section 235 The Election Commission shall control and hold, or cause to be held, an election of members of the House of Representatives, senators, members of a local assembly and local administrators, as the case may be, including the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner.

The Chairperson of the Election Commission shall have the charge and control of the execution of the organic law on election of members of the House of Representatives and acquisition of senators, the organic law on political parties, the organic law on Election Commission, the organic law on referendum and the law on election of members of local assemblies or local administrators and shall be the political-party registrar.

There shall be the Office of the Election Commission being an agency having autonomy in its personnel administration, budget and other activities as provided by law.

Section 236 The Election Commission shall have the following powers and duties:

(1) to issue notifications or regulations determining all acts necessary for the execution of the laws referred to in section 235 paragraph two including regulations relating to a launching of election campaigns and any act of political parties, candidates and persons having the right to vote to proceed in an honest and fair manner and determining rules to be complied by State in giving support of fair election and equal opportunity in campaigning;
(2) to lay down regulations determining prohibitions in performance of duties of the Council of Ministers and portfolio Minister under section 181 with due regard to the maintenance of interest of State and to honesty, fairness, equality and equal opportunity in an election;
(3) to determine measures for controlling of a donation of money to political parties, rendering of financial support by State, spending of money of political parties and candidates and auditing publicly of accounts of political parties, and to control a disbursement and receipt of money for benefit in voting at an election;
(4) to give orders instructing government officials, officials or employees of a State agency, State enterprise or local government organisation or other State officials to perform all necessary acts under the laws referred to in section 235 paragraph two;
(5) to conduct investigations and inquiries and to make decisions on arising problems or disputes under the laws referred to in section 235 paragraph two;
(6) to order a new election or a new voting at a referendum to be held in any or all polling stations when there occurs convincing evidence that the election or the voting at a referendum in that or those polling stations has not proceeded in an honest and fair manner;
(7) to announce the result of an election and the voting in a referendum;
(8) to promote and support or co-ordinate with government agency, State agency, State enterprise or local government organisation or to support private organisations in giving education to the public on the democratic regime of government with the King as Head of State and the enhancement of public participation in politics;

(9) to perform other acts as provided by law.

In the performance of duties, the Election Commission has the power to summon any relevant document or evidence from any person, or summon any person to give statements as well as to request public prosecutors, inquiry officials, government agencies, State agencies, State enterprises or local government organisations to take action for the purpose of performing duties, investigating, conducting inquiries and passing decisions.

The Election Commission has the power to appoint persons, a group of persons or representatives of private organisations to perform such duties as entrusted.

Section 237 A candidate in an election who commits an act or causes or supports another person to act in violation of the organic law on election of members of the House of Representatives and acquisition of senators or regulations or notifications of the Election Commission which resulting in the election not to be honest and fair, his right to vote at an election shall be suspended under the organic law on election of members of the House of Representatives and acquisition of senators.

If it appears convincing evidence, through an act of the person under paragraph one, that the President or an executive board of director of a political party connives or neglects at such commission or such commission is known to him but he fails to deter or revise such commission for the maintenance of honest and fair election, it shall be deemed that such political party doing an act for the acquisition of the power to rule the country by means which is not in accordance with the provisions of this Constitution under section 68. In such case, if the Constitutional Court orders to dissolve such political party, the right to vote at an election of the President or the executive board of directors of a political party shall be suspended for the period of five years as from the date such order is made.

Section 238 The Election Commission shall conduct an investigation and inquiry forthwith upon the occurrence of any of the followings;

(1) an objection is made by a voter, a candidate at an election or a political party having its members stand for at an election in any constituency that an election in that constituency is not appropriate or unlawful;
(2) an objection is made by a candidate in the selection or a member of the organisation referred to in section 114 paragraph one that the selection of senators is not appropriate or unlawful;
(3) it appears convincing evidence that, prior to being elected or selected, a member of the House of Representatives, senator, member of a local assembly or local administrator had committed any dishonest act to enable him to be elected or selected or he has been elected or selected dishonestly as a result of any act committed by any person or political party in violation of the organic law on election of members of the House of Representatives and acquisition of senators, the organic law on political parties or the organic law on election of members of local assemblies and local administrators;
(4) it appears convincing evidence that voting in a referendum is in violation of law or an objection is made by a person having the right to vote that voting in a referendum in any polling station is not appropriate or unlawful.

The Election Commission shall, at the completion of the conducts under paragraph one, pass forthwith a decision thereon.

Section 239 In the case where the Election Commission passes the decision to have re-election or suspend the right to vote at an election before the announcement of the result of the election of members of the House of Representatives and senators, such decision shall be final.

If the Election Commission is of the opinion, after the announcement of the result of election, that re-election must be held or the right to vote at an election of a member of the House or Representatives or a senator must be suspended, it shall submit a complaint to the Supreme Court of Justice for decision. When the Supreme Court of Justice receives the complaint of the Election Commission, such member of the House or Representatives or senator shall not be able to perform his duty until the complaint is dismissed by the Supreme Court of Justice. In the case where the Supreme Court of Justice has an order for re-election in any constituency or for suspension of the right to vote at an election of any member of the House of Representatives or senator, the membership of the House of Representatives or the membership of the Senate in such constituency shall terminate.

In the case where the person under paragraph two is unable to perform his duty, he shall not be regarded as one of the existing members of the House of Representatives or the Senate, as the case may be.

The provisions of paragraph one, paragraph two and paragraph three shall apply mutatis mutandis to the election of members of local assemblies and local administrators and, in such case, a submission of a complaint under paragraph two shall be made to the Courts of Appeal and the order of the Courts of Appeal shall be final.

Section 240 If there is an objection that the selection of a senator is not appropriate or unlawful or there is convincing evidence that a senator committed an act under section 238 prior to be selected, the Election Commission shall conduct an investigation and inquiry forthwith.

Upon reaching any decision, the Election Commission shall forthwith submit its decision to the Supreme Court of Justice for decision and the provision of section 239 paragraph two and paragraph three shall apply mutatis mutandis to an inability of such senator.

In the case where the Supreme Court of Justice orders to revoke the selection or suspend the right to vote at an election of a senator, the membership of the Senate of such senator shall terminate as from the date such order is made, and the selection to fulfil the vacancy shall be taken.

The Chairperson of the Election Commission shall not participate in the proceeding or the giving of decision under paragraph one or paragraph two and, in this case, it shall be deemed that the Election Commission consisting of the remaining Commissioners.

The objection and consideration of the Election Commission shall be in accordance with the organic law on election of members of the House of Representatives and acquisition of senators.

Section 241 During the period in which a Royal Decree calling for an election of members of the House of Representatives or senators, a Notification calling for selection of senators or a Notification calling for the voting in a referendum is effective, no Election Commissioner shall be arrested, detained or summoned by a warrant for inquiry except in the case where permission of the Election Commission is obtained or where the arrest is made in flagrante delicto.

In the case where an Election Commissioner has been arrested in flagrante delicto, or where an Election Commissioner is arrested or detained in other cases, it shall be forthwith reported to the Chairperson of the Election Commission and the Chairperson may order a release of the person so arrested, but in the case where the Chairperson of the Election Commission is arrested or detained, the remaining Election Commissioners shall have the power to order a release.

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

CHILEAN ELECTORAL SYSTEM

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I. Introduction

Citizens' participation in the election of rulers-whether at a presidential, parliamentary, municipal or distriet level-is one of the fundamental characteristics of democracy.

The Chilean electoral system is quite varied and unique. It is not ruled by the Constitution, but by an Act. All citizens over 18 years old must, unless deprived from their civil rights by means of a court decree, cast a personal, secret and informed vote at universal elections. A system allowing Chileans living abroad to vote overseas remains to be implemented. Voting has recently become a voluntary act while enrollment has turned out to be compulsory.

The Chilean President is directly elected. If no candidate obtains a simple majority, a runoff between the two most voted candidates is held 30 days later.

11. Constitutional Regulations

The electoral system

As regards the electoral system, the Constitution provides as follows:

Section 18. There shall be a public electoral system Regarding matters not provided for by this Constitution, a constitutional organic law shall determine the organization and operation thereof, the manner in which electoral processes and plebiscites will be conducted, and, at all times, shall guarantee full equality between independent candidates and members of political parties, both with regard to the presentation of candidacies and to their participation in said processes.

Responsibility for safeguarding public order during electoral acts and plebiscites shall rest with the Armed Forces and Carabineros in the manner prescribed for by law.

The organic laws referred to above are Law No. 18,556 on Electoral Enrollment and Service (1986) and Law No. 18,700 on Elections and Tallies, enacted by the Military Junta in 1988.

These regulations have remained substantially unaltered since their enactment, execpt for Law No. 20,395 of 2009, which created the new staff framework for the Electoral Service.

2. Composition of both Chambers and speciþc electoral mechanisms.

The Constitution governs the composition of both the Lower and Upper Chambers of the Congress. Seetion 47 sets the number of representatives at 120 and provides for the requirements to be satisfied by Senators and Representatives. However, the Constitution fails to specify the manner in which they shall be elected. In 2005, 15 years after the return of democracy, this matter was determined by an Act, which, as at this date, is still a matter of controversy

3. Justice and the Electoral Service

Under Chapter IX (sic), the Constitution establishes an electoral justice system, comprised of a "Tribunal Calificador de Elecciones (TRICEL)" (Electoral Qualifying Court) and the regional electoral courts.

TRICEL is responsible for verifying the general conduction of Presidential, tallying their results and resolving any complaints deriving therefrom. This Court is formed by 4 justices sitting in the Supreme Court of Justice, appointed by the said Court by lot, and a citizen having served as Speaker or Assistant Speaker of the Upper or Lower Chamber for a term being not less than 365 days, appointed by the Supreme Court by lot.

(section 95).

It also creates the Regional Electoral Courts, formed by a justice of the respective Court of Appeals appointed by the said Court and two members appointed by TRICEL from among such persons as have practiced law or served as a justice or associate justice of the Court of Appeals. They are responsible for verifying, in general, that elections are conducted according to law. Appeals against their decisions may be lodged with the TRICEL (sections 96 and 97).

Law No. 18,556 entrusts the Electoral Service with the duty to keep a Voters _ register and organize elections, particularly as regards voting places, polling stations and tallies. Its decisions may be appealed before the electoral justice.

It is an autonomous, incorporated body with funds of its own, which shall discharge the duties referred to in the law and report to the Chilean President through the Ministry of the Interior. The Service shall be under the supervision of the Chilean Comptroller 'General's Office in matters such as examination and verification of income and expenditures statements and control of the lawfulness of the Service's acts connected with its staff and its legal regime (Section 88).

Iii. Electoral Systemís Main Features

The Presidential election system has no special characteristic.

Elections of mayors and council members are held separately. The election system has been modified on several occasions, the last one being in 2001. The most voted candidate is elected as mayor, provided the percentage of votes east for him/her is in excess of 30%; otherwise, the most voted candidate of the prevailing coalition is elected as mayor. The number of council members to be appointed ranges from 6 to 8 to 10-depending on whether the municipality has less than 70,000, between 70,000 and 150,000 or over 150,000 voters-using a proportional system.

Congressional elections are governed by the controversial "binomial" system.

Parliamentary elections are based on the election of two candidates per district or other constituency, if dealing with representatives or senators, as the ease may be.

Certificates of candidacy for senators or representatives submitted by political parties or coalitions may include up to two candidates per district or other constituency and, in the case of independent candidacies, up to one candidate.

The two most voted candidates of the most voted coalitions (...incomplete text), unless a same coalition doubles the votes cast for the next following list or coalition. (sic)

In the event of equality of votes between candidates of a same coalition or between candidates of different coalitions having, in turn, drawn level, the Court shall, at a public meeting, draw lots and proclaim the prevailing party as elected.

What usually happens is that a candidate is elected from each of the most voted coalitions per district or other constituency. Doublings by a single coalition are very rare. The system tends to the equality of votes, thus favoring the first minority.

The above-described binomial system has been subject to several criticisms, including, inter alia:

1. Unfair representation, as seats are obtained with 33% of the votes, although the most voted coalition secures 65% of the votes. Additionally, some candidates are elected although securing fewer votes than unsuccessful candidates.
2. Exclusive representation, as major minorities are excluded from the Parliament while-as we have already told - the first minority is favored. It reinforces the formation of two large coalitions of political bodies.
3. Difficulties for independent candidates to reach the Parliament. According to recent studies, out of 600 representatives elected between 1990 and 2005, just above 1% were independent.
4. During elections, harsh competition is generated within a same coalition, as only the most powerful candidate within each is elected, it being hardly

possible for a coalition to double the votes cast for the other coalition. Consequently, the weakest candidate is punished. The harshness of competition has led some coalitions to avoid it by omitting a candidate, i . e. by appointing only one candidate per coalition, almost guaranteeing his/ her election. Should the two most voted coalitions do the same, the election would be but an instance to reaffirm the decision made by the leaders of political parties.

5. The system favors congressmen in office, as challenging candidates have few possibilities of defeating them.
6. Complex negotiations must be held between the leaders of the political coalitions, thus making a bad impression on Chilean citizens. Paradoxically, the binomial system forces political parties to coalesce into blocs and then weakens them as it prornotes competition between them.

The binomial system was the result of the electoral engineering of those who designed the 1980 Constitution, enacted during the term of the dictatorship, to force the existence of a democracy granting guarantees to political minorities. The "Concertacion" governments have unsuccessfully strived to replace this system with a proportional German-like system. However, the high quorums required to such end have made it impossible.

IV. REGULATION OF SPECIFIC MATTERS

Law on political parties

Political parties are governed by Law No. 18,603 (Organic Law on Political Parties), which sets the requirements to be satisfied by them. This law was enacted during the dictatorship and contains several rules hindering its due operation. A bill is under discussion at the Parliament to replace said law, to finance political parties' activities out of public funds and to regulate optional primary elections to appoint candidates, the results thereof being binding.

Regulation of Political Advertising and Electoral Expenses

Political advertising is aimed at inducing voters to cast their votes for a certain candidate or supporting any of the proposals submitted to consideration in a plebiscite Said advertising may be carried out only on such opportunities and in such manner as prescribed by law.

Advertising in the press and radios can only take place between thirty and three days before the election or plebiscite, both days inclusive (section 30, paragraph 4, of Law No. 18,700). However, in case of ballotage in Presidential elections, advertising may only take place between fourteen and three days before the election, both days inclusive. The same applies to advertising through flyers, mobile elements or luminous or projected signs.

Advertising is forbidden in cinemas and video display rooms and in every place if carried out by fixed or mobile loudspeakers, save only for the broadcasting of speeches in mass meetings (section 30, final paragraph, Law No.18,700).

Additionally, no political advertising is allowed by means of paintings, signs or flyers on the outside of buildings and fences, whether public or private, exeept that, in the latter case, the owner or holder of the building has consented thereto; the same restriction applies to urban elements and equipment, such as roads, sidewalks, bridges, parks, posts, fountains, statues, jardinieres, benches, traffic lights and kiosks, or elements hanging over the road or, in any way, from electrical, telephone, television or other cables.

Municipalities shall, ex officio or at the request of a party, decree that illegal advertising be removed. Candidates and political parties shall be bound to reimburse expenses incurred by municipalities on such account.

Finally, pursuant to section 35 of Law No. 18,700, Carabineros de Chile shall see to compliance with these provisions. The Electoral Service (sic).

The only TV advertising allowed consists in a TV 30 minute program broadcasted twice a day, during one month, on a free basis, distributed pro rata among candidates and political parties or coalitions, as the case may be.

The law also provides for a compensation to candidates and political parties, according to the number of votes cast in their favor.

CONCLUSION

Different electoral systems coexistin Chile, depending on the public office to be filled.

The so-called "binomial"system-which governs parliamentary elections-has been widely discussed since its creation 1990.

The electoral system will soon be significantly amended by the automatic enrollment of voters and, hopefully, by allowing Chileans settled abroad to vote at consular posts overseas. This would match the body of voters with the number of citizens entitled to vote, potentially increasing the current number of voters by over one third. Youngsters' participation-which has dramatically decreased in recent years-would be particularly boosted.

These changes require no Constitutional reform, save for the elimination of the 120 representatives fixed number. However, it would demand wide consensus to reach the hard-to-secure quorum prescribed by the Constitution: four sevenths of the representatives and senators in office. The increase in the number of vaters will, nevertheless, substantially alter the electoral map and favor arevision of the system.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

THE LEGAL FRAMEWORK OF THE ELECTORAL SYSTEM OF TIMOR-LESTE

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The principles of the electoral system of Timor-Leste are laid down in the Constitution. The statutory law mainly provides procedural rules for the elections and all that is necessary for the fulfilment of those principles.

I. The Constitution

1. General Principles

The Constitution begins by saying, in its section 1, n. 1:

The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person.

Section 7 contains the principles of universal suffrage and multi-party system. This section reads as follows:

1. The people shall exercise the political power through universal, free, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution.
2. The State shall value the contribution of political parties for the organized expression of the popular will and for the democratic participation of the citizen in the governance of the country.

Section 62 (on source and exercise of political power) states:

The political power lies with the people and is exercised in accordance with the Constitution.

Section 65 and 66 of the Constitution establish the general principles of the electoral system.

Section 65 (on elections) reads as follows:

1. Elected organs of sovereignty and of local government shall be chosen by universal, free, direct, secret, personal and regular suffrage.
2. Registration of voters shall be compulsory and officially initiated, single and universal, to be up-dated for each election.
3. Electoral campaigns shall be governed in accordance with the following principles:
   a) Freedom to canvass;
   b) Equality of opportunity and treatment for all candidacies;
   c) Impartiality towards candidacies on the part of public bodies;
   d) Transparency and supervision of electoral expenses.
4. Conversion of the votes into mandates shall observe the principle of proportional representation;
5. The electoral process shall be regulated by law.
6. Supervision of voters' registration and electoral acts shall be incumbent upon an independent organ, the competences, composition, organization and functioning of which shall be established by law.

Section 66 (on referendum) reads as follows:

1. Voters who are registered in the national territory may be called upon to express their opinions in a referendum on issues of relevant national interest.
2. A referendum shall be called by the President of the Republic, following a proposal by one third, and deliberation approved by a two thirds majority, of the Members of the National Parliament, or following a well-founded proposal by the Government.
3. Matters falling under the exclusive competence of the Parliament, the Government and the Courts as defined by the Constitution shall not be the subject of a referendum.
4. A referendum shall only be binding where the number of voters is higher than half of the registered electors.
5. The process of a referendum shall be defined by law.

2. The Election of the President of the Republic

Section 75 (on eligibility) says who can stand as presidential candidate and what he's term of office is:

1. To stand as presidential candidates, East Timorese citizens should meet each of the following requirements cumulatively:

a) Original citizenship[1];
b) At least 35 (Thirty -five) years of age;
c) To be in possession of his or her full faculties;
d) To be proposed by a minimum of five thousand voters.

2. The President of the Republic has a term of office of 5 years and shall cease his or her functions with the swearing-in of the new elected President.
3. The President of the Republic's term of office may be renewed only once.

Section 76 establishes specific rules on the election of the President of the Republic:

1. The President of the Republic shall be elected by universal, free, direct, secret and personal suffrage.
2. The election of the President of the Republic shall be conducted through the system based on the majority of validly expressed votes, excluding blank votes.
3. Where no candidate gets more than half of the votes, a second round shall take place on the 30th day following the first voting.
4. Only the two candidates obtaining the highest number of votes shall be eligible to stand in a run-off election provided they have not withdrawn their candidacies.

Section 82 establish the electoral mechanism for the election of a new President in case of death, resignation or permanent disability of the incumbent President of the Republic or in case of refusal by the President-elected to take office or in case of his or her death or permanent disability.

Section 82 reads as follows:

1. …
2. Permanent disability shall be declared by the Supreme Court of Justice, which shall also have the responsibility to confirm the death of the President of the Republic and the vacancy of office resulting there from.
3. The election of a new President of the Republic in case of death, resignation or permanent disability should take place within the subsequent ninety days, after certification or declaration of death, resignation or permanent disability.
4. The President of the Republic shall be elected for a new term of office.

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[1] According to section 3 of the Constitution

1. There shall be original citizenship and acquired citizenship in the Democratic Republic of East Timor.
2. *The following citizens shall be considered original citizens of East Timor, as long as they are born in the national territory:*
   a) Children of father or mother born in East Timor;
   b) Children of incognito parents, stateless parents or parents of unknown nationality;
   c) Children of a foreign father or mother who, being over seventeen years old, declare their will to become East Timorese nationals.
3. *Irrespective of being born in a foreign country, children of a Timorese father or mother shall be considered original citizens of East Timor.*
   a) Children of an East Timorese father or mother living overseas;
   b) Children of an East Timorese father or mother serving the State outside the country;
4. Acquisition, loss and reacquisition of citizenship, as well as its registration and proof, shall be regulated by law.

5. In case of refusal by the President-elected to take office or in case of his or her death or permanent disability, the provisions of this Section shall apply.

Section 77 (on the inauguration and swearing-in) states:

1. The President of the Republic shall be sworn in by the Speaker of the National Parliament and shall be inaugurated in public ceremony before the members of the National Parliament and the representatives of the other organs of sovereignty.
2. The inauguration shall take place on the last day of the term of office of the outgoing President or, in case of election due to vacancy, on the eighth day following the publication of the electoral results.
3. At the swearing-in ceremony, the President of the Republic shall take the following oath:
   "*I swear to God, to the people and on my honour that I will fulfil with loyalty the functions that have been invested in me, will abide by and enforce the* Constitution and the laws and will dedicate all my energies and knowledge to the defence and consolidation of independence and national unity."

Section 93 (on election and composition) establishes the rules on the election of the members of the National Parliament and how many members should the National Parliament have:

1. The National Parliament shall be elected by universal, free, direct, equal, secret and personal suffrage.
2. The National Parliament shall be made up of a minimum of fifty-two and a maximum of sixty-five members.
3. The law shall establish the rules relating to constituencies, eligibility conditions, nominations and electoral procedures.
4. Members of the National Parliament shall have a term of office of five years.

Section 106 (on the appointment of the Prime Minister and the other members of the Government) reads as follows:

1. The Prime Minister shall be designated by the political party or alliance of political parties with parliamentary majority and shall be appointed by the President of the Republic, after consultation with the political parties sitting in the National Parliament.
2. The remaining members of the Government shall be appointed by the President of the Republic following proposal by the Prime Minister.

3. The Control Over the Elections

The control over the elections is exercise by two bodies: the Supreme Court of Justice and the National Electoral Commission.

Section 126 states:

1. It is incumbent upon the Supreme Court of Justice:

   …

   e) To verify the legality regarding the establishment of political parties and their coalitions and order their registration or dissolution, in accordance with the Constitution and the law;

2. It is incumbent upon the Supreme Court of Justice, in the specific field of elections:
   a) To verify the legal requirements for candidates for the office of President of the Republic;
   b) To certify at last instance the regularity and validity of the acts of the electoral process, in accordance with the respective law;
   c) To validate and proclaim the results of the electoral process.

Section 82, n. 2, on the election of the President of the Republic in case of death or permanent disability, states that:

Permanent disability shall be declared by the Supreme Court of Justice, which shall also have the responsibility to confirm the death of the President of the Republic and the vacancy of office resulting there from.

There is no Supreme Court yet in Timor-Leste.

According section 163, *the judicial Organization existing in East Timor on the day the present Constitution enters into force shall remain operational until such a time as the new judicial system is established and starts its functions.*

The judicial Organization existing in East Timor is the one established by UNTAET under its Regulation number 1999/11 amended by Regulation 2001/25.

According section 164, n. 2,

Until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor.

The highest judicial instance of the existing judicial organization is the Court of Appeal (Tribunal de Recurso) established under Regulation n. 1999/11.

Although the Court is not a political body, the President of the Supreme Court is appointed by the President of the Republic and this appointment should be ratified by the National Parliament, and (according section 128) out of the 4 members seating with the President of the Supreme Court of Justice in the Superior Council for the Judiciary, witch is the organ of management and discipline of the judges and it is incumbent upon it to appoint, assign, transfer and promote the judges, one is designated by the President of the Republic, one is elected by the National Parliament, and one is designated by the Government.

II. The ordinary statutes

The ordinary statutes governing matters on electoral system are: (a) Law 5/2006 (28 December) establishing the National Electoral Commission; (b) Law 7/2006, 28 December, amended by Law 5/2007 (27 March), on the election of the President of the Republic; (c) Law 6/2006 (28 December), on the elections for the National Parliament; (d) and Penal Code of Timor-Leste approved by Decree-Law 19/2009 (April 8th).

These laws can not violate the norms and principles enshrined in the Constitution.

1. Law 5/2006 (December 28) establishes the National Electoral Commission. Section 5 estates that the National Electoral Commission is composed of:
   Three members appointed by the President;
   Three members elected by National Parliament;
   Three members appointed by the Government;
   A judge elected by their peers;
   An attorney elected by their peers;
   A public defender elected by their peers;
   One member appointed by the Catholic Church;
   A nominated member of other religious denominations;
   A representative of organizations representing women.

   According section 8 of Law 5/2005,
   It is incumbent upon the National Electoral Commission
   a) To supervise the electoral process;
   b) To oversee the implementation of constitutional and legal provisions concerning the electoral process;
   c) To approve the regulations implementing the implementing regulations under this Act and other election laws, and codes of conduct for candidates, observers, and tax professionals of the media;
   d) To promote the objective of clarifying citizens about the election
   e) To ensure equal treatment of citizens in all acts of voter registration and electoral operations;
   f) To ensure equal opportunities and free advertising of applications during the election campaign;
   g) To consider and certify party coalitions for electoral purposes, as well as the lists of independent candidates;
   h) To inform the Prosecution about any acts which constitute unlawful election it is aware of;
   i) To prepare and submit to the STJ minutes with provisional national results in order to be assessed and declared the final outcome of the elections;
   j) Perform such other functions as are conferred by law.

2. There are two laws governing the main elections, mainly containing the procedural rules and covering matters that according the Constitution should be regulated by ordinary law. These laws are:
   (a) The Law 7/2006 (December 28), amended by Law 5 / 2007 of March 27, governs the elections of the President of the Republic;
   (b) The Law 6/2006 (December 28) regulates elections to the National Parliament.

3. The electoral offences

Some behaviours in violation of the electoral principles were considered crime punishable with imprisonment and fine by the Law 6/2006 and the Law 7/2007.

Now the Penal Code of Timor-Leste, approved by the Decree-Law 19/2009 (April 8th), defines a set of electoral crimes in its sections 229 to 242.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

CONCEPT OF ELECTORAL SYSTEM IN COMPARISON

Hon. Pemamiththa Abraham Ratnayake
Justice of the Supreme Court of Sri Lanka

The concept of General Elections is referred to at the commencement of the Constitution of Sri Lanka. In Article 3 it is stated "in the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise." Article 4(e) of the Constitution states "the franchise shall be exercisable at the election of the President of the Republic and of the members of Parliament and at every referendum by every citizen who has attained the age of 18 years and who being qualified to be an elector as provided therein and, has his name entered in the register of electors.".

Accordingly, in Sri Lanka the Supreme Law and other Election Laws recognize the following Elections:

Presidential and Parliamentary elections as mentioned earlier as well as Provincial councils and Local Authorities Elections.

Chapter XIV of the Constitution deals with the subject of "The franchise and elections". It contains provisions with regard to elections to the post of President and election of the Members of Parliament. Art. 88 coming under this Chapter states that every person is qualified to be an elector unless disqualified as provided for in Art. 89 of the Constitution.

Sri Lanka has an executive presidency and the President is elected at a separate election conducted solely for that purpose. The procedure for the Presidential Election is laid down in the Presidential Election (Special Provisions) Act No. 2 of 1981. The procedure in respect of Parliamentary Elections is laid down in Parliamentary Elections Act No. 1 of 1981.

The Parliament has a total membership of 225 members (Art. 62 of the Constitution). The election is conducted under a proportional representation system as laid down in Art. 99 of the Constitution. Article 99(1) to (5) deals with the working of the proportional representation system.

Article 99

(1) "At any election of Members of Parliament, the total number of members which an electoral district entitled to return shall be the number specified by the Commissioner of Elections in the Order published in accordance with the provisions of paragraph (8) of Article 98.

(2) Every elector at an election of Members of Parliament shall, in addition to his vote, be entitled to indicate preferences for not more than three candidates nominated by the same recognized political party or independent group.

(3) Any recognized political party or any group of persons contesting as independent candidates (hereinafter referred to as an "independent group") may for the purpose of any election of Members of Parliament for any electoral district, submit one nomination paper setting out the names of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by three.

(4) Each elector whose name appears in the register of electors shall be entitled to only one vote notwithstanding that his name appears in the electoral register in more than one electoral district.

(5) The recognized political party or independent group which polls the highest number of votes in any electoral district shall be entitled to have the candidate nominated by it, who has secured the highest number of preferences, declared elected."

For the purposes of this election, Sri Lanka is divided into 9 Provinces and each of the Provinces has electoral districts under them. In all a total of 196 members are elected in the following manner:

In terms of Art. 98 (3) of the Constitution, 160 members are elected directly from the electoral districts.

Article 96 (4) of the Constitution states as follows:-

96 (4)" The electoral districts of each Province shall together be entitled to return four members, (independently of the number of members which they are entitled to return by reference to the number of electors whose names appear in the registers of electors of such electoral districts), and the Delimitation Commission shall apportion such entitlement equitably among such electoral districts".

36 members are elected based on the provinces as laid down in the above Provision of the Constitution, i.e. 4 members from each of the 9 Provincial Councils numbering 36.

The balance 29 members are elected under Article 99A of the Constitution through a system commonly referred to as the "National List" of the Political Parties. Each Party is required to hand over such a list to the Commissioner of Elections and the Party becomes entitled to nominate members from the

National List in accordance with the proportion of votes that it receives at the general election.

Article 99A of the Constitution states as follows:-

99A " After the one hundred and ninety six members referred to in Article 98 have been declared elected at a General Election of Members of Parliament, the Commissioner of Elections shall forthwith apportion the balance twenty nine seats among the recognized political parties and independent groups contesting such General Election in the same proportion as the proportion which the number of votes polled by each such party or group at such General Election bears to the total number of votes polled at such General Election and for the purposes of such apportionment, the provisions of paragraphs (4), (5), (6) and (7) of Article 98 shall, *mutalis mutandis*, apply".

The responsibility of conducting the elections is reposed on The Election Commission which is appointed in terms of Chapter XIV A of the Constitution. The Election Commission consisting of 5 members are appointed by the President on the recommendation of the Constitutional Council. The main object of the Commission as laid down by Art. 103 (2) of the Constitution is "to conduct free and fair elections and referenda". The members are appointed for a period of 5 years and many provisions have been introduced to ensure their independence during the period they hold office.

It is the Supreme Court of Sri Lanka which has the jurisdiction to hear and determine any case challenging the election of the President. Art. 130 of the Constitution states as follows:-

" The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on-

(a) any legal proceeding relating to election of the President or the validity of a referendum.

(b) any appeal from an order or judgment of the Court of Appeal in an election petition case:

Provided that the hearing and determination of a proceeding relating to the [election of the President or the validity of a referendum shall be] by at least five judges of the Supreme Court of whom, unless he otherwise directs, the Chief Justice shall be one."

Sec. 21 of the Presidential Elections (Special Provisions) Act No. 2 of 1981, dealing with the Presidential Elections states that "no elections shall be called in question except by an Election Petition presented to the Supreme Court". Supreme Court has the power to declare the election of the candidate who has been returned to be void and to declare the petitioner if he was a candidate to be duly elected.

On the other hand, it is the Court of Appeal which has the jurisdiction to hear and determine an election petitions in respect of elections to the Membership of Parliament. Article 144 of the Constitution states as follows:-

"The Court of Appeal shall have and exercise jurisdiction to try election petitions in respect of the election to the membership of Parliament in terms of any law for the time being applicable in that behalf".

Parliament Elections Act No. 1 of 1981 deals with the procedure for the Election of Members of Parliament. It create a number of offences related to such elections and grounds for avoiding such elections.

Provincial Council Elections

Some of the Administrative and legislative powers in respect of the 9 Provinces are given by the Constitution to Provincial Councils comprising members elected by the voters of the particular province.

The members of the Provincial Councils are elected in terms of the provisions contained the Provincial Councils Act No. 42 of 1987.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

Current Situation of the Electoral System in Mongolia

Jamsran Byambadorj
Chairman of the Constitutional Court of Mongolia

Esteemed colleagues judges,
Ladies and gentlemen,

On behalf of the Constitutional Court of Mongolia please allow me to express my sincere gratitude to the Constitutional Court of Indonesia, its Chairman Mr. Mohammed Mahmud, and all colleagues for their warm hospitality, excellent organization of the 7th Conference of Asian Constitutional Court Judges, and for providing us with outstanding arrangements to help us achieve our goals.

I would also like to express my gratitude to the Konrad Adenauer Fund of Germany and to its Regional Director in Singapore Mr. Klauspeter Hill for their continued support of the initiative and organization of the first seminar of the Asian Constitutional Court Judges, for the financial and organizational support to the following meetings, and for your leading role in the establishment of the Association.

I also thank the honorable justice of the Constitutional Court of the Republic of Korea, Chairman of the Preparatory Committee Mr. Dong-Heub Lee for his invaluable contribution to the establishment of the Asian Association of Constitutional Courts and Equivalent Institutions.

As you are well aware, since 1990 when the Mongolian people chose a democratic path of development, there has been a marked improvement

in all aspects of social relations of our country, and democracy became a reality in Mongolia.

The People's Great Hural, elected in 1990 became the last People's Great Hural in the history of Mongolia's electoral system. During 1990-1992 this Hural played an important role in the democratic reforms of the Mongolian society, and in shaping the country's new political system.

The historical significance of this People's Great Hural lies in the fact that this Hural, during its second session after discussing the draft for 70 days, ratified the new Constitution of Mongolia.

The ratification of the new Constitution on 13 January 1992 by the People's Great Hural of the People's Republic of Mongolia marked Mongolia's entry into a new democratic stage of development. Social regime, political structure, and the whole of Mongolian society changed fundamentally.

The current Constitution created the foundations for the development of a truly democratic electoral system.

The electoral system of Mongolia includes the country's electoral rights, distribution of ballots, the procedures for organizing and conducting elections to the State Great Hural, for the President, and local self-governing organizations, which, according to the current legislature, are elected by their residents.

It needs to be noted first of all that free elections are now considered an inseparable part of the people's rule, the highest form of democracy itself, or in other words, the process by which the people realize their power.

Section 1 of Article 3 of the Mongolian Constitution proclaims that: "State power shall be vested in the people of Mongolia. The people shall exercise state power through their direct participation in State affairs as well as through the representative bodies of State power elected by them."

Democratic principles, such as democracy, justice, freedom, equality, assurance of national unity, rule of law upon which is founded the electoral system that satisfies the requirements of the current democratic society and state are reflected in Section 2 of Article 1 of the Mongolian Constitution.

It is especially important to note that the new Constitution, unlike its predecessors, does not link elections with a process of forming any single organ of power, for example hurals. Instead elections are viewed as a universal tool of people's rule, attributively associated with democracy.

Another novelty of the Constitution which requires special attention is the provision of norms which grant, for the first time in domestic practice, an individual's right to elect and be elected. Previously this right was considered as an element of an electoral system—a mechanism with a sole purpose of forming Hurals. From now, the Constitution (Section 9, Article 16) assures this right under the part Human Rights and Freedoms, turning it into a universal right not related to any single system of state power or local self-government.

Following the ratification of the new Constitution, it became important to approve the Law on State Great Hural, the Law on the President, laws on elections to aimag, capital city, *soum* and district citizen's representative hurals.

In the law—the amendment to the Constitution indicated that the elections to the State Great Hural will be conducted in June of 1992, and Presidential elections will be conducted in June of 1993. According to the Constitution, the State Great Hural consists of 76 members and is a permanent unicameral body.

In Mongolia, since 1921 all elections were held using the majority method, so it is familiar and understandable to citizens. In the same way, elections to the State Great Hural in 1992 and 2008 were conducted in multiple mandate electoral districts, in 1996, 2000 and 2004 in single mandate districts by the majority method.

Unique features of the current local election system are that they are:

(i) declared by the State Great Hural; and
(ii) held using the majority method in single ballot constituencies.

The essence of this right is reflected in the Constitution of 1992 in Section 9 of Article 16 which declares a general right of citizens of Mongolia to participate in managing state affairs both directly and through their representatives.

Section 2 of Article 21 and Section 3 of Article 31 of the Constitution preserve the fundamental principles of electoral rights. In addition to the traditional principles of universal, direct voting by secret ballot, the principles of voluntary participation and freedom of expression were also granted in the Constitution. However, the principle of equality of voters at elections is not reflected in the Constitution.

Given that these are elections of citizen's local self-government, the elections should involve only this structure of the society.

We believe that the electoral system in Mongolia passed two major stages - the democratic and socialist. This periodization does not fully reflect the real situation, but is merely an attempt to artificially link the issue with the previous periodization of socialist structure under the ideology of a single ruling party.

In our view, the periods should first take into account the democratic transformation. Therefore it seems more appropriate to divide the history of the electoral system in Mongolia into two main stages. The first stage--the stage of formation of the electoral system in Mongolia from 1921 to1990, and the second stage--transition to a truly democratic electoral system from1990 to present.

The Constitution of Mongolia declares that "the State Great Hural of Mongolia is the highest organ of State power and the supreme legislative power shall be vested only in the State Great Hural". In countries with democratic state system, especially countries with a parliamentary form of government, now almost ceased to exist a notion of a supreme organ of state power. During the

discussions of the draft of the new Constitution in 1991-1992, the situation had remained unchanged. This is primarily due to the fact that most of the deputies of the People's Great Hural, at the time had not yet abandoned the conception of a vertical structure of state power.

The State Great Hural is the supreme authority, which holds the exclusive right to legislate, which proves that Mongolia is a country with a parliamentary form of government.

A separate matter of interest is how the number of members of the State Great Hural was decided.

The main legal basis for holding elections to the State Great Hural are the Constitution of Mongolia and the Law on Elections of the State Great Hural.

According this law, subsequent elections are set by the State Great Hural not later than 45 days before polling day. The polling day is set on non working days and official holidays, that is on Saturdays or Sundays. In general polling is held on Sundays. Polling on non weekdays and official holidays helps to bring the greatest number of voters to elections, to ensure universal participation. Although the law does not specify, given that a significant proportion of the population is engaged in nomadic animal husbandry, as well as taking into account the harsh continental climate conditions of Mongolia, in practice the State Great Hural and Presidential elections are typically held at the junction of spring and summer.

Electoral districts are formed in a period not later than 40 days before polling, taking into account the size of the population and characteristics of administrative-territorial units.

Due to the fact that in recent years, a significant portion of the Mongolian population migrates to Ulaanbaatar, Darkhan, Erdenet and adjacent to the capital aimags, during the formation of electoral districts number of mandates allocated to some aimags may be reduced to one, while the majority of aimags have 2 or 3 mandates (electoral districts). Currently, the State Great Hural approved the concept of real development for Mongolia, at the same time the country's economic and demographic needs call for a significant reduction in the number of aimags.

If we can achieve this task, then, while maintaining a majority election system, the need for consolidated districts with an equal number of mandates is expected to arise in the future.

In Mongolia a system of organizations conducting elections is already well established, and they have held several State Great Hural and Presidential elections. Also established are the legal and other conditions to allow electoral authorities to work independently, without being subjected to pressure from the government and political parties.

However, the issue of maintaining work places, remuneration of persons employed in the electoral organizations during the elections is yet to be resolved.

The following committees comprise the system of the electoral organization:

- general election committee;
- regional election committee;
- district election committee;
- branches of the district election committee; and
- precinct election committee.

The General Election Committee is a standing organization whose main function is organization of elections to the State Great Hural and Presidential elections throughout the country.

Territorial election committees work in aimags and capital city districts only during Presidential elections, organize the preparatory work for holding these elections, summarize their results and submit them to the General Electoral Committee.

Territorial election committees are formed by the General Election Committee prior to each Presidential election.

District election committees are formed by the General Election Committee during elections to the State Great Hural in each electoral district to organize the election process, sum the results across the district to identify candidates with the highest number of votes, recognize a candidate's election to the State Great Hural and issue a temporary certification of a Member of Parliament. One electoral district covers several *soums*, and branches of district electoral committees are formed in each *soum*.

Soum and district citizen's representative hurals organize precinct election committees for purpose of organizing polling and summing of its results. The structure and composition of these committees are the same in elections to the State Great Hural and Presidential election.

Voter registration and compilation of voter lists is important in implementing the principle of universality of elections. The voter list is compiled based on the voters' documents which prove their Mongolian citizenship.

Unfortunately, it has become a regular occurrence in our country when political parties and candidates participating in elections, using the flaws in the system of resident registration, register a single voter in multiple voter lists in order to influence him or her to cast votes numerous time, usually by giving them cash rewards. This set-up often occurs in the capital and other big cities. Mechanisms to prevent and stop such indecent actions already exist. For example, it is enough to recall elected persons, if gross violations of the Election Law are proven in court. Unfortunately, current members of the Parliament

elected in this way refuse to include such a regulation in the law, in order to use this method again in the next elections.

According to the law, parties and their coalition have the right to nominate candidates to the State Great Hural. An independent citizen may also stand as a candidate. In other words, the right of collective entities allowed to nominate a candidate is vested only with political parties.

Political parties are a special institution that permeates all elements of the constitutional-legal structure of state power and they have a decisive influence on both its formation and operation.

Any party independently or in a coalition must submit for registration to the General Electoral Committee their formal decision participate in the election, present their election program and agreement to form a coalition 40 days prior to polling. A party which did not announce its official decision to participate in the election has no right to nominate a candidate.

Parties participating in elections as a coalition are required to decide the issue of forming a coalition at their at their convention or at its conference or plenum, if between conventions, and sign an agreement on this, which reflects the parties' the rights and obligations before each other, indicates the official name of the coalition, establishes a body representing the coalition, lists names and titles of persons comprising this body, and presents the structure of this body which will carry out preparatory work for the elections on behalf of joined parties.

In order to ensure electoral rights of citizens the Law on Election to the State Great Hural has provided citizens the right to nominate own candidacy. An individual independently nominating his own candidacy needs to be supported by an appropriate portion of the electorate by passing a set threshold. In this case, based on the provision of the law which requires that a minimum of 801 members are required to create and register a political party be 801 people, similarly, an independent candidate must collect at least 801 signatures of voters registered in his or her electoral district. The law further requires that while collecting signatures of 801 voters, representation of all soums comprising the given electoral district must be accounted.

Section 5 of Article 24 of the Law on Elections to the State Great Hural specifies that "the district election committee or its sub-committee shall verify the correctness of signatures of the supporters of a candidate against citizens' documents and registered address, and, if necessary, shall interview the supporters. In case of forged signatures, the district election committee shall cancel the candidacy of the person concerned."

The ballot which is the main document that reflects the will of the voter and upon which the votes are tallied, is printed according to a standard form approved by the General Election Committee and sent to the district election committees, then subsequently sent to their branches and precinct committees not later 5 days before polling.

In the ballot, candidates' names are written in the order of names of parties and coalition from where he is nominated. The position of parties and coalitions on the ballot is set according to their registration in the Supreme Court. In the case coalitions, their order is determined according to the registration of the coalition's member party which is first registered in the Supreme Court.

Names of independent candidates are positioned after the names of candidates nominated by political parties or coalitions in order of their registration at district electoral committees.

A voter circles an ordinal number before the name of the candidate for whom he votes.

A candidate shall be deemed to have been elected to the State Great Hural if he or she obtains the majority of votes in a particular district, provided that at least 25 percent of votes are ensured. If 50 percent of voters of the given district did not vote, re-elections are conducted in that district.

The General Election Committee shall inform the President of Mongolia of election results, present him with a list of elected members of Parliament and distribution of parliamentary seats to parties based on voting results within 15 days after polling. If as a result of the new elections to the State Great Hural 57 out of 76 members are elected, its quorum is deemed to be valid and holding of the first session of Parliament becomes possible.

The Law on Election to the State Great Hural states that the President of Mongolia shall, within 30 days after polling, issue a decree to convene the first session of the State Great Hural, open the first session of the newly elected Parliament and shall chair the sessions until the election of its Speaker.

In the case of a discharge of a member of the Great State Hural by reason of his death, resignation at his/her own request, or recall from the members of Parliament, re-elections are conducted in the district from where he/she was elected. The re-election procedure is identical to the regular election procedures.

Both ruling and opposition parties, as well as parties that have no seats in Parliament may participate in the re-elections for a vacant mandate. Therefore in terms of emotions, buzz and resources expended these re-elections could nearly match regular elections.

Current regulations concerning funding arrangements of election campaigns, establishment of candidates' election funds and reporting of the funds' expenditures do not fully meet standards. Section 5 of Article 5 of the Law on Elections to the State Great Hural states that "Election expenses of the candidates of parties and coalitions shall be borne by the respective parties and coalitions. Independent candidates shall bear election expenses by themselves."

Parties, coalitions, as well as candidates nominated in the manner of self-motion, are required to create an election fund, establish a special bank account, and notify the General Election Committee and announce of this account publicly. This special account shall accumulate coalition's as well as candidate's

own funds contributed to the election campaign, as well as all donations from various organizations and individuals. Payment of expenses is made through this same account.

Individuals and organizations may make cash donations and these funds should be transferred only to this bank account designated to finance the cost of elections.

During the period commencing from the date of announcement of elections and ending with the day of polling, candidates are forbidden to receive cash outside of the designated bank account, or receive donations from public institutions and organizations, enterprises with state ownership, foreign organizations, joint ventures, foreign nationals and stateless persons.

Above is a summary of the current situation of the electoral system in Mongolia. Now let me share with you my views on the role of the Constitutional Court and ordinary courts in resolving election disputes. I want to note that the Constitutional Court, as the defender of the Mongolian Constitution, plays here an important role.

In the past period the Constitutional Court had discussed with its middle bench 8 times and 2 times with its full bench disputes relating to Constitutional violations of some articles of the Election Law, and has declared void articles violating the relevant articles of the Constitution of Mongolia.

It is necessary to legalize the right to recall members of the State Great Hural at any time based on the conclusion of the Constitutional Court, in cases of gross violations of the Election Law, such as illegal receipt of donations, cash and other gift hand-outs with purpose of influencing votes, organizing casting of numerous votes by one elector, voter fraud, conspiracy with members of the electoral committee with purpose of issuing false election results, and deliberately distorting vote counting. Such violations should be proven in ordinary court before being discussed by the Constitutional Court. To do so, the court needs to be provided with an opportunity to review all processes and documents related to the election. It should be noted that, although the court should have this right, the current Election Law generally precludes this right.

Thank you for your attention.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

CONCEPTS OF ELECTORAL SYSTEMS IN COMPARISON*

JOSE PORTUGAL PEREZ
JUSTICE OF THE SUPREME COURT OF THE PHILIPPINES

I. INTRODUCTION

A Summary of the Historical Development of the Philippine Electoral System

Elections and other democratic institutions were primarily imported into the Philippines from Western models. The emergence of institutions such as the secret ballot, referendum, political parties and legislature was a product of American colonialism.[1]

Under Spanish rule (1521-1898), the right of suffrage did not exist. The arrival of the Americans eventually brought about the enfranchisement of a portion of the Philippine population.[2] After establishing total control over the Philippines by 1901, the American colonizers governed their newly acquired territory through the appointive Philippine Commission under the supervision of the American governor-general. The Commission performed both executive and legislative functions, with token Filipino participation, until 1907. Soon after, the American introduced elections to allow greater participation of the Filipino elite in colonial governance.[3]

Taking a cue from the elite experience at limited municipal elections during the last days of Spanish colonial rule, the American colonial government proceeded to lay down the foundation for municipal, provincial and national elections.[4]4 Initially, the Americans conducted municipal elections in areas pacified under military rule. The first election in the country was held in Baliuag,

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* Paper read in the 7th Conference of Asian Constitutional Court Judges, Jakarta, Republic of Indonesia, 12 to 15 July 2010.

1 Julio Teehankee, Electoral Politics in the Philippines, <http://www.quezon.ph/wp•content/uploads/2006/09/Electoral%20Politics%20in%20the%20Philippines.pdf> (visited 8 June 2010) citing Paredes, 1989, pp. 2-4.

2 Bernas, S.J., The 1987 Constitution of the Philippines: A Commentary, 2009 Edition, Rex Bookstore, Inc., p. 652.

3 Teehankee, supra note 1 citing Caoli, 1989, McCoy, 1994 and Franco, 2000.

4 Id., citing Paredes, 1989.

Bulacan on 6 May 1899. This was followed by four (4) Cavite municipalities in compliance with General Order No. 40, Series of 1900, issued by the military governor.[5]

The Philippine Commission continued to place the legal framework for a more systematic organization of local governments. It enacted Acts No. 82 & 83, providing for the organization of municipal and provincial local governments. A limited electorate was given the right to elect the municipal president, the municipal vice-president and the council. Provinces were governed by a three-member board, headed by a governor who was indirectly elected by the municipal councilors in the province. Thus, the provincial elections of 1902, 1904 and 1906 were reflections of municipal politics.[6]

The first legislative election was held on 30 July 1907 and was administered under the first General Election Law of the Philippines (Act No. 1582), enacted on 9 January 1907. It provided for the election of members of the unicameral Philippine Assembly, elective provincial officials, and all municipal officials, by direct vote of qualified electors. The law created a Board of Election Inspectors to direct, administer and supervise elections in the polling places to prevent fraud. A system characterized by strict secrecy in balloting was also adopted.[7] The total number of registered voters was 104,966 or only 1.15 per cent of the total population at that time. From this number, a turnout of 98,251 went to the polls and cast their ballots.[8]

Between 1907 and 1934, ten legislatures were elected at three-year intervals. The Jones Law (Philippine Autonomy Act) of 1916 transformed the unicameral Philippine legislature into a bicameral legislature composed of the House of Representatives and the Senate. Membership to both chambers was by way of a plurality vote: in single-member constituencies (78 in 1907 to 94 in 1934) for the House, and in 12 two-member constituencies of the Senate. Each voter had two votes for the Senate.[9]

Act No. 1582 provided for a highly elitist and, by the standards of the seventies, male-chauvinistic electorate.[10] Section 14 of the Act reads:

Every male person twenty three years of age or over who has a had a legal residence for a period of six months immediately preceding the election in the municipality in which he exercises the suffrage, and who is not a citizen or subject of any foreign power, and who is comprised within one of the following three classes –

a. Those who, prior to the thirteenth of August, eighteen hundred and ninety-eight, held the office of municipal captain, governadorcillo, alcalde, lieutenant, cabeza de barangay, or member of any ayuntamiento;
b. Those who own real property to the value of five hundred pesos, or who annually pay thirty pesos or more of the established taxes;
c. Those, who speak, read, and write English or Spanish, shall be entitled to vote at all elections: PROVIDED, That officers, soldiers, sailors, or mariners of the Army or Navy of the United States shall not be considered as having acquired legal residence within the meaning of this section by reason of their having been stationed in the municipalities for the required six months.

[5] Id., citing Maambong, 1992 and Hutchcroft 2000.

[6] Id., citing De Guzman, Reforma & Panganiban, 1988, Franco, 2000 and Hutchcroft, 2000.

[7] Id., citing Tancangco, 1988, p. 82.

[8] Id., citing Liang, 1970, p. 67.

[9] Id., citing Hartmann, Hassall & Santos, 2001.

[10] Bernas, supra note 2 at 654.

These requirements remained undisturbed until the 1935 Constitutional Convention. Here, the debates centered primarily on women's suffrage. The Convention finally approved and the people ratified the following provision which became Article V, Section 1 of the 1935 Constitution:[11]

Suffrage may be exercised by male citizens of the Philippines not otherwise disqualified by law, who are twenty-one years of age or over and are able to read and write, and who shall have resided in the Philippines for one year and in the municipality wherein they propose to vote at least six months preceding the election. The National Assembly shall extend the right of suffrage to women, if in a plebiscite which shall be held for that purpose within two years after the adoption of this Constitution, not less than three hundred thousand women possessing the necessary qualifications shall vote affirmatively on the question. (Emphasis supplied)

The plebiscite was held on 30 April 1937, pursuant to Commonwealth Act No. 34, and more than three hundred thousand women voted for women suffrage.[12]

By 1939, all existing election laws were consolidated into an Election Code (Commonwealth Act No. 357) that empowered the secretary of the interior to supervise all types of election. However, in order to insulate the electoral process from partisan politics, a constitutional amendment was passed and approved in a plebiscite to create an independent Commission on Elections.[13] Five elections were held in the Commonwealth period: the presidential and legislative elections of 1935; the local elections of 1937; the legislative elections of 1938; the local elections of 1940; and the presidential and legislative elections of 1941.

The 1935 Constitution that established the Philippine Commonwealth provided for a presidential form of government patterned on the United States model. The Constitution originally introduced a unicameral National

Assembly, but an amendment in 1940 re-established the bicameral legislature, which remained until 1972.[14]

At the 1971 Constitutional Convention, the debates centered on three issues: (1) the lowering of the voting age from 21 to 18; (2) the removal of the literacy requirement; and (3) the authorization of absentee voting.[15] Only the proposals to lower the voting age and to remove the literacy requirement were approved. Thus, under the 1973 Constitution, the right of suffrage was given to those who possessed the following qualifications: (1) Philippine citizenship; (2) age of 18 years or over; (3) residence in the Philippines for at least one year preceding the election; (4) residence in the place wherein they propose to vote for at least six months preceding the election; and (5) freedom from any disqualification prescribed by law. The 1987 Constitution has retained these qualifications and has added a provision for absentee voting.[16]

II. THE PHILIPPINE ELECTORAL SYSTEM – THE PRESENT SYSTEM

The electoral process in the Philippines is largely defined and governed by the 1987 Constitution. Pursuant thereto, we elect our political leaders by

[11] Id., citing I Aruego, 1936, pp. 215-228.

[12] Bernas, supra note 2 at 654.

[13] Teehankee, supra note 3 citing Tancangco, 1988, pp. 82-83.

[14] Id., citing Hartmann, Hassal and Santos, 2001.

[15] Bernas, supra note 2 at 654.

[16] Id. at 655-656.

direct voting.[17]The people themselves choose who govern them. And in order to win, only a plurality[18] of votes is required: the candidate who procures the most number of votes wins. It is not necessary that the winner obtain an absolute majority of the votes cast.

Pursuant to the mandate of the Constitution, the Philippines is governed by the multi-party system of politics. According to the 1987 Constitution, "[a] free and open party system shall be allowed to evolve according to the free choice of the people."[19] This provision provides the constitutional basis for the shift from a two-party system under the 1935 and 1973 Constitution to a multi-party system.

The Philippines hold elections on both national and local levels. On the national level, we elect the head of state and chief executive (the President) and Vice-President who both have a term of six (6) years, and the members of the Philippine legislature – called the Congress.[20] The Philippine Congress has two (2) chambers[21]: the Senate, composed of twenty-four (24) senators,[22] who do not represent any geographical district and who are elected for a term of six (6) years[23]; and the House of Representatives, currently composed of 269 members[24] representing legislative districts apportioned from the provinces and cities of the Philippines in accordance with the number of their inhabitants[25] and who serve for a term of three (3) years.[26]

The territorial and political subdivisions of the Philippines are the provinces, the cities, the municipalities and the barangays,[27] the latter being the smallest and most basic political and territorial unit. Pursuant to a mandate[28] of the Constitution, Congress enacted the 1991 Local Government Code[29] which governs local elections.

Thus, on a local level, we elect the chief executive and legislature, respectively, as follows: for a province, the governor and vice-governor and the members of the provincial board; for a city or municipality, the mayor and vice-mayor and the members of the city or municipal councils; for a barangay, the barangay captain and the members of the *barangay* councils.

Local elective officials from the governor to the members of the city and municipal council hold office for a term of three (3) years.[30] *Barangay* officials have a term of five (5) years.[31]

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[17] Art. VI, Sections 2 & 5 and Art. VII, Sec. 4 of the 1987 Constitution. Republic Act No. 7160 also known as the Local Government Code of 1991, Title II, Chapter I, Sec. 41.

[18] Id. at Art. VII, Sec. 4

[19] Id. at Art. IX-c, Sec. 6.

[20] Id. at Art. VI, Sec. 1.

[21] Id.

[22] Id. at Art. VI, Sec. 2.

[23] Id. at Art. VI, Sec. 4.

[24] 14th Congress, see the official website of the House of Representatives: www.congress.gov.ph.

[25] Art. VI, Sec. 5(1), 1987 Constitution.

[26] Id. at Art. VI, Sec. 7.

[27] Id. at Art. X, Sec. 1.

[28] Id. at Art. X, Sec. 3.

[29] Republic Act No. 7160 was approved on 10 October 1991.

[30] Art. X, Sec. 7, 1987 Constitution.

[31] Republic Act No. 8524 (An Act Changing the Term of Office of Barangay Officials and Members of the Sangguniang Kabataan from Three (3) Years to Five (5) Years, Amending for the Purpose Section 43 of Republic Act No. 7160) dated 14 February 1998.

Owing to the lessons learned from the Marcos regime which lasted close to twenty-one (21) years[32], the Constitution of the Philippines now imposes a limitation on the terms of office of all elective public officials. The President is not eligible for any re-election[33]; whereas the Vice-President cannot serve for more than two (2) successive terms.[34] No senator can serve for more than two (2) consecutive terms[35] and a member of the House of Representatives and all local elective officials, for more than three (3) consecutive terms.[36]

Another salient feature of the Philippine electoral system, as enshrined in our Constitution, is the party-list system. Under this set-up, representatives from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector,[37] are elected as members of the House of Representatives. This system enables Filipino citizens belonging to marginalized and underrepresented sectors, organizations and parties who lack well-defined political constituencies but who could contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole, to become members of the House of Representatives.[38]

In the landmark case of *Ang Bagong Bayani–OFW Labor Party v. Commission on Elections*,[39] the Supreme Court declared that "[t]he party-list system is a social justice tool designed not only to give more law to the great masses of our people who have less in life, but also to enable them to become veritable lawmakers themselves, empowered to participate directly in the enactment of laws designed to benefit them. It intends to make the marginalized and the underrepresented not merely passive recipients of the State's benevolence but active participants in the mainstream of representative democracy."

The party-list system is presently governed by Republic Act No. 7941 which was signed into law by then President Fidel V. Ramos on 3 March 1995. Under the Declaration of Policy of this Act, "[t]he State shall promote proportional representation in the election of representatives to the House of Representatives through a party-list system of registered national, regional and sectoral parties or organizations or coalitions thereof, which will enable Filipino citizens xxx who lack well-defined political constituencies xxx to become members of the House of Representatives."

In the above-mentioned case of *Ang Bagong Bayani v. COMELEC*,[40] the Supreme Court held that "proportional representation" does not refer to the number of people in a particular district, because the party-list election is national in scope. Neither does it allude to numerical strength in a distressed or oppressed group. Rather, it refers to the representation of the "marginalized and underrepresented" such as those belonging to the following groups: labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth veterans, overseas workers, and professionals.[41]

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[32] President Ferdinand Marcos was in office from 30 December 1965 up to 25 February 1986 when he was overthrown from power by what is now known as the People Power Revolution.

[33] Art. VII, Sec. 4, 1987 Constitution.

[34] Id. at second paragraph.

[35] Id. at Sec. 4, Art. VI.

[36] Id. at Sec. 7 and Sec. 8, Art. X; Sec. 43(b), Local Government Code of 1991, as amended.

[37] Art. VI, Sec. 5, 1987 Constitution.

[38] Republic Act No. 7941, Sec. 2, or "An Act Providing for the Election of Party-List Representatives through the Party List System and Appropriating Funds Therefor" was approved by President Fidel V. Ramos on 3 March 1995.

[39] G.R. No. 147589, 26 June 2001 (359 SCRA 698).

[40] Id.

[41] Republic Act No. 7941, Sec. 5, supra note 22.

On the other hand, "lack of a well-defined constituency" refers to the absence of a traditionally identifiable electoral group, like voters of a congressional district or territorial unit of government. It pertains, again, to those with disparate interests identified with the "marginalized or underrepresented."[42]

Thus, in the same case, the Supreme Court laid down the guidelines[43] for the accreditation of party-list organizations:

First, the political party, sector, organization or coalition must represent the marginalized and underrepresented groups identified in Section 5 of Republic Act No. 7941. In other words, it must show – through its constitution, by-laws, history, platform of government and track record – that it represents and seeks to uplift marginalized and underrepresented sectors. Verily, majority of its membership should belong to the marginalized and underrepresented.

Second, while even major political parties are expressly allowed by Republic Act No. 7941 and the Constitution to participate in the party-list system, they must comply with the declared statutory policy of enabling "Filipino citizens belonging to marginalized and underrepresented sectors xxx to be elected to the House of Representatives." In other words, while they are not disqualified merely on the ground that they are political parties, they must show, however, that they represent the interests of the marginalized and underrepresented.

Third, in view of the express Constitutional prohibition that "religious denominations and sects shall not be registered,"[44] the religious sector may not be represented in the party-list system.

Fourth, a party or an organization must not be disqualified under Section 6 of Republic Act No. 7941, which enumerates the grounds for disqualification, as follows:

(1) It is a religious sect or denomination, organization or association organized for religious purposes;
(2) It advocates violence or unlawful means to seek its goal;
(3) It is a foreign party or organization;
(4) It is receiving support from any foreign government, foreign political party, foundation, organization, whether directly or through any of its officers or members or indirectly through third parties for partisan election purposes;
(5) It violates or fails to comply with laws, rules or regulations relating to elections;
(6) It declares untruthful statements in its petition;
(7) It has ceased to exist for at least one (1) year; or
(8) It fails to participate in the last two (2) preceding elections or fails to obtain at least two per centum (2%) of the votes case under the party-list system in the two (2) preceding elections for the constituency in which it has registered.

Fifth, the party or organization must not be an adjunct of, or a project organized or an entity funded or assisted by, the government. By the very nature of the party-list system, the party or organization must be a group of citizens, organized by citizens and operated by citizens. Thus, it must be independent of the government.

Sixth, the party must not only comply with the requirements of the law, its nominees must likewise do so. Section 9 of Republic Act No. 7941 reads:

[42] Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, supra, note 23, at p. 719.

[43] Id. at 727-731.

[44] Art. IX(c), Sec. 2(5), 1987 Constitution.

SEC. 9. *Qualifications of Party-List Nominees.* – No person shall be nominated as party-list representative unless he is a natural-born citizen of the Philippines, a registered voter, a resident of the Philippines for a period of not less than one (1) year immediately preceding the day of the election, able to read and write, a *bona fide* member of the party or organization which he seeks to represent for at least ninety (90) days preceding the day of the election, and is at least twenty-five (25) years of age on the day of the election.

In case of a nominee of the youth sector, he must at least be twenty-five (25) but not more than thirty (30) years of age on the day of the election. Any youth sectoral representative who attains the age of thirty (30) during his term shall be allowed to continue in office until the expiration of his term.

Seventh, not only the candidate party or organization must represent marginalized and underrepresented sectors, so also must its nominees. Surely, the interests of the youth cannot be fully represented by a retiree; neither can those of the urban poor or the working class by an industrialist.

Eight, while lacking a well-defined political constituency, the nominee must nevertheless be able to contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole, given that "the nominee of a party, [whether] national or regional, is not going to represent a particular district xxx."[45]

The Supreme Court concluded its decision in the *Ang Bagong Bayani* case with an epilogue: It is a "fundamental social justice principle that those who have less in life should have more in law. The party-list system is one such tool intended to benefit those who have less in life. It gives the great masses of our people genuine hope and genuine power."[46]

The Philippines likewise confirms and upholds the right of the youth to be heard in and to contribute to the formulation of laws and ordinances that concern and affect them. Hence, in its Declaration of Principles and State Policies, the Constitution of the Philippines declares that: "[T]he State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs."[47]

Thus, in the Philippines, at the barangay level, there is a youth council, called the Sangguniang Kabataan, composed of a chairman, seven (7) members, a secretary, and a treasurer,[48] who are at least fifteen (15) but not more than twenty-one (21) years of age.[49]

Among its powers and functions[50] are to:

(1) Promulgate resolutions necessary to carry out the objectives of the youth in the barangay in accordance with the applicable provisions of this Code;
(2) Initial programs designed to enhance the social, political, economic, cultural, intellectual, moral, spiritual, and physical development of the members;
(3) Hold fund-raising activities, the proceeds of which shall be tax-exempt and shall accrue to the general fund of the sangguniang kabataan;

[45] Explanation of Former Senator Jose Lina during the bicameral conference committee proceedings on the disagreeing provision of Senate Bill No. 1913 and House Bill No. 3040, 31 January 1994, p. 4, cited in Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, supra, at p. 731.

[46] Ang Bagong Bayani-OFW Labor Party v. COMELEC, supra, note 23 at p. 731.

[47] Art. II, Sec. 13, 1987 Constitution.

[48] The Local Government Code of 1991, Sec. 423.

[49] 49 Id. at Sec. 428.

[50] Id. at Sec. 426.

(4) Create such bodies or committees as it may deem necessary to effectively carry out its programs and activities;
(5) Consult and coordinate with all youth organizations in the barangay for policy formulation and program implementation; and
(6) Coordinate with the appropriate national agency for the implementation of youth development projects and programs at the national level.

Like *barangay officials*, members of the *Sangguniang Kabataan* have a term of five (5) years and are ineligible for re-election to the same position after three (3) consecutive terms.

Finally, the electoral system in the Philippines also provides a mechanism for absentee voting. Republic Act No. 9189[51] or "The Overseas Absentee Voting Act of 2003" dated 10 February 2003, defines absentee voting as "the process by which qualified citizens of the Philippines abroad exercise their right to vote".[52] This law was promulgated as a response to what Commissioner Blas F. Ople, a member of the 1986 Constitutional Commission, described as "the Filipino labor force explosion overseas".[53] During the deliberations of the Commission, Commissioner Ople pointed to government data reporting some 600,000 contract workers and employees overseas effectively deprived of the right of suffrage[54] by the Constitution's residence requirement.[55] This occasioned the proposal by Commissioner

Florenz D. Regalado of a provision which read: "The National Assembly shall prescribe a system which will enable qualified citizens temporarily absent from the Philippines or place where they are registered to cast their votes."[56] This eventually evolved into the present first paragraph of Sec. 2 of Article V of the Constitution which states: "The Congress shall provide xxx a system for absentee voting by qualified Filipinos abroad."[57]

Republic Act No. 9189 now allows citizens residing abroad to vote even if they are recognized as immigrants by the country of their residence.[58] In the case of immigrants and permanent overseas residents not otherwise disqualified to vote under Republic Act No. 9189, however, an affidavit declaring their intention to resume actual physical permanent residence in the Philippines not later than three (3) years after approval of his/her registration as an overseas absentee voter, is required to be furnished the Commission on Elections.[59] The affidavit is meant to be a statement that he or she never intended to abandon his or her domicile in the Philippines.[60]

These are the more salient features of the Philippine Electoral System.

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[51] "An Act Providing for a System of Overseas Absentee Voting by Qualified Citizens for the Philippines Abroad, Appropriating FundsThererfor and for Other Purposes."

[52] Republic Act No. 9189, Sec. 3

[53] Bernas, supra note 2 at 661.

[54] Id., citing the Record of the Constitutional Commission, Volume II, p. 11.

[55] Art. V, Sec, 1 of the 1987 Constitution states that:
"Suffrage may be exercised by all citizens of the Philippines not otherwise disqualified by law, who are at least eighteen years of age, and who shall have reided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months immediately preceding the election. xxx"

[56] Bernas, supra note 2, citing the Record of the Constitutional Commission, Volume II, p. 32.

[57] Id.

[58] Id. at 663.

[59] Republic Act No. 9189, Sec. 8(c).

[60] Bernas, supra note 42.

III. CONCLUSION
The Future: Electoral Reforms

Philippine elections are governed by a multitude of laws aimed at safeguarding the entire electoral process from beginning to end. Aside from the Omnibus Election Code of 1985 (*Batas Pambansa Bilang 881*), Philippine electoral law is contained in more than ten separate election laws and related legislation that include the Local Government Code of 1991.[61]This is affirmation that the Philippine government constantly advances electoral reforms to make Philippine elections truly democratic. Since the first General Election Law of 1907, Philippine elections had been governed by four election codes[62] prior to the present Omnibus Election Code – a continuing response to the demands of modernization and the changing political and social conditions of the country.

A significant development in the Philippine electoral process is the recent automation of Philippine elections pursuant to the governing law, Republic Act No. 9369.[63] Under this system, appropriate technology is used in voting, counting, consolidating, canvassing and transmitting election results and other electoral process.[64] Thus, on 10 May 2010, the Philippines conducted its first nationwide fully automated elections – from the casting of votes, to their counting and the transmission and canvassing of election results. Whereas before, the winning candidates are proclaimed weeks or even months after the election, with the automation of the elections, the winners are proclaimed within days after the election.

Inspite of this important step towards meaningful reforms, however, and notwithstanding numerous laws, elections in the Philippines is nevertheless encumbered by many other challenges, foremost of which is the existence of political dynasties in the Philippines notwithstanding the express Constitutional provision.[65] In terms of the quality and social inclusiveness of elections, the major institutions in the national and political arena are still dominated by the economic and political elites. The political clans and dynasties have successfully maintained their dominance in national and local politics by adapting to the changing contours of the social, economic and political terrains. They extend their dominance by bequeathing power to their next of kin.[66] It is thus not uncommon to find in the Philippines husbands and wives or fathers, daughters and sons holding several elective positions.

Another drawback is the politicization of the Commission on Elections (COMELEC), the body tasked to supervise all electoral exercises in the Philippines. The COMELEC is an independent constitutional body created by a 1940 amendment to the 1935 Constitution. Before the creation of the COMELEC, supervision over the conduct of elections was vested in the Executive Bureau, an office under the Department of the Interior. The close official

[61] Teehankee, supra note 3.

[62] Presidential Decree No. 1296 (The 1978 Election Code); Republic Act No. 6388 (The Election Code of 1971); Republic Act No. 180 (The Revised Election Code of 1947); and Commonwealth Act No. 357 (The Election Code of 1939).

[63] An Act Amending [Republic Act No.] 8436, entitled "An Act Authorizing the [Comelec] to Use Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National or Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, [Republic Act No.] 7166 and Other Related Election Laws, Providing Funds Therefor and For Other Purposes" passed on 23 January 2007.

[64] Republic Act No. 9369, Sec. 2(1).

[65] Art. II, Sec. 26, 1987 Constitution.

[66] Teehankee, supra note 3.

relationship between the President and the Secretary of the Interior and the perceived compelling influence of the former over the latter bred suspicion that electoral exercises were manipulated to serve the political interest of the party to which they belonged. The then National Assembly

was thus compelled to propose the creation, by Constitution amendment, of an independent body to oversee elections in the country.[67]

Since then, however, the integrity of the COMELEC has been seriously put to doubt as a result of partisan links and influence. Reforms are thus necessary to ensure that the COMELEC is insulated from political interference to the end that it may carry out the purpose for which it was created.

Admittedly, much is yet left to be accomplished to guarantee truly democratic elections. Clearly, too, reforming the electoral system requires not only policy changes but, more importantly, legislation and even constitutional amendments. For instance, with the automation of Philippine elections, the proclamation of the winning candidates is supposed to be expedited. While this was indeed achieved with respect to the local candidates up to the senators, it took a month[68] before the President and Vice-President were proclaimed in view of the Constitutional requirement that they be proclaimed by Congress after it shall have canvassed the votes.[69] This consequently defeats the purpose of the Automation Law to expedite the election.

Still, vital steps are being taken to address these obstacles. As early as the 8th Congress, a bill has been introduced to fully make functional the Constitutional provision that prohibits political dynasties and is presently awaiting passage into law. Also pending in the Senate is Senate Bill No. 227, entitled "The Political Party Development Act of 2007" which seeks, among others, to institutionalize reforms in the financing of electoral campaigns and to promote party loyalty and discipline.[70] This latter piece of legislation seeks to address the rampant practice of "political turncoatism"[71] or the act of shifting one's political affiliation[72] which weakens party structure, confuses the electorate and undermines the concept of a viable opposition.

As politics is a dynamic field, every country should be able to keep up with its changing landscape. Thus should electoral reforms be as much a part of every country's electoral system as its political processes.

[67] See the official website of the COMELEC: http://www.comelec.gov.ph/aboutus_/bkground.html.

[68] The 2010 National and Local Elections were held on 10 May 2010. President Benigno Simeon C. Aquino III and Vice-President Jejomar C. Binay were proclaimed on 9 June 2010.

[69] Art. VII, Sec. 4, 1987 Constitution.

[70] See official web site of the Senate of the Philippines: http://www/senate.gov.ph/lisdata/43273723!.pdf.

[71] Id. at Sec. 5(l).

[72] Id. Explanatory note of Senator Loren Legarda.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

THE ROLE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN WITHIN ELECTORAL PROCESS

Mr. Rauf Guliyev
Secretary General of
The Constitutional Court of
The Republic of Azerbaijan

The proceedings on certain cases which fall within the jurisdiction of Constitutional Court of Republic of Azerbaijan including the cases on verification and approval of the results of elections to Parliament (Milli Mejlis) of Republic of Azerbaijan are regulated by legislation. I have to underline that the competence of Constitutional Court in this field in confined to review of constitutionality and legality of certain legal acts.

According to Article 86 of Constitution of Azerbaijan the validity of results of parliamentary elections is verified and approved via the procedure specified by legislation i.e. the Law on Constitutional Court and Constitution. In accordance with Article 117 of Electoral Code the Central Electoral Commission verifies within 20 days the protocols of the district electoral commissions and within 48 hours submits them to Constitutional Court. After getting those documents the Constitutional Court within 10 days verifies them with participation of specialists. The session of the Plenum of Constitutional Court devoted to verification of validity of results shall be held within 7 days after reception of materials by Constitutional Court.

During examination of a case connected with approval of electoral results the Constitutional Court asks the Court of Appeal and Supreme Court for information on the cases examined in those courts on protection of electoral rights of citizens.

Taking into account the results of verification the Plenum of Constitutional Court adopts by majority of 5 votes the decision on full or partial approval or disapproval of parliamentary elections. If the protocols of district electoral commissions correspond to the requirements of Electoral Code the Constitutional Court approves the results of elections. This decision is of final nature.

The parliamentary elections held in 2005 were very important for Azerbaijan as they were first parliamentary elections held after accession of our country to Council of Europe.

I would like to touch upon some procedural aspects of adoption of the decision of Constitutional Court regarding the approval of elections in 2005. After getting the materials from Central Electoral Commission our Court invited the specialists and sent the inquiries to Court of Appeal, Supreme Court, Ministry of Justice and Prosecutor's Office asking them to provide the information on cases of violation of electoral rights and electoral legislation.

On the basis of materials submitted by Central Electoral Commission as well as the additional materials submitted by other state bodies and the opinion given by the specialists the Constitutional Court came to conclusion that 115 of 121 protocols of district electoral commissions which had been used by Central Electoral Commission to draw up the final protocol were corresponding to Electoral Code. The rest 6 protocols of district electoral commissions were contradicting to the requirements of above mentioned Code and thus the results of elections in those districts were not approved.

As you may see the competence of Constitutional Court connected to approval of parliamentary elections have certain limitations and the judicial investigation of Constitutional Court is confined to establishing whether the relevant documents meet the requirements of legislation.

At the same time one should bear in mind that by Constitution the Constitutional Court is attributed to judicial power and thus the modes of its functioning are characterized as judicial ones.

In this sense it would be relevant to note that the legislation of Azerbaijan does not recognize Constitutional Court as a political body. That means that the Constitutional Court is the highest constitutional body of justice and adjudicates on the issues of correspondence to Constitution and checking of legality. The intervention of Court into political processes and making the statements which carry the political nature does not conform to its constitutional status. Bearing in mind this aspect one should note that in its decisions the Constitutional Court does not establish the democratic nature of elections or their correspondence to modern standards but checks the conformity of protocols of district electoral commissions to the requirements of Electoral Code. In other words, the decision of Constitutional Court concerning the approval of electoral results is not political but legal assessment.

However, this is not the only role of Constitutional Court of Azerbaijan in electoral procedure. Our Court can examine also the individual complaints. For instance, just before parliamentary elections there were some complaints as to the actions of certain institutions. But all of these complaints were related to the

factual issues and not the legal ones. Since these issues are beyond the competence of Constitutional Court they were not admitted to judicial examination. The complaints related to the intervention into electoral process were sent to the Prosecutor's Office asking it to examine the facts of interference.

As to presidential elections I have to note that in this case the role of Constitutional Court is limited to 1) verification of the documents submitted by Central Electoral Commission as to their correspondence to the requirements of Electoral Code and; 2) declaration of results which are submitted by Central Electoral Commission. In case of reveling of any inconformity the Constitutional Court can cancel the results of elections. Thus, finally, the Constitutional Court officially announces the results of elections what constitute the completion of all the procedure of presidential elections.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

ELECTION SYSTEM IN BRUNEI DARUSSALAM

Dato Seri Paduka Hj. Kifrawi bin Dato Hj. Kifli

In Brunei Darussalam, members of Legislative Council are in general appointed by His Majesty The Sultan and Yang DiPertuan of Negara Brunei Darussalam (His Majesty).

Under Article 4 of the Brunei Darussalam Constitution (the Constitution) His Majesty is vested with supreme executive authority. His Majesty is the Prime Minister and Supreme Commander of the Royal Brunei Armed Forces. In the exercise of the executive authority His Majesty is advised by Members of the Council of Ministers and the Privy Council. Members of the Council of Ministers are also members of the Legislative Council. Some members of the Privy Council are also members of the Legislative Council.

Article 39 of the Constitution provides that His Majesty shall have the power to make laws for the peace, order, security and good government of Brunei Darussalam. In exercising this legislative power, the Legislative Council debate Bills and if passed by the Legislative Council, the Bill would become law, if His Majesty has given the approval.

The Constitution provides that Legislative Council shall consist of not more than 45 members;

(a) up to 30 persons shall be appointed by His Majesty from the following:[1]

(i) ex-officio Members who comprise the Prime Minister and all Ministers appointed by His Majesty;
(ii) Titled persons;
(iii) persons who have rendered distinguished public services;
(iv) persons who have achieved distinctions in the field of religion, management, any profession, business, trade, agriculture, cultural arts or community activities, or who are representatives of particular communities; and

[1] Chief justice of The Supreme Court of Brunei Darussalam

(b) up to 15 persons shall be elected in accordance with the laws relating to election in force in Brunei Darussalam.

The 15 members represent the 4 Districts in Brunei Darussalam.

Until the laws relating to elections are in force (not in force yet), the 15 members are appointed by His Majesty upon recommendation by a Selection Committee. The 15 members recommended are selected from all village leaders from all 4 Districts in Brunei Darussalam.

In Brunei Darussalam village leaders are elected by the people from their respective villages.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

Electoral Systems in Comparison: Unique Features of the Singapore Parliamentary System

Chao Hick Tin
Vice President of the Supreme Court of Singapore.

The political structure of Singapore is basically the Westminster model of parliamentary democracy with the executive power being exercised by the Cabinet headed by the Prime Minister. This is in contrast to the government of South Korea, for instance, where the head of the executive branch of the government is the Korean President[1], who is also the Head of State[2]. In Singapore, the President is the Head of State[3], but is not person who has the general direction and control of the government. However, the President of Singapore is an elected office. This is in contrast, for example, to the position in Malaysia, where the head of state, or Yang di-Pertuan Agong of Malaysia, is elected by the rulers of the Malay States from among themselves[4].

Those who are familiar with Parliamentary democracies would be familiar with how a Parliamentary government is usually set up. In short, the political party with the largest number of elected Members of Parliament (usually having a majority in Parliament) will form the government. The Members of Parliament are elected by the popular vote. The elected Members of Parliament form the legislative branch of government, but from the same body, the executive branch

1 Art. 66(4) Constitution of the Republic of Korea

2 Art. 66(1) Constitution of the Republic of Korea

3 Art. 17(1) Constitution of the Republic of Singapore (hereinafter 'CS')

4 Art. 32, Constitution of Malaysia

of government is also drawn, usually in the form of a core of Ministers forming a Cabinet. The head of the Cabinet, as mentioned above, is the Prime Minister[5]. Parliaments may function as a single house of lawmakers (unicameral) (for example, Singapore and New Zealand), or in a bicameral system (for example, Australia and Canada).

Apart from these broad characteristics which are common in Parliamentary democracies, certain features have developed over the years in Singapore which should be highlighted for comparison. As mentioned earlier, Singapore has not only an elected Parliament but also an Elected President. This feature and other differences will be discussed in brief in this paper.

Parliamentary Elections in Singapore

In Singapore, Parliamentary elections are required to be held at least once every 5 years[6]. In practice, the President usually dissolves Parliament before the full 5 years is up. This is done upon the advice of the Prime Minister, and elections are required to be held within 3 months of the dissolution of Parliament[7]. Members of Parliament are elected based on the "first past the post" rule, i.e. the candidate with the greatest number of votes wins the election[8]. So, for example, in a 3-way fight there is no necessity for any one candidate to win an absolute majority of the votes.

While most of you may be familiar with the election of Members of Parliament from discrete single-member constituencies, one unique feature of Singapore Parliamentary elections is the Group Representative Constituency (GRC). A GRC is a constituency represented by 3 to 6 Members of Parliament. GRCs are usually larger electoral divisions, both in terms of population as well as physical area. In a GRC, candidates run for election as a group of representatives, and in a contested election in a GRC, voters can choose either one group of candidates or another, but cannot choose between individual candidates within the group. In Singapore, the GRC arrangement ensures that there is representation in Parliament of Members from the Malay, Indian and other minority communities[9]. Our Deputy Prime Minister had the opportunity to explain the rationale of the GRC recently in Parliament[10]. He said, "In the 70s and early 80s, when there was increasing evidence of voting patterns along ethnic lines, the Government, after long debate, decided to introduce the GRC system. GRCs encourage political parties to take a multi-racial perspective, and ensure that our ethnic minorities will always be represented in Parliament regardless of who wins the election." To achieve this objective, the President will, prior to elections, designate for each GRC to have at least one candidate from the Malay community, the Indian community or other minority community. Thus, when candidates choose to

5 In Singapore, for example, the President appoints as Prime Minister a Member of Parliament who in his judgment is likely to command the confidence of the majority of the Members of Parliament - Art. 25 CS.

6 Art. 65(4) CS

7 Art. 66 CS

8 Section 49(7E) Parliamentary Elections Act (hereinafter 'PEA')

9 Art. 39A CS

10 Second Reading Speech by DPM Wong Kan Seng in Parliament on 26 April 2010 when moving the Constitution of the Republic of Singapore (Amendment) Bill 2010

contest the elections in a GRC, they must ensure on Nomination Day that their group has at least one candidate from the community designated earlier by the President. After Nomination Day is announced, any person desiring to run for election in a GRC as a person belonging to the Malay, Indian or other minority community will have to apply for a certificate certifying that the person actually belongs to that particular community[11]. Two different Committees appointed by the President (upon the nomination of the Presidential Council for Minority Rights[12]) determine whether potential candidates belong to the community which they claim to belong to[13]. At present, Singapore has 14 GRCs and 9 single member constituencies. By law, at least 8 constituencies must not be GRCs[14].

Another unique feature of Singapore Parliamentary system is the inclusion of non-elected Members in our Parliament. While in other parliamentary democracies lawmakers consist of only elected officials, Singapore provides for the inclusion of 2 categories of non-elected Members of Parliament: the Non-Constituency Member of Parliament (NCMP) and the Nominated Member of Parliament (NMP).

NCMPs are chosen from among the opposition MPs who poll the highest percentage of votes but still lost at the elections. These candidates are *declared* to be elected as NCMPs. The law provides for a maximum of 9 NCMPs, and their actual number is calculated based on 9 minus the actual number of elected opposition MPs[15]. So, for example, if 6 opposition MPs are elected, then the top 3 unelected opposition MPs who polled the highest percentage of votes will be declared as elected NCMPs. This rule is subject to certain limitations, e.g. the candidate must poll at least 15% of the votes in his constituency[16]. In the event that the highest percentage of votes is garnered by an unsuccessful opposition group contesting in a GRC, then the group will determine among themselves who will be the NCMP(s)[17]. This ensures that there will be at least 9 opposition MPs in Parliament[18]. Why does Singapore have NCMPs? The reasons were recently recounted by Singapore's Deputy Prime Minister Wong Kan Seng in Parliament. He said, "The NCMP scheme was introduced in 1984 to ensure that Parliament has at least a few Opposition Members, even if the electorate only returned candidates from the ruling party to Parliament. Three benefits were highlighted then. The first was to provide PAP Ministers and MPs with the experience of the cut and thrust of debate by sparring with Opposition Members. The second benefit was to allow the electorate to judge for themselves what elected Opposition Members can and cannot do for the people. The third was to dispel any suspicions of cover-ups, since Opposition MPs would give vent to any

11 Section 27A(5) PEA

12 These are constitutionally appointed persons appointed under Art. 69 CS

13 Section 27C PEA

14 Section 8A(1A) PEA

15 Section 52(1) PEA

16 Section 52(3A) PEA

17 Section 52(3B) PEA

18 Unless the top unsuccessful opposition candidates fail to even garner 15% of the votes

allegation of misfeasance or corruption or nepotism, even if these proved false, and allow the Government to rebut them."[19]

Turning now to NMPs (Nominated Members of Parliament) – NMPs, unlike NCMPs, do not stand for election at all. Instead, they are nominated by Parliament and appointed by the President to be NMPs. They must, however, be Singapore citizens who are qualified to be candidates. The duration of appointment of an NMP is 2½ years. They are nominated by a Special Select Committee of Parliament from names submitted by the general public. The law lays down that "The persons to be nominated shall be persons who have rendered distinguished public service, or who have brought honour to the Republic, or who have distinguished themselves in the field of arts and letters, culture, the sciences, business, industry, the professions, social or community service or the labour movement; and in making any nomination, the Special Select Committee shall have regard to the need for nominated Members to reflect as wide a range of independent and non-partisan views as possible."[20] The number of NMPs is fixed at exactly 9, and the objective behind the NMP scheme is to ensure that there will be non-partisan alternative views in Parliament.

Speaking in Parliament when the scheme was first introduced in 1989, the then-Deputy Prime Minister Goh Chok Tong had this to say about the NMP scheme: "… (W)e can improve the present system simply by Parliament itself, i.e., we, the elected representatives, nominating a number of politically non-partisan Singaporeans who can contribute to good government as MPs ... it is a special privilege it can extend to those Singaporeans who can contribute, but who for good reasons, have no desire to go into politics or to look after a constituency, to enter Parliament…. Although the PAP has done its best to persuade the best to serve the country, there are always Singaporeans who can contribute but who are not able, or prepared, to take part in elections and look after a constituency. For example, many foreign companies, in particular multi-national companies, do not allow their staff to take part in elections because they want to retain a neutral position in their host country. Oil companies practise this policy. For the same reason, some local companies do not allow their staff to stand for elections. The Straits Times, for example, does not allow their journalists to do so. I hope that these companies will allow their staff to become Nominated MPs because such MPs will not be politically partisan. Then we can have a group of Singaporeans hitherto not available, who can make a significant contribution from their wider experience, expertise and insights into our economic and social problems. Women are another category of Singaporeans who can contribute to public service but who are under-represented in Parliament. There are only four of them. Most women who can contribute are immersed in their careers and with families to look after. Few women will want to handle three full-time jobs - elections and a constituency, plus a career, and family. They may be willing to

[19] Ibid, at n10

[20] The provisions governing NMPs can be found in The Fourth Schedule of the Constitution of the Republic of Singapore

become a Nominated MP if they do not have to look after a constituency. And that way, we can have more women in Parliament."[21]

Consistent with the roles expected of the NCMPs and NMPs, they are allowed to vote in Parliament relating to all matters and bills except bills pertaining to financial and constitutional matters[22].

The GRC, the NCMP and the NMP are the three important features which Singapore has introduced. I now turn to give an account of the special feature of Singapore's Elected President.

Presidential Elections in Singapore

In a country where the President is the executive head, like in Indonesia and the Philippines, the President is elected directly by the people. However, in the usual Parliamentary democracy like India, for example, the President is the titular Head of State and Government, and his or her direct election by the people is not the norm.

Singapore did not always have an Elected President. Before 1 September 1993, Singapore's President was appointed by Parliament. During that period, the President's roles were largely ceremonial. The day to day running of the government was completely in the hands of the Cabinet and Prime Minister. However, in 1991, the Constitution of the Republic of Singapore was amended to change the office of the President to an elected office[23]. This change came hand in hand with a greatly increased role for the Elected President. The Elected President was given powers to veto the use of the government's past reserves[24], appoint key civil service appointments[25], and to examine the government agencies' enforcement of the Internal Security Act[26] and Maintenance of Religious Harmony Act[27], and to look into certain investigations of corruption[28]. Once elected, the Elected President serves for a period of six years.

These changes came about after much consideration by the Government, which culminated in the issue of a White Paper entitled "Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services"[29] in 1988. After setting out the rationale for having an elected presidency, i.e. ensuring that no government would squander the savings of the country, the paper laid out the safeguards very clearly in the following manner: "To safeguard national reserves and assets, and the integrity of the public services, it is proposed to create an Elected President who will serve as a watchdog or custodian in

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21 Second Reading Speech by then-DPM Goh Chok Tong in Parliament on 29 November 1989 when moving the Constitution of the Republic of Singapore (Amendment No. 2) Bill

22 Art. 39(2) CS provides: A non-constituency Member or a nominated Member shall not vote in Parliament on any motion pertaining to — (a) a Bill to amend the Constitution; (b) a Supply Bill, Supplementary Supply Bill or Final Supply Bill; (c) a Money Bill as defined in Article 68; (d) a vote of no confidence in the Government; and (e) removing the President from office under Article 22L.

23 Constitution of the Republic of Singapore (Amendment) Act, No. 5 of 1991

24 The present Art. 148A CS

25 Art. 22 CS

26 Section 13A Internal Security Act

27 Art. 22I CS

28 Art. 22G CS

29 Cmd. 10 of 1988

these two areas. The Parliamentary system of government will not be altered. The Prime Minister and his Cabinet will govern the nation. Even in these two critical areas, the Prime Minister and his Cabinet still take the decisions, but they must seek the President's concurrence. If the President does not concur, a Government which is convinced of the rightness of its actions can take the issue to the people. The power of the President to grant or withhold his concurrence in these two areas amounts to a two-key safeguard mechanism. The Prime Minister and Cabinet will possess one key and will take the initiative. For their decision to be valid, the second key must be used; namely, the President must concur."[30] From the first 1988 White Paper, it was envisioned that only persons with certain qualifications would be able to be entrusted with the important office of the Elected President. The White Paper stated "Whoever is entrusted with the safeguard role must be capable, experienced in public affairs, and have an astute overview of the national interest. He must have the wisdom to judge the Government's actions in the two areas, and the courage and decisiveness to disagree with the government when national interests so requires. Such a person must himself have exercised authority, preferably in the public sector and have experienced the contrary pulls and pressures of government decision making. He must be able to balance the demands of political expediency and the public interest. The Constitution should require Presidential candidates to have such experiences and qualities."[31]

As a result, people desiring to run as candidates for the office of Elected President in Singapore must first meet a set of qualification criteria. A Presidential Elections Committee, comprising the Chairman of the Public Service Commission, the Chairman of the Accounting and Corporate Regulatory Authority and a member of the Presidential Council for Minority Rights, was thus formed under the Constitution[32] to ensure that candidates had the requisite qualifications. What are these qualifications? They are listed down in the Constitution[33] and comprise the commonly known criteria of citizenship, age, integrity, etc. One of the more unique qualifications however, bearing in mind the crucial fiscal role to be fulfilled by the President, includes the requirement that the candidates must have, for a period of not less than 3 years held office (i) as Minister, Chief Justice, Speaker, Attorney-General, Chairman of the Public Service Commission, Auditor-General, Accountant-General or Permanent Secretary; (ii) as chairman or chief executive officer of certain statutory boards; or (iii) as chairman of the board of directors or chief executive officer of a company incorporated or registered under the Companies Act with a paid-up capital of at least $100 million or its equivalent in foreign currency. The Presidential Elections Committee also has the power to decide if persons who fall outside these categories but present themselves as candidates with experience in other similar or comparable positions nonetheless qualify to run for election for the post.

30 Supra, paragraphs 33 & 34

31 Id. Note 29, para 18(d)

32 Art. 18 CS

33 Art. 19 CS

As this was an unprecedented development, the role of the Elected President has gradually evolved over the years through a series of constitutional amendments and White Papers. Notwithstanding these fine-tuning, the President's essential role remains largely unchanged.

Singapore had its first Elected President in 1993, and the current President of Singapore, Mr S R Nathan, is the second President to take office since the constitutional amendments of 1991. He is currently serving his second 6 year term.

Conclusion

These, are, in brief, some of our unique features relating to our Parliamentary system of Government. Singapore is glad to share its experiences in this area and to also learn from the experiences of other nations.

SESSION TWO

TYPICAL PROBLEMS AND SHORTCOMINGS IN LAW AND PRACTICES



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

THE ROLE OF THE CONSTITUTIONAL COUNCIL MOROCCAN TO ENSURE FAIR COMPETITION AMONG CANDIDATES FOR ELECTIONS

Mohammed Achergui

President of The Constitutional Council of Morocco

INTRODUCTION:

I noted at the outset that the constitutional jurisdiction in Morocco due to the early sixties, which contained the first written constitution of the Kingdom of the year 1962 make room within the constitutional Supreme Council (Supreme Court). Under the constitutional review of 1992 known as the elimination of a quantum leap bill shall state the establishment of the Constitutional Council, as a supreme constitutional judicial body independent of the rest of the constitutional authorities.

Have been assigned to the current constitution (1996) of the Constitutional Council the terms of reference are numerous and very important, including in particular, observe the constitutionality of organic laws, ordinary and constitutional rules of procedure of Parliament and the adjudication of disputes that may occur between the parliament and the government on the allocation of jurisdiction between the law of return to Parliament and the regulatory field due to the government. He was in charge also has the power to decide the validity of the election of members of parliament and referendum operations.

And on the disposition of the validity of the election of Members of Parliament - that concerns us here - careful of the Constitutional Council, in numerous resolutions issued in this regard, the need to respect the health of the election, through its emphasis on the obligation to respect constitutional principles and legal rules that ensure fair competition and equal opportunities for all candidates and compliance controls and conditions that protect the freedom

of voters to choose between the candidates, along with his commitment to take action on Almwakmat affecting the legal rules and rulers of the Organization of the election process.

If the legislature has established a Constitutional Council, three cases may have the power to cancel the election in part or in whole, such as: If no election in accordance with the clauses of the law, or if the ballot free or marred by fraud is involved, or if elected by the people who do not They may stand for election under the law or under a court ruling, the practice of heavy to the Council in the electoral field, given the increasing faith of the citizens the role of constitutional jurisprudence in ensuring the integrity of the election, led to important precedents fed penalty cases cancellation mentioned above, and developed special features that characterize the elimination of the constitution Elimination of injunction. If the task of the latter are enjoined may commit acts of stakeholders in the electoral process, the first task is to decide the validity of the election, by monitoring the honesty and integrity of electoral processes and the impact or lack of effect of irregularities associated with the outcome of the ballot.

Before addressing in some detail the evidence on the keenness of the Constitutional Council, on the subject of this symposium, to maintain fair competition among candidates for the election, it seems to me useful to recall, even as a brief to some interpretations, which established the Constitutional Council, which some constitutional principles, major, without which can not conduct elections based fair competition.

I-great constitutional principles:

Through extrapolation of the Council's decisions concerning, in particular, control of constitutionality of laws, organizational and regular and constitutional rules of procedure of Parliament, it is clear that the Council highlighted many of the principles that serve the principle of His Highness the Constitution and protect the rights and individual and collective freedoms and ensure the principles of competition and equal opportunities, and is what would promote the building of representative institutions and creating an atmosphere of trust that required for the normal functioning of the various components of a modern democratic State. The following are some examples in which the Council has devoted some of these principles:

1. Rationing exercise the functions of representative and stand, can not be done only within certain limits and does not leave by the method of intervention is crucial to the legislature (Decree No. 07/630 dated January 23, 2007),
2. Include the Organic Act on the House provisions concerning determine who has the status of the voter, the method of voting, and the course of the electoral process from beginning to announce their results, are rules designed to ensure freedom and fairness of elections (Resolution 97/124 of 26 August 1997).
3. Deprivation of a person did not debts owed by a public official from engaging in mission or representative, without providing legal guarantees

that would protect the constitutional principles, is not in conformity with the Constitution (Resolution No. 2000/382, dated March 15, 2000),

4. The requirement of political affiliation in those who wish to stand for election inconsistent with the principle of constitutional guarantees of freedom of citizens to engage in any political or trade union organization of their choice (Resolution No. 2002/475, dated June 25, 2002),
5. Parties carry out their tasks stipulated in the Constitution within the party system are incompatible with the single-party regime founded on the principles of constitutional value is particularly in a multiparty system, freedom to compete among themselves (Decree No. 07/630 dated January 23, 2007),

II-to ensure fair competition:

Reference to the resolutions of the Council in the electoral sphere, it is noted that action on health even though it was headline to the jurisdiction of the Council in this area, but his commitment to ensure fair competition and equal opportunities and respect for the freedom of the will of the voter to make of these principles are an essential component of reference adopted by the Council. Given the large number of these resolutions and the richness of its contents will be limited in this paper to give some examples of the election to ensure the health and equal opportunities for candidates and fair competition among themselves and respect for freedom of the voter.

A - TO ENSURE THE HEALTH OF ELECTION:

When challenged by some parties on the electoral process in the health and ratified this process, and claims that there are practices that will harm some of the regulations and conditions prescribed in the regulations of the parliament and the electoral code and will convince the Council of these Almwakmat, it declared the abolition of the electoral process, either partially or in full, but this does not means that the decisions rejecting the appeals submitted to it which are the most numerous, in turn, does not include enshrining the principles of health that makes sure the election by the Council.

If the Council in such cases does not require the abolition of the election, it is the role of pedagogical important benefit in addition to the appellant every interested party, which explains the terms and rulers and the means to challenge the electoral process, as well as to convince the appellant because of the exclusion Mwakmath whether the appellant a faith good and the inability to produce a substantive arguments, or was intended only to take the possibility of appeal conferred by the law.

The Council, which is entrusted with the validity of legislative elections, is in both cases in connection with a vital stake is to maintain the credibility of the elections, and therefore the credibility of the institutions emanating from it, so we find it does not hesitate to cancel the election when it comes to certified the breach of legal requirements affect the validity of the election.

This, and breaches of legal requirements encountered by the Board so many, including the following models of the eligibility of candidacy or voting

papers or the formation of the polling stations or the health of a lecture or secrecy of the vote:

1. Candidate in the contested election that he had received a final decision of conviction, lose eligibility to run according to the organization law of the House of Representatives, and based on that statement must revoke the election (Resolution No. 08 / 712 dated September 17, 2008),
2. Non-burning ballot papers right in front of the voters present after the screening process is contrary to the law, and keep the head office of the vote in this paper casts doubt on the end of that, which does not exclude him a maneuver fraudulent aimed at influencing the will of the voters to persuade them to vote for the contested election, it which is a non-assurance of the sincerity and integrity of the ballot and the outcome of the result (Decree No. 09/770 dated light in June 2009),
3. Non-compliance with the number of members prescribed by law upon the formation of the Office of the vote, which is the fundamental action because of its close relationship with the good functioning of the electoral process and ensure the safety of the ballot, would prevent the safe to the results obtained in some polling stations, and thus should not invoked votes cast in these offices (Resolution No.: 98/180 issued on March 13, 1998),
4. Not to sign the record of the Office of the vote according to the conditions set forth in the provisions of Article 41 of the Organic Law on the Council of Advisers, make him lose the strength of evidence law, and is doomed to invalidity, resulting in the cancellation of the ballot result, (Resolution No.: 10/794, issued on April 13, 2010),
5. Evidence of diversion of a set of ballots and delivered them to some voters, outside the office of the vote, and stashing them in the ballot box, is actually contrary to the law and a breach of the secrecy of the vote, which gives the uncertainty of the sincerity and integrity of the ballot, and therefore needed to permit the abolition of the outcome. (Decree No. 04/564 dated April 14, 2004).

B - TO ENSURE EQUAL OPPORTUNITIES:

The Council is keen to ensure equal opportunities for candidates both during the preparatory stage of the electoral process and the submission of nominations, or during the stage of the ballot:

1 - pre-trial phase:

The Board on the stage prior to the start of the electoral process, the right of all citizens, who meet the legal requirements, to stand for election. The following are some examples:

1 - The Board considered that the violation has been established controls required by the preparation and revision of regulations would deprive the number of citizens available to the legal requirements to participate in the election as voters or candidates, which lead to the cancellation of the ballot result. (Resolution No.: 2000/404 dated June 22, 2000),

2 - The Board considered that refrain for the registration of candidate for membership of the House of Councilors, despite a court ruling to cancel the decision of the magistrate to reject the candidature of the person concerned is a violation of judicial authority and in violation of Article 50 of the Organic Law on the Council of Advisors. He also contended that the exclusion of a regulation illegally from the competition to represent the nation, is a violation of an explicit fundamental right guaranteed by the Constitution, laws, regulatory complementary to all citizens, of the right to run, and violation of the freedom of choosing the electors and provide the perfect opportunity for them to choose freely from the preferences among the candidates; (Resolution No.: 2010/795 dated April 28, 2010),

3 - The Board considered, in another resolution, that, despite the fact that the appellant has not demonstrated by proof of its alleged refusal officer Treasury recognizes the amount of security was a maneuver aimed at removing him from the electoral competition for the benefit of contested election, the prevention between him and run for the election of the House of Representatives will , to have the resulting prejudice to the electoral process requires sincerity of allowing all those entitled to stand on an equal footing among them (Resolution No.: 98/218 of 9 June 1998).

And protecting the right to run as a constitutional right, the Board considered, in this resolution as well, that the District Court, by refusing originally to respond to the request of the appellant before the exhaust means of investigation available to them a law to verify the validity or invalidity of his claim regarding the work is not separable from the decision to refuse registration contested nomination to it, may be offered to their rule of invalidity,

4 - The Board considered that nothing in the law which prevents “scholars” the mosques as citizens from running and voting and representation offices of candidates to vote (Resolution No.: 98/705, issued on May 28, 2008),

2 - stage of the campaign and the ballot:

The campaign period appropriate to highlight the most illustrative equilibrium relationship that must prevail between all the rights and freedoms that should be enjoyed by the candidate, and the constraints that limit these rights and freedoms of legal rules and disciplines on the other. In order to maintain this delicate balance ensures the Council to achieve fair competition among candidates and lists of candidates, by respecting rules and controls required by the health of the election by ensuring the impartiality of the administrative authorities and the legality of the use of public finance, audio and video, the following are some examples:

1 - The Board considered that the content of publications distributed to the general electorate during the campaign, including in respect of expressions of insult and defamation of treason, regardless of the validity of that or not, have deviated from the controls and conduct of electoral and exceeded the limits of freedom in the exercise of the electoral propaganda, to constitute fraud is involved to subvert the elections and influence the voters to turn

their voices in ways contrary to the law (Resolution No.: 2000/393 dated May 3, 2009),

2 - The Board considered, after he was sure that the publications related to electoral advertising of portraits of His Majesty the King in the bottom of the image of the contested election, that the contested election, using it one of the sanctities of the country and the symbol of its unity as a means of propaganda campaign, have been the maneuver fraudulent contrary to the law to be with the abolition of election (Resolution No.: 08/705 issued on May 28, 2008),

3 - The Board considered that, after examination of the publication's election contested election, he noted that it contains the next image, images of synthetic of choice of the names and headquarters of the Community of employment to which he belongs and on the facades compilation country code in different ways, which is a violation of the law and practice could affect voters and persuade them to vote for the benefit of contested election (Resolution No.: 08/708 issued on June 24, 2008),

4 - The Board considered that the right candidate for the minister to ensure that the publications of the election all the information concerning the functions of ministerial offices held, because like the rest of the candidates have the same rights and subject to the same duties (Resolution No.: 03/517 issued on June 10, 2003),

5 - The Board considered that the holding of gatherings by the Chairman of the Board of mass before the start of the campaign to discuss the problems of citizens if they fall in the mandate of the contested election, but it was designed from behind win over voters, which is the beginning of a campaign partial premature, and this is contrary to legal controls on the organization of elections and the launching of the campaign (Resolution No.: 09/747, issued on March 24, 2009).

6 - take the Council through the research done by the local authority has not adhered to neutrality envisioned by the law, including that the intervention of representatives from some groups to appoint members to the polling stations are invited to vote for the contested election would constitute a violation of the law of the relevant regulatory House of Representatives, and leads to Abstraction ballot regulatory requirements guaranteeing the normal walking as well as to create an environment lacking the free choice of voters, which prevents the safe to the results declared for election (Resolution No.: 2000/399 dated June 13, 2000),

7 - The Board considered that the deprivation of a number of voters from voting in some offices, which stood by the records of this office in 1774 voters, while not exceeding the difference between the number of votes obtained by the contested election, and those obtained by the appellant 98 votes, so do not benefit Some polling stations to extend the time of voting to eight o'clock this evening, is not ruled out with him, that the distinction between the electorate, the opportunity for each to cast their ballots over a longer

period of time available for others, may rise to influence in the elections is a matter of uncertainty for the safety and therefore needed to set aside and the abolition of the outcome of the (Resolution No.: 95/70 dated April 3, 1995).

D - RESPECT FOR FREEDOM OF THE VOTER:

Comes to freedom of the voter's top priority, which ensures the Council ensured, through his concern that the poll would be free and fair and not tainted by any fraud is involved that would affect the freedom of election and choice, whether through threats, pressure or through recourse to methods of active bribery and the purchase of receivables . In this context it should be noted that the relationship be between the acts associated with a lack of equal opportunity and conditions of fair competition between the candidates on the one hand, and respect for the will of the voter on the other hand, was implicated affect some of the others, and in this context, note that cancellations are always a result of evidence of fraudulent maneuvers. And when the Council ensure lack of respect for the principles of equal opportunities and fair competition and prevent acts that would affect the will of the voter in the free choice of candidates, it does not hesitate to cancel the result of the ballot. Has passed the Council in this range, a wide range of decisions which cite the following examples:

1 - establishing as fact the active bribery and the distribution of money on a group of advisers in order to bring out the vote for a list of certain would affect the will of the voters, which is not reassuring to the sincerity and integrity of the result obtained by the candidate, which therefore needed to be revoked and the cancellation election. (Resolution No.: 01/434 issued on February 13, 2001),

2 - evidence of the existence of copies of promissory notes made by the voters stated before the Council that they have closed For the purposes of an election, prior to delivery to the contested election in order to ensure their votes to him, and witnesses stated in turn that a winning candidate to make money during the election campaign through the use of bills of exchange for electoral purposes, and the presentation of financial donations and benefits in kind or promises of jobs compared to a vote, would give rise to uncertainty about the honesty and integrity of the ballot (Resolution No.: 07/650, issued on July 26, 2007),

3 - The Board considered in several resolutions on the occasion of renewal of one third of the members of the House of Councillors for the year 2006, he is sure that by reading the content of phone calls captured during the election campaign in a legal way, that some of the winning candidates resorted to practices contrary to the law touched the integrity and sincerity of the ballot, and therefore influenced the will of the voters (resolutions No: 634 and 637 and 639, 641 and 642 and 643 and 644 and 645 and 648), but the Council in such cases has not abrogated the entire electoral process, after it was discovered from the research done by the violations of the law committed by some of the winners did not overlooking other elected or it did not affect the outcome of the process in question.

Summary:

Is clear from reviewing the outcome of the Constitutional Council in the electoral field, the latter devoted to the passion to be bound by the legal requirements and controls Almsatrip required by the health of the electoral process, a set of principles to ensure that the candidates free competition and equal opportunities, and protects the right of voters in the freedom of choice and respect their will . These are some conclusions that deserve re-recalled in this area:

- This is a given legal principles have their basis in constitutional value of the Constitution and regulations complementary;
- Is the crucial decisions of the Council does not accept any hesitation when it comes to harm these principles or even the mere suspicion that the breach thereof could have an impact on the outcome of the ballot;
- The Council in its keen on highlighting the causal link between the health component of election and other items that belong to freedom of competition, equality of opportunity or freedom of the voter.
- Works Council to adopt the principles referred to above in the reasons for its decisions, even when it comes to the decisions of refusal, as it often indicates that the shortcomings raised in front of him does not affect these principles.

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

The Permissibility of the Use of Voting Computers in Democratic Elections

Contribution to the panel "Typical problems and shortcomings in law and practice"

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We live in a world that is dominated more and more by electronics and electronic devices. Also for electoral law, it will not be possible to ignore this development. In my brief contribution, I would therefore like to address the problems which are involved with electronic voting.

The spectrum of possibilities of electronic voting range from the use of electronic voting machines by which voters can cast their vote at a polling station, to voting in electronic networks, in particular online voting, in which the vote is transmitted from the computer at home to a public voting office.

In Germany and Europe, the constitutional courts have to date dealt with the use of electronic voting devices, so-called voting computers. In Germany, mainly voting computers have been deployed which exclusively store the votes cast by the voters in an electronic memory.

In a decision of 3 March 2009, the Federal Constitutional Court declared the use of these voting computers unconstitutional because it violated the principle of the public nature of elections which results from the fundamental constitutional options for democracy, the republic and the rule of law.

The public nature of elections is the fundamental precondition of a democratic formation of the political will. It ensures the correctness and the retreaceability

of the election events and thus creates an essential precondition for the citizens' well-founded trust in the correctness of the election. The state system of representative democracy, in which the rule of the people is mediatised, in other words, in which the rule of the people is not permanently exercised directly,

requires that the act of the transfer of state responsibility to the members of Parliament is subject to special public scrutiny.

In a representative democracy, the election of the people's representation constitutes the fundamental act of legitimation. The casting of votes in the parliamentary elections is the essential element of the process of the formation of the political will from the people to the state bodies and thus it is at the same time the foundation of political integration. Compliance with the electoral principles which apply in this context and confidence in such compliance are therefore preconditions of a democracy that is able to function. Only the possibility to examine whether the election complies with the electoral principles under constitutional law can ensure that there is no deficiency in the transfer of state authority to the representatives of the people, which is the first and most important element of the unbroken chain of legitimation from the people to the bodies and office-holders entrusted with state duties.

Only if the voters themselves can reliably verify the correctness of act of delegation, in other words, only if the election takes place "before the eyes of the public" can the confidence of the people as the sovereign in the composition of Parliament corresponding to the will of the voters be guaranteed; this confidence is necessary for the functioning of democracy and for the democratic legitimacy of state decisions.

According to the Federal Constitutional Court's ruling, voting computers which record the voters' votes in electronic form and ascertain the result of the election electronically only meet the constitutional requirements if the essential steps in the act of voting and in the ascertainment of the results can be checked by the citizen reliably and without special expert knowledge. The voter himself or herself must be able to verify even without a more detailed knowledge of computers whether his or her vote as cast is recorded truthfully as a basis for counting or at least as a basis for a subsequent re-count.

The major scope of the effect of possible errors in the voting machines or targeted election-rigging requires special precautions to be taken in order to comply with the principle of the public nature of an election. While, if voting papers are used, manipulations or election falsifications are at any rate only

possible with considerable effort and with a very high risk of discovery, which has a preventive effect, programming errors in the software or targeted election-rigging through manipulation of the software of electronic voting devices are difficult to recognise. If the election result is ascertained by computer-controlled processing of the votes stored in an electronic storage medium, it is therefore not sufficient if only the result of the calculation process as implemented in the voting machine can be taken note of using a summary paper printout or an electronic display.

The Federal Constitutional Court does not generally regard the regard the use of voting computers as unconstitutional. It must, however, be ensured

that a reliable correctness check, which is required under constitutional law, is possible. The court did not have to decide what technical possibilities exist which comply with the principle of the public nature of elections by making it possible for the electorate to trust in the correctness of the procedure in which the election result is ascertained because the procedure is retraceable. The Federal Constitutional Court merely indicated possible solutions which are discussed by experts or which are already being used in other countries, for example voting devices which, in addition to recording the vote in electronic form, print out a paper record of the vote cast that is visible to the respective voter (a so-called VVPAT = Voter Verified Paper Audit Trail), which can be checked before the definite casting of the vote and is subsequently collected to make verification possible. An examination that is independent of the electronic recording of votes is also possible with systems in which voters use a voting paper and the electoral decision is recorded in electronic form at the same time (for instance by means of a "digital voting pen") or subsequently (for example by a voting paper scanner), in order to electronically evaluate it at the end of the election day.

The problems caused by modern technologies in electoral law became apparent not only in the election of US President Bush in the year 2000. In February last year, a CIA official said in a hearing before the U.S. Election Assistance Commission in Florida: "… wherever the vote becomes an electron and touches a computer, that's an opportunity for a malicious actor potentially to … make bad things happen." He stated that the CIA had registered irregularities during elections in several countries. In a referendum on President Chavez's removal from office in 2004, for example, 19,000 voting machines had been used. Chavez had won the referendum with a support of almost 60 per cent. Local researchers had doubted the correctness of the voting result. They had mentioned technical manipulations of the voting devices because Chavez had obtained good results especially in regions where he actually did not have many supporters. In the presidential elections in Ukraine in 2004, the supporters of candidate Viktor Yanukovych had secretly placed a "non-authorised computer" in the headquarters of the returning officer. This had been discovered by means of intercepted phone calls, with the result that the election had later on been declared invalid by the Supreme Court in Kyiv and had been ordered to be repeated. Yanukovych had lost the repeated election to his competitor Viktor Yushchenko. From Macedonia, a CIA official reported a so-called "voters' genocide": members of the Albanian minority had been deleted from the digital voters' lists by means of a simple "Delete" command. Hackers in Georgia proceeded the other way round: they added to the voters' lists names of persons some of whom had already died in the 18th century.

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CONTROL CONSTITUCIONAL A LA SEGUNDA REELECCIÓN EN COLOMBIA.

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1. Planteamiento del problema político-constitucional.

El asunto propuesto a las deliberaciones de la VII Conferencia de Cortes y Tribunales Constitucionales de Asia tienen un doble carácter: de una parte, se trata de un tema típicamente político, pues consiste en el diseño de su sistema presidencial y en las reglas electorales que lo regulan; de otra parte, tiene una connotación jurídica especial al estar desarrollada en normas de rango constitucional.

Lo primero, el carácter político del régimen presidencial, conduce a que sea el pueblo ciudadano y los órganos democráticos de representación popular, quienes hayan de decidir sobre la extensión del período presidencial. Lo segundo, la naturaleza jurídica y constitucional de la regulación sobre la posibilidad de que el Presidente de la República sea elegido en más de una ocasión, conlleva a que el Poder Judicial intervenga en dicha definición.

Sobre la manera en que se ha ejercido este control jurisdiccional por la Corte Constitucional de mi país sobre las decisiones que buscaban consagrar la validez de una segunda reelección presidencial, versa esta intervención.

2. El régimen constitucional de la reelección del Presidente de la República.

La Constitución Política de Colombia de 1991 consagra un régimen presidencial, tal como se ha hecho ininterrumpidamente desde el origen de nuestras instituciones en 1821. Esto significa que el Presidente de la República hoy es elegido directamente por el Pueblo, específicamente, por los varones y mujeres mayores de diez y ocho años de edad; no es el cuerpo nacional de

representación -congreso o parlamento- a quien corresponde tal designación como puede ocurrir en regímenes parlamentarios. Adicionalmente, la Constitución fija en cuatro años la duración del período presidencial, después de haber ensayado períodos de dos años y de seis años, habiéndose encontrado excesivamente cortos e insuficientes los primeros y peligrosamente prolongados los segundos, en su momento.

Históricamente, las constituciones en Colombia han permitido que un Presidente pudiera ser reelegido por la voluntad popular. Mas estas reelecciones generalmente fueron mediatas o por período interpuesto. Sólo en algunos momentos del siglo XIX, especialmente en los albores de la República, se permitió que el Jefe de la Nación pudiera seguir ejerciendo el poder una vez concluyera un período: fue lo que ocurrió con Simón Bolívar, libertador del país y fundador de la República en la segunda década del siglo XIX. En suma, durante el siglo XX, el Presidente de Colombia podía ser elegido por segunda vez a la Presidencia después de haber dejado el poder y habiendo transcurrido por lo menos un período presidencial. Sólo en una ocasión un expresidente logró ser reelecto, mas no culminó su segundo período debido, en buena parte, a las tensiones políticas que desató su reelección.

Influidos por la experiencia histórica y persuadidos de que el poder presidencial ha de tener límites temporales, los constituyentes de 1991 adoptaron la prohibición absoluta de la reelección del Presidente, al tiempo que reiteraban la duración de su período en cuatro años.

3. La reforma constitucional consagratoria de la reelección presidencial inmediata.

Tras la promulgación de la Constitución Política de 1991, Colombia ha tenido cuatro Presidentes de la República, curiosamente, ninguno mayor de cincuenta años al momento de tomar posesión. El actual Presidente, Álvaro Uribe, asumió el cargo el 7 de agosto de 2002. Los éxitos logrados por su gobierno en la lucha contra la violencia multicausal y los grupos de guerrillas, paramilitares y organizaciones ligadas al negocio ilícito de las drogas estupefacientes, unidos a un estilo de trabajo cercano a la población, lo elevaron a niveles de popularidad nunca antes registrados en Colombia: actualmente, tras ocho años de ejercicio de la presidencia, distintas mediciones realizadas le otorgan una popularidad y aprobación a su gestión entre el 74% y el 76%, habiendo registrado niveles superiores al 80% en algunos momentos cumbres de su mandato como tras la liberación incruenta de ciudadanos secuestrados.

Con base en los niveles de popularidad y aprobación indicados, y considerando la insuficiencia de un lapso de cuatro años para desarrollar un mandato programático, sectores políticos y de opinión promueven la institucionalización de una reelección presidencial, con posibilidad de ser inmediata. Mediante un Acto Legislativo de Reforma Constitucional expedido por el Congreso de la República -órgano legislativo y constituyente- , en el año 2005 se consagra en la Constitución Política de Colombia, la posibilidad de elegir a un Presidente en dos períodos continuos, mediante dos elecciones diferentes. Nótese que en modo alguno se trató de una extensión del período de cuatro años, sino de la

posibilidad de que, mediante el voto popular, un Presidente en ejercicio acceda a un segundo período consecutivo.

4. El control judicial formal sobre el trámite de la reforma constitucional de 2005.

Con todo, no bastaba que el Congreso de la República aprobara la reforma a la Constitución para que procediera la reelección presidencial. Era necesario, de acuerdo con la Constitución misma, que la Corte Constitucional declarara la exequibilidad o conformidad con la Constitución, de tal reforma. Ello ocurrió en el segundo semestre del año 2005.

Este punto plantea varias dificultades jurídicas. En primer lugar, ¿puede una reforma constitucional ser inconstitucional? En segundo lugar, hasta donde llega la competencia de una corte de jueces para juzgar la constitucionalidad de una reforma dictada por la corporación de origen popular que representa al Pueblo? No es cualquier cosa: se trata de temas de la mayor importancia en el constitucionalismo contemporáneo.

La Constitución de 1991 había previsto lo primero: atribuyó expresamente a la Corte Constitucional la potestad de revisar una reforma constitucional-emanada del Congreso, del Pueblo o de una Asamblea Constituyente-, por vicios de procedimiento en su formación. Vale decir, la propia Constitución Política confió a la Corte el control formal de las reformas a la misma, entendiéndose que el control sobre la forma -no sobre la material- versa sobre las exigencias constitucionales sobre requisitos de publicidad del proyecto, del quórum en las cámaras legislativas para decidir, del cumplimiento de un número de debates, de la obtención del mínimo de votos tanto en las comisiones como en las sesiones plenas de la cámara alta y de la cámara baja.

En ejercicio de tan clara facultad jurídica, la Corte Constitucional decidió la exequibilidad del Acto Legislativo de Reforma Constitucional, por considerar que el trámite de la iniciativa, desde su presentación y hasta su aprobación final, cumplió los requisitos de trámite y procedimiento predeterminados en la propia Constitución. En síntesis, la Corte declaró la constitucionalidad formal de la reforma que estableció la reelección presidencial inmediata.

5. El control judicial sobre el alcance de la enmienda constitucional de 2005: la teoría de la diferencia entre 'reforma' o de la 'sustitución' de la Constitución.

Sin embargo, la Corte Constitucional no se limitó al examen sobre el procedimiento de formación de la reforma. Se ocupó, además, de sentar una teoría: a su juicio, el Congreso de la República puede 'reformar' mas no 'sustituir' la Constitución Política. Es decir, concluyó que el poder de dictar normas constitucionales de enmienda de la Constitución vigente, tiene un límite: es facultad de reforma, no de sustitución, de ella misma. En otras palabras, no puede ni dictar una nueva Constitución -sustitución total- ni suprimir un elemento esencial o identificatorio de la misma -sustitución parcial-.

Tal teoría fue desarrollada por la Corte Constitucional en 2003, partiendo de diferenciar entre un poder constituyente y el poder constituido. A su juicio, sólo el poder constituyente primario tiene capacidad de dictar una Constitución Política que reemplace un orden constitucional preexistente; por el contrario,

los poderes derivados o constituidos, surgidos al amparo de tal ordenamiento superior, tienen un poder limitado de enmienda, pues su facultad de dictar normas constitucionales no puede exceder lo dispuesto por el poder constituyente primario. En concreto, el Congreso de la República carecería de competencia para negar el derecho político de participación a un sector de la población por razón de género, o para atribuir la función legislativa o jurisdiccional al Ejecutivo, o para abolir el pluralismo político o los derechos humanos fundamentales de la población. Estos actos de enmienda serían considerados sustitución de la Constitución, no reformas constitucionales.

Concluyó la Corte que en Colombia son expresión del poder constituyente primario los actos constituyentes del Pueblo, cuando éste se pronuncia directamente, sin intermediación alguna ni marco constitucional preexistente que lo limite. Pudo ser el caso, histórico, de 1957, cuando para superar una dictadura o poder de facto que había dado un golpe de Estado años atrás, se manifestó el Pueblo en un Plebiscito convocado por un gobierno de transición para restablecer el orden constitucional interrumpido y reconstituir los poderes públicos. Otro caso, para la Corte, en que el Pueblo actúa como poder constituyente primario ocurre cuando el mismo faculta expresamente a una Asamblea Constituyente para dictar un nuevo orden constitucional, tal como ocurrió en 1991, mediante una Consulta Popular. En estos casos, el Pueblo o la Asamblea pueden expedir una Constitución que sustituya total o parcialmente la anterior.

Con todo, la Corte Constitucional encontró exequible la reforma que modificando la Constitución de 1991, incorporó la reelección presidencial inmediata, al considerar que cumplió los requisitos de procedimiento previstos y no tuvo el alcance de sustituirla.

6. El control judicial de la ley de referendo constitucional de 2009.

Por el contrario -y este es el punto de llegada de esta reflexión-, en febrero de 2010, la Corte Constitucional encontró que la ley de iniciativa popular que convocaba al Pueblo colombiano a un Referendo Constitucional para introducir la posibilidad de una segunda reelección -inmediata o mediata-, sí sustituía la Carta Política de 1991 y, en consecuencia, la declaró inconstitucional.

Inicialmente, consideró que dicha Ley de convocación a un Referendo Constitucional -presentada por millones de ciudadanos para ser tramitada por el órgano legislativo[1]-, incumplió los trámites constitucionalmente previstos: excedió el tope de gastos establecidos para la promoción de la iniciativa popular; fue votado en una sesión extraordinaria del Congreso de la República sin la debida citación a las cámaras legislativas; el Congreso cambió sustancialmente el texto propuesto por los ciudadanos que respaldaban la iniciativa, transgrediendo una restricción de trámite. La Corte revalidó la tesis de que los procedimientos no son adjetivos o baladíes: existen en garantía de los principios en que se basan las democracias, como los de prevalencia de las mayorías y defensa de las minorías, por lo que tienen una entidad constitucional sustancial y deben

[1] Las leyes pueden ser tramitadas a iniciativa de los congresistas, del Gobierno o de un número de ciudadanos superior al 5% del censo electoral. En el caso, esta la ley que convocaba a Referendo Constitucional fue presentada por casi el 15% del censo de ciudadanos aptos para votar el Colombia.

ser respetados por los titulares del poder de reforma de la Constitución. Con base en esto, apuntó a la inconstitucionalidad del Referendo por la Segunda Reelección Presidencial.

Pero lo más significativo fue que fundamentó la inconstitucionalidad de la Ley de Referendo Constitucional, por considerar que promovía una reforma que significaba una 'sustitución' parcial de la Constitución. En otras palabras, aplicó la teoría del límite al poder de enmienda constitucional que hace unos años había apenas esbozado.

En que se basó la Corte Constitucional para dictaminar la inconstitucionalidad de una Ley que convocaba al Pueblo colombiano para aprobar o improbar una reforma constitucional que permitía la segunda reelección presidencial[2]? En primer lugar, consideró que la posibilidad de una segunda reelección presidencial -y así, de un tercer período presidencial consecutivo- afectaría sensiblemente el equilibrio de los poderes públicos en Colombia, por acumulación excesiva del mismo en cabeza del Presiente de la República, con detrimento de las facultades de las restante ramas del poder. En segundo término, juzgó que de ser aprobado el referendo, se habría sustituido el principio democrático de alternación presidencial o alternancia efectiva en el ejercicio del poder, pues un Presidente en condición simultánea de candidato presidencial podría concretar en su favor las ventajas derivadas del ejercicio del poder por ocho años e impedir en la práctica que otros ciudadanos accedan a la primera magistratura de la Nación. En tercer lugar, en desarrollo de lo anterior, encontró la Corte que un Presidente estaría en una posición privilegiada frente a otros candidatos, sustituyendo parcialmente el principio y el derecho constitucional de igualdad de sus contendores particulares[3]. Por todas estas razones decretó la Corte Constitucional la inconstitucionalidad.

7. La reacción política al fallo de la Corte Constitucional.

Una vez comunicada públicamente la sentencia de inconstitucionalidad de la Ley de convocatoria a un Referendo Constitucional para una segunda reelección presidencial, el Presidente de la República, públicamente anunció su respeto a la decisión de la Corte Constitucional y su acatamiento inmediato. Así, no obstante la enorme popularidad de la que goza el actual mandatario de los colombianos, a partir de ese momento su nombre no sería presentado a consideración de los ciudadanos para un tercer período presidencial. Adicionalmente, no hubo partido político alguno que desconociera o incitara al desconocimiento del fallo proferido.

A tres meses y medio del pronunciamiento de la Corte Constitucional, Colombia celebró las elecciones presidenciales más transparentes y pacíficas que han tenido legar en muchas décadas de historia nacional. El exministro de defensa nacional del actual Presidente Uribe, doctor Juan Manuel Santos, ha

[2] Como se aprecia, el Referendo a que se convocaba mediante la Ley declarada inconstitucional, no disponía un tercer período consecutivo a favor de un Presidente de la República: de haber sido aprobado, permitía constitucionalmente la segunda reelección presidencial. De todas manera, hubiera sido necesaria una nueva elección presidencial.

[3] Adicionalmente, en una primera reelección se mitiga jurídicamente tal desigualdad mediante una ley especial de garantías electorales a la oposición, que, se consideró, no aplicaba para una segunda reelección.

sido elegido por el voto popular como Presidente Constitucional para el período 2010-2014, por el 70% de los ciudadanos sufragantes, el pasado 20 de junio.

8. Conclusión.

(i) En Colombia, la Constitución prevé que la Corte Constitucional ejerce un control formal sobre las reformas a la Constitución, esto es, sobre la observancia de los trámites y requisitos constitucionales para su aprobación.

(ii) Por la vía jurisprudencial, la Corte Constitucional ha considerado que los órganos constituidos como titulares del poder de expedir normas constitucionales, tienen limitada su competencia a la 'reforma' mas no la 'sustitución' de la Constitución.

(iii) A diferencia de lo que ocurrió con la reforma constitucional que estableció la posibilidad de una primera reelección presidencial en Colombia, la Corte Constitucional juzgó inexequible la posibilidad de una segunda reelección presidencial. Así, actualmente, ningún ciudadano puede ocupar la Presidencia de la República en más de dos ocasiones. Fundó la Corte su sentencia en que tal posibilidad entrañaría una sustitución parcial de la Constitución, por la afectación de los principios de separación de poderes, alternación presidencial e igualdad política.

(iv) Colombia dio una muestra más de fortaleza institucional, con ocasión de este suceso histórico. La Corte Constitucional pudo dictar sentencia sin haber recibido objeto de presiones indebidas o coacción alguna. El Presidente de la República depositario de los más altos índices de aprobación y respaldo popular, acató el fallo judicial inequívoca e inmediatamente. Las fuerzas políticas de la Nación, mayoritariamente favorables en el Congreso al referendo por la segunda reelección presidencial, aceptaron la decisión judicial. Finalmente, el Pueblo colombiano dio muestras de una gran madurez constitucional, al afrontar y resolver pacíficamente esta tensión política, en el marco de nuestras instituciones democráticas.



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CONSTITUTIONAL COURT JUDGES

CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN AND IMPROVEMENT OF THE ELECTION LEGISLATION (PROBLEMS AND SOLUTIONS)

Bakhtiyar Mirbabaev

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Dear ladies and gentlemen!

First of all let me express my great gratitude for invitation of the representatives of Uzbekistan for today's so high level international conference to its organizers – to Constitutional Court of the Republic of Indonesia and Konrad Adenauer Foundation.

From the first days of its independence the Republic of Uzbekistan has put forth the task of creating humane and democratic law-governed state, which was proclaimed in the Constitution of the Republic of Uzbekistan.

The Constitution confirmed that Uzbekistan is sovereign democratic republic and that democracy in the Republic of Uzbekistan is based on the principles common to all mankind according to which the ultimate value is a human being, his life, freedom, honour, dignity and other inalienable rights. Democratic rights and freedoms are protected by the Constitution and laws.

In the Constitution it is stipulated as one of political rights of citizens the right of citizens to participate in the management of public and state affairs. Thus, according to Article 32 of the Constitution citizens of the Republic of Uzbekistan have the right to participate in the management of public and state affairs, both directly and through representatives. Such participation shall be exercised by way of self-government, holding referendums and democratic formation of state bodies.

President of the Republic of Uzbekistan Islam Karimov said, that "The concepts of democracy and the elections always move together, they connected with each other. Elections stands for democracy. Democracy stands for elections"[1].

[1] Karimov I.A. Uzbekskiy narod nikogda i ni ot kogo ne budet zaviset. T.13. — T.: «O'zbekiston», 2005. P.73.

For that reason one cannot imagine democratic law-governed state and civil society without elections. Elections are a legal tool of providing the participation of citizens in formation of representative power of state authority. Elections are a form of nation's expression of will, in result of which representative power of state authority is formed. Democracy and freedom in elections affects directly on improvement of the quality of representative power of state authority's activity.

Therefore during the years of independence the electoral system which existed during the totalitarian regime was thoroughly reformed under auspices of President of Uzbekistan Islam Karimov. In point of fact a new electoral system was formed. The concept of omnifaceted democratization of electoral system was elaborated and gradually implemented, in consequence of which it was created a considerably unique system of elections. The election legislation has been improved systematically, i.e. in all courses. The attention was paid to the guarantees of both active and passive election right of citizens.

The formation and improvement of electoral system so as the development of the Republic of Uzbekistan in whole during the years of independence can be divided into 2 stage.

First stage, from 1991 till 2000 – the stage of elaboration and adoption of the legislative framework of the formation of representative power of state authority.

In this stage there were adopted the Constitution of the Republic of Uzbekistan and a number of laws, aimed at creating the legal framework of organizing and conducting elections.

In the Constitution there were distinctly represented main principles of state and social construction, including priority of human rights and headship of the norms of international law. With consideration of these principles there were determined the foundations of electoral system, was done work on formation of integral system of representative bodies of state authority in the center and municipalities.

The second stage, from 2001 till present – the stage of further improvement of election legislation, aimed at active democratic renewal and modernization of the country.

In this stage the improvement of election legislation was aimed at accomplishment of main key goal of this period, i.e. consistent gradual transition from strong state to strong civil society.

In this period supreme state representative body was converted to bicameral Oliy Majlis of the Republic of Uzbekistan. In this respect a number of alterations and additions were introduced to the election legislation, aimed at democratization of elections, efficient provision and improvement of the guarantees of the election rights of citizens.

The guarantees of the election rights of citizens depending on in which legislative act they are fixed can be divided into three groups.

1. The guarantees fixed in the Constitution of the Republic of Uzbekistan.
2. The guarantees fixed in constitutional laws.
3. The guarantees fixed in other laws. The guarantees of the third group in its turn can be divided into two subgroups: the guarantees fixed in the laws dedicated to elections directly and the guarantees fixed in one or another law, obliquely affecting the issues of elections.

It should be noted that all these guarantees no matter where they are fixed interrelated and compose single system.

In accordance with Article 43 of the Constitution of the Republic of Uzbekistan safeguarding the election rights, so as the other rights of citizens, is vested on the state.

In accordance with this provision of the Constitution the state creates and improves the system of the legislative acts on elections, takes care of their inviolately execution, stipulates responsibility measures of the individuals who violated the election rights of citizens. In accordance with Article 117 of the Constitution the right to vote, equality and freedom of the expression of will is guaranteed by law.

With the goal of implementing this norm of the Constitution special Law "On the guarantees of the election rights of citizens" was adopted on the 5th of May 1994. The provisions of the Constitution on the guarantees of the election rights of citizens were elaborated in it.

As the President of the Republic of Uzbekistan Islam Karimov has noted: "First of all, life itself demand us unconditional observation of rule of law principle and freedom of expression of will, provision of necessary conditions for realization of rights and freedoms of citizens, mass media, conditions for secret ballot and equal suffrage, in other words inviolately observation of democratic norms and standards"[2].

Constitutional law "On the results of referendum and the main principles of the organization of state authority", adopted on the 4th of April 2004, proclaimed provision of the guarantees of the rights and freedoms of citizens on the basis of generally accepted principles and norms of international law, as well as gradual liberalization all parts of political life, state and social construction as main principles laid on the foundation of the work on improvement of national legislation.

The Constitution of the Republic of Uzbekistan determines the legal framework of the electoral system of the country. Chapter XXIII of the Constitution which consists of the Article 117 is dedicated to electoral system of the Republic of Uzbekistan. In accordance with this article citizens of the Republic of Uzbekistan have the right to elect and be elected to the representative bodies of state authority.

The citizen of the Republic of Uzbekistan who has reached eighteen years old has the right to elect. A deputy of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan, as well as a member of the Senate of the

[2] Karimov I.A. Predanno slujit Rodine i svoemu narodu – vysshee shchastye. – T.: «O'zbekiston», 2007, P. 76.

Oliy Majlis of the Republic of Uzbekistan may be a citizen of the Republic of Uzbekistan who has reached on the date of the election twenty five years of age and permanently residing on the territory of the Republic of Uzbekistan. For the deputies of Jokarghy Kenes of the Republic of Karakalpakstan it is required to be reached twenty five years of age, for the deputies of district and city Councils of peoples deputies it is required to be reached twenty one years of age.

Only citizens, who have been legally certified as insane, as well as persons in prisons, may neither elect nor be elected. In any other cases direct or indirect infringement on citizens' election rights is inadmissible.

The elections are held on the basis of the general, equal and direct suffrage by secret ballot.

In the Republic of Uzbekistan elections are held in multiparty basis. In the end of 2008 the alterations and additions stipulated by the demand of time and international norms and aimed first of all at further liberalization and democratization of the election legislation were introduced to the electoral system of the Republic of Uzbekistan.

In particular, enhancement of the role and influence of political parties in state management, introduction of the institution of the plenipotentiary representative of political party, providing them with certain rights and powers, aimed at protecting the interests of political parties allowed to improve further the electoral system, which met great support of international community.

In result of these modifications the representation of citizens in Legislative Chamber of Oliy Majlis of the Republic of Uzbekistan considerably extended, where the number of seats was increased from 120 to 150. It introduced a new principle aimed at protecting the environment, natural resources and environmental safety of the public, in accordance with this principle in the Parliament it was allocated 15 seats for the members of Ecological movement of Uzbekistan.

Thus, today 135 deputies of the Legislative Chamber are elected on a regional single-member constituencies on a multiparty basis, 15 members of the Legislative Chamber are elected from the Ecological movement of Uzbekistan on its conference.

Members of the Senate of the Oliy Majlis of the Republic of Uzbekistan are elected in equal quantity – in six person – from the Republic of Karakalpakstan, regions and the city of Tashkent by secret ballot at relevant joint sessions of deputies of Jokarghy Kenes of the Republic of Karakalpakstan, representative bodies of state authority of regions, districts and cities from among these deputies.

Voters, regardless of their location, whether they are in another city or province or territory of another State, are guaranteed the right to participate directly in elections.

Voters have the right to freedom of expression of will and secret ballot. District election commissions, organizing the vote in specially allocated areas,

provide citizens with the opportunities to free and secret expression of will. Control over voters' expression of will is not allowed.

Citizens of the Republic of Uzbekistan who have reached by the day or on the day of election the age of 18 years, either permanently or temporarily residing in the territory of relevant election commission are entitled to be included in the voter's list.

Voters are provided with the opportunity to get acquainted beforehand with the voter's list in the premises of the district election commission.

The voter has the right to declare to the district election commission about the error or inaccuracy in the voter's list. Within twenty four hours the district election commission must check the statement and either remove the error, or issue the applicant a certificate of reasoned rejection of the application.

To carry out pre-election meetings bodies of state authority are obliged to provide voters with the specially equipped premises, the necessary reference and information materials. The time and place of the meetings are reported to the voters in advance.

The entire election campaign is based on the basis of general publicity. The decisions of relevant election commissions on the formation of constituencies and district polling stations, electoral commissions, as well as the results of registration of candidates, voting and elections, published in the press.

Voters have the right to get acquainted with the program of future activities of political parties and individual candidates involved in the elections.

On voting day, voters are guaranteed the right to replace the damaged ballot for a new one.

Voters, who are not able to be on the day of elections at their residence, have the right to vote in advance. In such cases, the relevant district election commission at the request of the voters gives the electoral lists of prescribed form with adequate data about the candidates for deputies. Voters can leave a filled electoral list in a sealed envelope to a member of the district election commission.

Voters, who can not come into premises for voting because of health condition or other reasons, have the right to file an appropriate request to the district election commission, which is obliged to organize voting in the seat of the voters.

In Uzbekistan it is achieved compliance of the electoral legislation on guarantees of the election rights of citizens with the generally accepted norms of international law. An important place in this case have the international legal documents of the UN. For example, according to Article 21 of the Universal Declaration of Human Rights, the will of the people is the basis of the authority of government, this will is 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.

The Constitution embodied the rule stipulating that the procedure for the elections shall be specified by law. Implementing this provision of the Constitution it is adopted a number of special laws on elections. They guarantee

citizens the right to appeal the actions and decisions of officials, state bodies, election commissions, infringing the election rights of citizens. Citizens may appeal to election commissions, state bodies, court.

Article 272 of the Civil procedural code of the Republic of Uzbekistan stipulates that the court should not later than three days consider appeals against decisions of election commissions, if it left less than six days till the day of elections, then it should be considered immediately. The complaint tried by court with the participation of the applicant and the representative of the relevant election commission, if the complaint concerns not the applicant but another person, that person shall also be invited to the court. The court decision transferred immediately to the relevant election commission and the applicant.

Criminal code of the Republic of Uzbekistan (Article 146) stipulates criminal liability for violation of the secrecy of voting, falsification of election documents, making fictitious entries on the ballot or subscription lists, notorious incorrect counting of votes in the organization and conduct of elections.

In accordance with Article 147 of the Criminal code criminal liability is established for obstructing by violence, threats, deception or corruption the free exercise of citizens' right to elect or be elected, to conduct canvass, exercise of the proxies of candidates for deputies of their mandate.

Thus, the Constitution and election legislation of the Republic of Uzbekistan are a solid foundation, the main basis of free and democratic elections and serve as a guarantee of the right of citizens to participate in the management of state and public affairs, in the formation of state bodies of representative power and aim at achieving the main goals of the country - creating democratic state and strong civil society.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

THE TYPICAL PROBLEMS AND SHORTCOMINGS IN LAW AND PRACTICE IN CAMBODIA

Penn Thol
Member of the Constitutional Council of Cambodia

Honorable Chief Justice of the Constitutional Court
Honorable Chairmen and Judges
Distinguish Guests
Ladies and Gentlemen,

I am much honored to participate in this important event bringing together Asian Constitutional Court Judges and representatives of relevant international and regional organizations from other regions in order to exchange very useful experiences.

But first of all, I would like to thank the Constitutional Court of the Republic of Indonesia for organizing this conference so that we can exchange our views on "the typical problems and shortcomings in law and practice" concerning with the General Election. Also, allow me to take this opportunity to thank the Konrad Adenauer Foundation for arranging our delegation's travel itineraries.

On this issue of the Session two, dealing with the typical problems and shortcomings in law and practice, I wish to refer to our 1993 Constitution, chapter 12 *new* on the creation of the Constitutional Council and fixing its role in the Article 136 *new*: "The Constitutional Council shall have the competence to guarantee the respect of the Constitution, to interpret the Constitution and the Laws adopted by the National Assembly and definitively reviewed by the Senate. The Constitutional Council has the right to examine and to decide on litigations related to the elections of the Members of the National Assembly and to the elections of the Senators."

In its competence to guarantee the respect of the Constitution, to interpret the Constitution and the Laws adopted by the National Assembly and

definitively reviewed by the Senate, the Constitutional Council can examine the constitutionality of laws before or after their promulgation, except the organic laws, the rules of procedures of the National Assembly and of the Senate which shall be examined before their promulgation (or their implementation). Concerning the competence to examine the constitutionality of the organic laws, the paragraph 1 of the article 16 *new* of the law on the Organization and the Functioning of the Constitutional Council and the law on the amendment of this law stated that the organic laws and their amendments, once adopted by the National Assembly and definitively reviewed by the Senate, must be sent by the President of the National Assembly to the Constitutional Council for the control of their constitutionality, before their promulgation. Thus, with reference to the above-mentioned matters, the law on the Elections of the Members of the National Assembly is one of the organic laws which the Constitutional Council has already examined its constitutionality.

In its competence to examine and to decide on litigations related to these legislative elections, the Constitutional Council acts as a court, despite the fact that it does not belong to the Judiciary Power.

The law on the Organization and the Functioning of the Constitutional Council and the Amendment of this law also provide for its competence before and after the legislative elections. The Articles 25 *new* to 35 of Section 3 of this law give details of the procedure. In the Article 26, the Constitutional Council is mandated to examine before the elections and to decide on:

1. any petition from a political party or a candidate who contests the decision of the National Election Committee rejecting the complaint related to the candidacy or to the list of registered candidates. This petition shall be filed within 7 days at the latest after receiving the notification from the National Election Committee;
2. any petition of a person contesting the decision of the National Election Committee rejecting his/her request for registration on the voters' list. This petition shall be filed within 5 days at the latest after receiving the notification from the National Election Committee;
3. any petition by an individual or his/her representative against the decision of the National Election Committee rejecting the complaint about his/her missing name, or the objection to the registration of names or the upholding on the voters' list of the name of any individual whose conditions are considered inconsistent with the law on the elections. The petition shall be made within 5 days at the latest after receiving the notification from the National Election Committee. After receiving the petition, the Constitutional Council shall decide on the aforementioned case within 10 days at the latest;
4. any petition of political party contesting its registration on the list of political parties being refused. The petition shall be filed within 5 days at the latest after receiving the notification from the Ministry of Interior. After receiving the petition, the Constitutional Council shall decide on the case within 30 days at the latest.

The Article 27 *new* deals with the competence of the Constitutional Council to examine after the elections and to decide on :

1. any direct petition against the results of the elections by an individual or a political party candidate to the elections. This petition shall be filed within 72 hours at the latest after the proclamation of the preliminary results.
2. any petition from an individual or a political party contesting the decision of the National Election Committee rejecting their petition against the results of the elections. This petition shall be filed within 72 hours at the latest after receiving the notification from the National Election Committee. After receiving the petition, the Constitutional Council shall decide on the aforementioned case within 20 days at the latest.

The Article 29 *new* gives the power to the Constitutional Council if it deems necessary, to temporarily suspend the contested result of the elections concerning a member of the National Assembly or a member of the Senate or a political party.

In addition, the Article 34 *new* deals with the decision of the Constitutional Council on the cases related to the regularity of the elections, to the eligibility of a candidate for the elections and to the eligibility of a candidate declared elected. The Constitutional Council may agree or disagree with the decisions of the National Election Committee, declare the nullity of the elections that have been contested, or declare the candidate as duly elected.

In order to provide fair competition among candidates, the law on the Elections of the Members of the National Assembly and the law on the amendment of this law stipulate several conditions:

- All media, including state-run press, television and radio, shall make their services available to the National Election Committee at no cost for the purpose of publicizing electoral work and conducting voter education.
- The National Election Committee shall take steps to publicize political messages at the request of a political party which has been registered for running in the election, based on equal and orderly access to media.
- In exercising their rights to publicize, political parties and candidates shall refrain from using violence, abuse, or contemptuous remarks, causing fear, confusion and loss of confidence in the secrecy of voting.
- Public theaters, stadiums, parks and halls shall be made available to all candidates or political parties that have been registered for running in the election offering to rent for electoral campaign, based on equal and orderly access to those facilities.
- During the electoral campaign, political parties and candidates who wish to rent public theaters, stadiums, parks or halls, in accordance with Article 77 of this Law, shall submit an application to the manager(s) of these facilities at least three (3) days before the scheduled campaign meeting; and a copy of this application must be sent to the relevant Commune/Sangkat Electoral Commission. The manager of the facility shall respond to the applicant within twenty-four (24) hours the latest of receipt of the application.

- Political parties or candidates may conduct their campaign in private areas or halls with the consent of the owners but political parties or candidates must inform the relevant Commune/Sangkat Electoral Commission.
- All political parties and candidates shall not interfere with or obstruct activities of other political parties or candidates.
- Every political party and candidate shall avoid using threats, intimidation or violence against citizens, other political parties or candidates. Political parties and candidates shall not incite their supporters or voters to use threats, intimidation or violence against other parties or candidates.
- During the electoral campaign period and on polling day all political parties and candidates, members and supporters of political parties shall comply with the rules, provisions and principles set out in this Law and with the Code of Conduct, regulations and procedures of the National Election Committee, and shall respect the principles of human rights and democracy enshrined in the Constitution of the Kingdom of Cambodia. The procedures and modality of filing appeal or objection complaint during the election campaign and the complaint resolution shall be determined by regulations and procedures. The Constitutional Council is the highest competent body in the final adjudicating on relevant complaints.

The law on the elections of the Members of the National Assembly and the law on the amendment of this law, in order to make the vote counting transparent, provide some conditions as follows:

- After the announcement of closing of the polling, the Polling Station Commission shall record the number of voters who have cast their votes as well as the number of unused ballot papers, and shall arrange the counting of the ballots at the Polling Station in accordance with the Regulations and Procedures. If the counting of ballots at a given polling station cannot be conducted because of force majeure or insecurity, the National Election Committee shall separately issue directives regarding the case. National and international observers and political party agents may participate as witnesses of the ballot counting.
- The Polling Station Commission shall be responsible for the ballot counting. Before opening ballot box, the Chairperson shall invite members of the polling station, political party agents and observers to check the seals before open the box in their presence.
- The Polling Station Commission shall count the number of ballot papers that have been placed in the ballot box and shall check with the number of voters who have cast their ballots as indicated on the voter list. When the number of ballot papers in the ballot box differs from that of the voters as indicated, the Chairperson of the Polling Station Commission shall arrange for a recount. If the numbers still differ, the Chairperson of the Polling Station Commission shall note this fact in the minutes form. Then, the Chairperson of the Polling Station Commission shall arrange for the ballot counting in accordance with the Regulations and Procedures. After the ballot counting has been finished, the Polling Station Commission shall prepare minutes regarding the ballot counting in duplicate; one of which shall be sent to the

Commune/Sangkat Election Commission by enclosing the voter list, valid and invalid ballot papers, unused ballot papers, records of objections or complaints, if any, and other documents; and another copy shall be posted at the polling station. The valid and invalid ballot papers, unused ballot papers and records of complaints or appeals shall be separately packed in the supplied envelope. The Chairperson and members of the Polling Station Commission shall sign the minutes of the ballot counting. The minutes may be signed by representatives of political parties as witnesses.

Meanwhile, the law on the elections of the Members of the National Assembly and the law on the amendment of this law also set forth some points related to financing election campaigns such as:

All expenses for electoral campaign incurred by a political party or a candidate shall be covered by that political party or candidate.

Every political party that has been registered for running in election shall have an account book showing sources of incomes and expenses for electoral campaign purposes. The National Election Committee may examine the account book, if necessary.

All contributions received by a political party shall be credited into a bank account and all electoral campaign expenses shall be debited from the same account.

Finally, it should be noted that in relation to the election, the Constitutional Council examines and decides on the complaint of a political party concerning the refusal of it registration by the Ministry of Interior. And during the elections of the Members of the National Assembly and of the Senate, the Constitutional Council examines and decides on the direct complaint from any political party within 72 hours after the proclamation of the provisional results of the elections or on the complaint in appeal from a political party contesting the decisions of the National Election Committee. Moreover, the Constitutional Council has the competence to rule on litigations related to the elections of the Members of the National Assembly and those of the Senators; on the complaints concerning the initial electoral rolls at the time of the electors' registration and on the complaints occurred during the electoral campaign. In this case, the Constitutional Council acts as a Court.

Thank you very much for your kind attention!



DEFENSA DE LOS DERECHOS POLITICOS

Electoral Tribunal of the Federal Judiciary of Mexico

El alto grado de polarización social que se alcanzó en la elección presidencial de 2006, fue la razón que motivó al Poder Constituyente Federal a generar un cambio sustancial en el modelo electoral en México.

Ese acontecimiento motivó un debate electoral y posturas encontradas en las principales fuerzas políticas que propiciaron división en la sociedad, por tanto, se generó un déficit de legitimidad del gobierno. Así, la reforma electoral, trajo como consecuencia la modificación de diversos artículos de la Constitución Mexicana, lo que a su vez produjo la evolución de ordenamientos sustantivos y adjetivos en la materia electoral.

Temas fundamentales se abordaron, la disminución del gasto y tiempos en las campañas electorales, el fortalecimiento del sistema de partidos y su vida interna, el control de acceso a radio y televisión de los partidos políticos y particulares y la prohibición de propaganda negativa.

De las modificaciones constitucionales se destaca al Tribunal Electoral del Poder Judicial de la Federación como eje fundamental, el cual, se erige como la máxima autoridad jurisdiccional en la materia; su función escencial es garantizar que todos los actos de las autoridades federales y locales electorales, se sujeten a los principios de constitucionalidad y legalidad.

Dentro de las atribuciones fundamentales, sobresale la facultad de la Sala Superior de formular la declaración de validez de la elección del Presidente de los Estados Unidos Mexicanos, encargo por demás trascendente, si se toma en consideración que será un órgano jurisdiccional y no político (Cámara de Diputados), al que corresponde ya esa elevada responsabilidad.

Se fortalece al Tribunal Electoral con la facultad de inaplicar leyes electorales contrarias a la Constitución Federal, lo cual significa un avance en la sistemática del control constitucional en México, al añadirse una vía que permite

al ciudadano en lo individual y partidos políticos para promover los medios de impugnación previstos, acceder a una tutela judicial más efectiva, al estar ante la posibilidad jurídica que un órgano terminal y constitucional, realice el escrutinio jurisdiccional de los actos de las autoridades electorales, con un análisis puede concluir con la expulsión al caso concreto de normas violatorias de la Constitución.

De gran importancia y trascendencia resultó esta atribución, puesto que se completó el marco normativo del examen constitucional a nivel jurisdiccional en materia electoral; esto es, al control abstracto que proporcionan las acciones de inconstitucionalidad, competencia de la Suprema Corte de Justicia de la Nación, cuyo ejercicio corresponde a minorías legislativas y partidos políticos, se adicionó un nuevo modelo de análisis constitucional en la materia electiva.

Para el ejercicio de sus funciones jurisdiccionales y acorde con el Sistema Federado imperante en México, el Tribunal Electoral está compuesto por una Sala Superior y cinco Salas Regionales, la primera integrada por siete Magistrados y las restantes por tres, cada una.

De los procesos jurisdiccionales que competen al Tribunal Electoral destacan **la defensa de los derechos político electorales del ciudadano, potestad referida al control jurisdiccional de actos emitidos por autoridades electorales que se extiende también a órganos de los partidos políticos.**

Durante un largo periodo, predominó en México la idea de evitar someter al escrutinio jurisdiccional la protección de los derechos político-electorales; ello porque se limitó equipararlos al concepto de garantías individuales, tutelables sólo vía juicio de amparo; esto es, por un extenso lapso de nuestra historia política los derechos político-electorales fueron desprovistos de tutela jurisdiccional en el ámbito normativo interno, no obstante que en el Derecho Internacional se encontraban perfectamente salvaguardados en instrumentos aprobados por el estado mexicano, como el Pacto Internacional de Derechos Civiles y Políticos, Convención Americana de Derechos Humanos (Pacto de San José).

En México, es hasta la reforma de 1996 que los derechos político electorales son protegidos a nivel jurisdiccional mediante la implementación, desde el marco constitucional, de un medio de control competencia del Tribunal Electoral cuya finalidad es, precisamente, dirimir las impugnaciones de actos y resoluciones que violen los derechos de votar, ser votado, y de afiliación libre y pacífica para tomar parte en los asuntos políticos del país.

Cabe destacar que, en un principio esta tutela se extendió a los actos emitidos por los órganos internos de los partidos políticos, a partir del ejercicio judicial realizado por el Tribunal Electoral; defensa que finalmente se vio acogida en el texto constitucional con la reforma de 2007.

El procedimiento que se instauró legalmente, vino a complementar el sistema de justicia constitucional, identificando a los derechos político-electorales como una variante o modalidad de los derechos esenciales del hombre y dotando a los ciudadanos de una vía judicial para hacerlos cumplir, provocando con ello, que no quedaran sometidos a la decisión final de las autoridades electorales

administrativas o de los órganos internos de los partidos políticos.

El sistema de medios de impugnación en materia electoral está plenamente fortalecido a partir de la posibilidad de que **los ciudadanos, principales sujetos del derecho electoral, tengan a su alcance un medio de control capaz de tutelar esa clase de prerrogativas.** Consolidación que se percibe con el incremento en la promoción de esta clase de juicios.

Dentro del quehacer jurisdiccional el Tribunal que integro en el periodo de 2005 a 2008, se resolvieron un total de 9270 y, tan solo el año pasado (2009), resolvimos **13,870** juicios para la protección de los derechos político electorales del ciudadano.

La labor jurisdiccional del Tribunal Electoral, como máximo órgano de control constitucional, en la materia, se ha orientado hacía un esfuerzo coordinador del derecho constitucional doméstico con el derecho comunitario, en general en cuanto a la protección de los derechos humanos, entre los que se encuentran los derechos políticos; así, el trabajo judicial reconoce que hay principios esenciales que guardan una posición prevalente, de ahí que se realizan interpretaciones que armonizan las disposiciones derivadas de los instrumentos internacionales, con el sistema jurídico mexicano.

En esta tarea fundamental de resolver los juicios para la protección de los derechos políticos es ya una constante la recepción del Derecho Comunitario en nuestro sistema jurídico interno al resolver los casos concretos.

La demanda de justicia imperante en varias regiones, lejos de desalentarnos, representa una extraordinaria posibilidad de los tribunales constitucionales, al momento de ejercer jurisdicción, de converger en una tendencia homogénea, en cuanto a la tutela de los derechos de participación política de votar y ser votado, por su carácter universal, que tenga como punto de partida de la interpretación, la integración de los tratados e instrumentos internacionales al orden jurídico doméstico.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

POLITICAL RIGHTS AND PARTICIPATORY DEMOCRACY, FROM THE PERSEPCTIVE OF THE CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA

Luisa Estella Morales Lamuño
President of The Supreme Tribunal of Justice and
Its Constitutional Chamber

Jakarta- Indonesia, 12 - 15 July 2010

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THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

Political Rights and Participatory Democracy, from the Persepctive of the Constitution of the Bolivarian Republic of Venezuela

Luisa Estella Morales Lamuño
President of The Supreme Tribunal of Justice and Its Constitutional Chamber

I. INTRODUCTION

From the constitutional law viewpoint, there is a broad doctrinal concept of political rights as an instrument in the hands of the citizen for exercising public Power and forming and deciding upon the political life of the State, but beyond doctrinal juridical positions, analyzing the theme of political rights and, in particular, the system of participatory democracy, invwolves an analysis of the feasibility of a political system, since there is no question that political power is that much stronger and long-lasting if it manages to encourage the establishment and consensus of its participants.

In this context, the problem of political participation goes beyond its juridical substratum and raises its head as an essential aspect of society's development, since it is basically a problem of perception of the concept of citizenship and her or his dignity when seen as having a starring actor in her or his own destiny.

The levels and caveats of political participation respond to each nation's historical actuality, but it is presented, generally speaking, as a response to crises in the representative system and the latter's ability to affront challenges posed by society in attending its needs.

However, as stated by Habermas, political participation can only acquire a function where democracy is understood as such, and therefore in this paper we will tackle some of the institutions that arose or were consolidated as a result of the constituent process that ended in the coming into force of the 1999 Constitution of the Bolivarian Republic of Venezuela.

More than nine years have passed since the people's approval of the 1999 Constitution, and the Bolivarian Republic of Venezuela has generated a participatory system that has impregnated all the bodies and competences associated with the exercise of Public Power.

To such end, we will undertake an analysis of the 1999 constituent process as a basis for reframing political rights and themes such as Participatory Democracy, the Participation Principle in the 1999 Constitution and progress in the means of political participation.

II. THE CONSTITUENT PROCESS AS A BASIS FOR REFRAMING POLITICAL RIGHTS

It is impossible to unravel the real sense and scope of the fundamental rights without looking back into the past and achieving the historical focus of the political institutions that lend order to a society. In this regard, a right shall be the reflection of the history of a nation's development, and therefore it cannot be studied as if isolated from the historical process that brought it to life, *"(…) in order to know what it is, we have to know what it has been and what it tends to be (…)"*, or, as stated by Julián Marías *"(…) bygone societies from which the current one arose are in principle at least the same society; this one is formed by the past, is essentially ancient; its whole reality proceeds from that that happened before it; what we find in it today is there because other events occurred in the past; the roots of usage, customs, beliefs, opinions, values, forms of coexistence are to be found in bygone times. On the other hand, all of these are modules, guidelines, standards, possibilities, pressures that condition life in today's society; but since life exists in time, they determine what it will be tomorrow, that is, the society of the future (…)"*.[1]

Therefore, in order to examine the theme of political rights in the 1999 Constitution and clarify their true repercussions in the advancing of fundamental rights, it is essential to indicate that the constituent process was the result of the generalized political, economic and social crisis that reared its head during the dying decades of the last century.

The terminal situation of crisis in the political system and very particularly in the political-representative system in Venezuela, arose because of the insuperable disassociation of society's needs and governmental action in all areas of the structures that comprised Public Power.

The State of Venezuela was then identified by the centralized nature of the parties, since the political parties took possession of a monopoly over representativeness and of society's participation, whereby two big political parties within an electoral system of proportional representation, ensured that the citizens could only participate in politics through the party system.

From a legal-constitutional perspective, the immediate need for a thorough reform of the State was then proposed, whereby the Constitution then in

[1] Quintana Linares, Segundo V. Tratado de Interpretación Constitucional. Abeledo-Perrot, Buenos Aires, 1998, p.256 and Julián Marías. La Estructura Social Teoría y Método, Mece, 1958, p.15.

force did not contemplate the possibility of convoking a Constituent National Assembly. In this regard, it must be explained that part of the doctrine considered that the representative principle enshrined in the 1961 Constitution was one of the greatest theoretical impediments for the constitutional reform promoted by President of the Republic Hugo Chávez Frías, since it considered that the amendment of the Constitution was only possible by reason of the suppositions expressly provided therein, since the Constitution in force at the time contained no regulation in such sense, and upon expressly enshrining the principle of participation, a plebiscite was therefore impossible to contemplate.

So it was that the dilemma arose between the required specific reform of the 1961 Constitution in order to enshrine and regulate the Constituent National Assembly as a political instrument for the reform of the State (the supremacy of the Constitution), and the sufficiency of popular sovereignty to initiate a constituent process, which was expressed in the possibility of admitting that the will of the people be consulted in such respect by means of the referendum provided in Article 181 of the Organic Law of Political Suffrage and Participation.[2]

In this regard, Sentence N° 17/1999 of the Political-Administrative Chamber of the former Supreme Court of Justice resolved all discussion of this matter and opted to admit the consultative referendum, based on Article 4 of the 1961 Constitution, setting forth that:

> *"(…) Article 4 of the Constitution of the Bolivarian Republic of Venezuela, according to the above traditional interpretative criteria, exclusively enshrines the principle of popular representation since it considers that although sovereignty is held by the people they cannot exercise it unless it is through the bodies of Public Power they have elected, that is to say that the means for conferring such sovereign power is the vote. A participatory system, on the contrary, would consider that people always retain sovereignty since, they can exercise it through their representatives and this is also ideal per se for imposing their will on the State. There can be no question that whosoever holds power and can exercise it by delegating it does not exhaust the power by such delegation. So it is that the holder of the power (sovereignty) implicitly has the faculty to impose it on aspects for which it has not delegated authority. Through suffrage the Constitution has provided for the popular designation of the representative bodies; but it has not listed the cases in which such power can be directly manifested. Therefore it is not correct to deny the possibility of such manifestation if deemed that the latter, by constitutional recognition, rests with the citizen and only when the same is directed towards the execution of functions of the State, specifically enshrined in the Constitution (public functions) is it exercised through delegation. Thus the possibility of delegating sovereignty through suffrage on the people's representatives is not an impediment for its direct exercise in matters in which there is no express provision in the norm as to the exercise of sovereignty through representatives. The people*

[2] Special Official Gazette N° 5.223 of May 28, 1998.

thus preserve their core power for cases such as being consulted regarding matters subject to a referendum (…)".[3]

Thus the Chamber did not limit itself in such ruling to resolving the problem posed, but rather set forth, from an institutional standpoint, its recognition of the principle of participation, upon recognizing that the people's power was converted into supremacy of the Constitution when, within the judicial mechanisms of participation, it decided to exercise it. For this reason the maximum judicial power accepted that upon recognizing as a fundamental right the principle according to which sovereignty resides in the people pursuant to the terms of the 1961 Constitution, the constitutional reform mechanism should necessarily offer a greater level of pluralism and participation than is provided in the 1961 Constitution for amendment or reform, the National Constituent Assembly being the ideal means for such purpose, and since the convocation of the National Constituent Assembly is within the institutional juridical system, the consultation to be undertaken must contain the bases and limits to such constitutional reform mechanism.

Once the possibility of calling a National Constituent Assembly was opened, a whole discussion arose as to the limits and bases of the constituent process and fundamentally of the nature, originating or derived, of the National Constituent Assembly. In regard to this latter controversy, the Supreme Court of Justice in Open Court recognized, again based on the principle of sovereignty and participation, the originating nature of the Assembly, deeming it a Sovereign Power whose limits were to be found in *"(…)the natural right, with individual rights over all others and (...) by reason of democracy and the obligations derived from international treaties (…)".*[4]

All of these judicial decisions permitted the accomplishment of a series of popular consultations on the definitive enactment of the Constitution of the Bolivarian Republic of Venezuela, for which referendums were held to determine the desire to convoke a National Constituent Assembly and to vote on the system for the future election of its members (April 1999); the election of the Constituents (July 1999); and the approval referendum of the final text sanctioned by the National Constituent Assembly (December 1999).

Thus the aforementioned decisions are, from an historical perspective, the means by which the Judiciary recognized and rendered viable the demands of Venezuela's society in respect of the conception of the new forms of State and government that were materialized in the Constitution resulting from

[3] The judgment concluded that "(…) The referendum provided in the Organic Law of Suffrage and Political Participation is an unregistered and inherent human right, the exercise of which is founded on Article 50 of the Constitution (…). It is applicable, not only methodologically but also ontologically, since if it is borne in mind that the right to a constitutional amendment depends on a reform to the Constitution in force, it will be subject to the constituted authority, which would place the latter above sovereign power. The lack of such right in the Constitution must be deemed a lapse of such Constitution, since it cannot be admitted that the sovereign power has renounced ab initio the exercise of an authority that is the result of its own political decision (…). The interpretation that must be attributed to Article 181 of the Organic Law of Suffrage and Political Participation, in regard to the scope of the consultative referendum which enshrines, insofar as the specific case which is the object of the appeal that is the subject of this action is concerned, is that: the opinion of the electoral body may be consulted through same regarding any decision that is of special national transcendence other than those specifically excluded by the Organic Law of Suffrage and Political Participation itself in its Article 185, including that which is related to the convocation of a Constituent Assembly (…)".

[4] See: Supreme Tribunal of Justice, Bases Jurisprudenciales de la Supraconstitucionalidad. TSJ, Colección Estudios Jurídicos, Caracas, 2000.

an originating constituent process, unique in the political history of the Nation.

Thus the approved Constitution was in no way foreign, from a juridical and doctrinaire perspective, to all the discussions that took place before achieving the reform of State; quite the contrary, since it would be fair to affirm that thanks to the assertions arising from such jurisprudential criteria in respect of political rights and in particular the principle of people's sovereignty and citizens' participation, the framework of the constituent process was born as well as, from a qualitative and quantitative point of view, a new perspective for handling the traditional distribution and exercise of Public Power.

III. PARTICIPATORY DEMOCRACY

The substratum of every democratic idea is determined by the ideological concept that precedes it and, like every human creation, it is conditioned by the cultural tradition *"(…) that in a human society we find an association of artisans, a clan, polygamous marriages or an order of knights, is something that depends on the culture of such society (…) social-political-economic systems - cultures, if you will - within which the human species lives and breathes and propagates, are closely related to the future of mankind (…)"*, to the extent that inventions and discoveries of society are finally a synthesis of historical cultural elements that are already present or the assimilation of a new element in a cultural system.[5]

As was mentioned above, a crisis arose in Venezuela as to the concept of democracy set forth in the 1961 Constitution, but more than anything else, society questioned the representative system proposed by such Constitution, since it had proven inadequate in effectively assuming the direction, organization and execution of the public policies required by communities to manage their basic needs.

The representative system was seen to be absolutely anachronistic in achieving the participation of the masses and of the citizen in the daily political life, which is an unquestionable requisite for the effective exercise of the rights and obligations that the legal code had enshrined.

So it was that under the old constitutional régime the people were duty-bound to pay taxes to subsidize the administrative policies of public services and nevertheless there was no way for society to ensure that resources and projects were effectively rendered, so the basic right to receive quality services took on a receptive nature by society vis-à-vis the State.

Similarly, the political elites had achieved - or at least found - under the representative model a model that was internationally recognized as democratic, which allowed them to maintain the balance between a passive or limited participation in the act of suffrage and the freedom to advance public policies independently of the will of the citizens or in the broad limitations of regulatory

[5] Withe, Leslie A. La Ciencia de la Cultura. Un estudio sobre el hombre y la civilización, Ed. Paidos, Buenos Aires, p. 373.

provisions, without the possibility of the people exercising continuous and direct control of the corresponding administration.

This situation was the object of a radical modification under the Bolivarian Constitution of Venezuela, since means were evolved to avoid a separation between civil society and political society by considering the citizen as subject to a collection of rights and duties of a public order nature, which, independently of its individual title *uti singuli* is always associated or at least acquires importance in the social context -*uti socii*-.

Therefore, in order to appreciate the particulars and relevance of the principle of participation in the Venezuelan system of justice it is necessary to examine the political rights enshrined in the Constitution of the Bolivarian Republic of Venezuela, their legislative development and jurisdictional tutelage, as well as their appearance in the public administration.

1. The Participation Principle in the 1999 Constitution.

The Constitution of the Bolivarian Republic of Venezuela, just as many other modern constitutions, included the principle of the sovereignty of the people in its Article 5, establishing that *"Sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by suffrage, through the organs exercising Public Power. The organs of the State emanate from and are subject to the sovereignty of the people."*

From a simple reading of the transcribed article, in comparison with the analogous Article 4 of the 1961 Constitution, which affirmed that *"Sovereignty resides in the people, who exercise it, by suffrage through the organs of the Public Power"*, or of other constitutions in comparative law, it is clear that the traditional principle of representative democracy was partially substituted by the principle of participation.

Actually, the Preamble itself of the Constitution announces that the *"(…) supreme end of reshaping the Republic to establish a democratic, participatory and self-reliant (…)"*, promoting such superior values as *"(…) life, liberty, justice, equality, solidarity, democracy, social responsibility and, in general, the pre-eminence of human rights, ethics and political plurality (…)"* (Article 3 *ejusdem*). In this oeuvre, now with the spirit of materializing such theories, it is clearly expressed that sovereignty resides untransferable in the people, who exercise it directly in the manner foreseen in this Constitution and in the law, and is indirectly exercised by the organs that exercise the Public Power.

Thus the terms of the norm contained in the aforementioned Article 5, associated with the constitutional juridical system, evidence that the constituent granted the principle of participation as a manifestation of the people's exercise of sovereignty with its dogmatic nature and as an essential value of our legal code. In fact, such axiomatic content also arises clearly from Articles 2 and 3 of the Constitution of the Bolivarian Republic of Venezuela, broadly developed in the open catalog of political rights, especially in the norms contained in Title II, Chapter IV of our Constitution.

The above has been made clear on repeated occasions by the Constitutional Chamber of the Supreme Tribunal of Justice when pronouncing on the content and scope of the participation principle, establishing, with a binding nature, that:

> *"(…)* **If affirmed that, by virtue of the entering into force of the Constitution of the Bolivarian Republic of Venezuela, the exercise of governmental activities shall be within the framework of the principle of participation, then all inhabitants must be provided with control mechanisms that will allow them to ensure the quality of life that they aspire to** *(…).* **When the Constitution enshrines participation as a principle it not only establishes and interpretative parameter of the legal code, but a true obligation in all the organs of the Public Power to materialize such principle in the development of their competences, and therefore the State and the citizens shall act within a framework of minimum responsibility and effectiveness**. *This responsibility and effectiveness, which derives from the direct exercise of Public Power by organized society, is not subject to recognition of social or community control - independently of inter-state controls - but to the imposition in charge of society as a whole and each one of its participants of the principle of self-responsibility, since as of the moment that the people (…) are able to determine the parameters within which they will develop their activities, they must assume the consequences of the quality and effectiveness of their intervention or their failure to participate. The scope of the principle of participation in the Venezuelan legal code is present both the citizens' right to take part in the exercise of Public Power and its control, but essentially in the principle of self-responsibility, which proposes that society must benefit and also suffer the effects of their participation and abstention (…)"* - See: Rulings of this Chamber Nos. 471/06 and 1.117/06-.

Therefore, in the Venezuelan legal code the principle of participation has a bi-frontal nature, which arises in the citizens' right to take part in the exercise of Public Power and its control, as well as in the principle of self-responsibility, which signifies that society and citizens, considered individually, will benefit from or suffer the effects of their ineffective or deficient participation or abstention in matters that interest them.

Within this conceptual framework it can be understood why in the archetype set forth in the Constitution of the Bolivarian Republic of Venezuela, the new division of Public Power not only responds, as in the case of the Electoral Power, to recognition of a State governed by a participative democratic system that reaffirms as one of its essential principles the exercise of sovereignty by the people, who exercise it directly or indirectly pursuant to the Constitution and the law, which generated a new proposal for the functions and competences assigned to the electoral organ (National Electoral Council - *Consejo Nacional Electoral*) - e.g., legislative initiatives, regulatory competences and privileges, among others[6] - or to the structure of the Supreme Tribunal of Justice - with the inclusion of the Electoral Chamber, but is incorporated and recognizes the

[6] See: Rulings of the Constitutional Nos. 934/06 and 1.117/06.

need to include direct citizen participation in the means of planning, executing and controlling matters such as politics or public works.

So it is that in Venezuela the principle of participation is not exhausted in endorsing institutions nor in the possibility of recurring to electoral procedures under the terms regulated by Articles 62 to 74 of Chapter IV "*Political Rights and Popular Referendum*" of Title III "*Human Rights and Guarantees and Duties*", but it covers and conditions all exercise of public power, as well as the interpretation that any jurisdictional organ gives to the competences contained in the national legal system.

Thus the principle of political partition can be analyzed, at least doctrinally, both from the perspective of a cardinal proposal of the constitutional system - with all its hermeneutic implications - or as a manifestation of such system, upon becoming a right of the citizens or of society in general, through the means regulated by the Constitution and other rules of a legal and sublegal nature of the Venezuelan legal code.

In regard to the fundamental right of the citizens, Article 62 of the Constitution recognizes that all citizens have the right to participate freely in public matters, either directly or through their representatives, but it emphasizes that it is the participation of the people in the formation, execution and control of public administration that is the means necessary for achieving the self determination that guarantees its complete development, both individual and collective. It should be noted that the right to participate does not become an absolute power of its holders, but that the constituent warns that this is the means for achieving the State's objectives, therefore its exercise becomes a true burden - the latter understood analogously to its meaning in procedural matters - or as an imperative aspect that benefits the subject's interests - either considered individually or collectively - on which it falls, in such a way that if they do not effectively exercise their right, they will have to put up with the negative consequences of their actions or omissions (self-responsibility).[7]

The principle of participation is seen, generally speaking, insofar as the institutions or means of its achievement is concerned, in all those regulations in which consultation or direct popular participation has been established, for the taking of State decisions.

2. Progress in the means of political participation.

In the political field, Article 70 of the Constitution provides the election of public positions, the referendum, the plebiscite, the revoking of the mandate, legislative, constitutional and constituent initiatives, open lobbying and the binding decisions of citizens' assemblies, among others as means for the people's participation and self-determination in exercise of their sovereignty; and in the social and economic arenas it establishes the instances of citizens' advice, self-administration, joint administration, cooperatives in all their forms, including those of a financial nature, savings funds, community enterprise and other associative formats guided by the values of mutual cooperation and solidarity.

[7] Therefore, it enshrines the correlative duty of the State and society to facilitate the generation of the most favorable conditions for its practice (Article 62).

It was therefore established that the law will regulate conditions for the effective functioning of the means of participation provided in Article 70 *ejusdem*, but, pursuant to Ruling N° 1.278/2005, the Constitutional Chamber of the Supreme Tribunal of Justice expressly provided as follows: *"(…) The Chamber must first of all remind that modern constitutions, among them the Venezuelan Constitution, contain authentic rules of Law, therefore it is not possible to talk of programmed provisions, unless expressly and clearly set forth in the Constitution (…) the Constitutional Chamber, since its first rulings has sustained that constitutional rulings, particularly those regarding Human Rights, Rights developed directly by the Social State, Guarantees and Duties are immediately applicable, without the need to wait for the legislator to regulate them, therefore, in this sense, they do not act like programmed rulings (…)*".

Therefore, except for the exercise of suffrage and the right to political participation by means of the election of representatives or directly, through the mechanisms provided in the Constitution and the law, for the purposes of this work this paper it has been decided to systematize the means of exercising political rights by themes and not by regulatory instruments.[8]

2.1. The referendum system

a. Consultative referendums, matters of particular national, state or local relevance

Pursuant to Article 71 of the Constitution, matters of particular national transcendence can be submitted to a consultative referendum, such initiative corresponding to the President of the Republic in Cabinet; to the National Assembly by means of an Accord approved by the vote of the majority of its members, and to the voters registered in the civil and electoral roll in a number of no less than 10%.

In respect of this form of referendum, Ruling Nº 1.372/06 of the Constitutional Chamber affirms that the President of the Bolivarian Republic of Venezuela is not in the *"(…) constitutional obligation to submit matters of particular national transcendence to a consultative referendum, since this is optional not only for the President of the Republic in Cabinet, but also for the National Assembly, pursuant to the text of the same Article 71 of the Constitution of the Bolivarian Republic of Venezuela, which establishes as follows: '(…) Article 71. Matters of particular national transcendence* ***may*** *be submitted to a consultative referendum (…)' (Highlighted by the Chamber) (…). From a simple reading of the partially transcribed article, it is clear that not only is it optional for the President of the Public in Cabinet to call a consultative referendum, but also that individuals may, by means of a request of no less than 10% of the voters registered in the Civil and Electoral Roll, call a consultative referendum for such purpose (…)"*.

The possibility is also enshrined of submitting matters of special transcendence on a state, municipal or parochial level to a consultative referendum, which initiative corresponds to the Legislative Councils,

[8] In any event, it should be emphasized that many means of political participation are more developed locally, therefore the majority of the considerations set forth will be related to their respective regulations, without prejudice to the fact that based on the participation principle many of the institutions referred to are reflected both on a national as well as state level.

Municipal Councils and Parochial Meetings, respectively, by agreement of two thirds of their members; to the State Governor and Municipal Mayor, or to the voters in a number of no less than 10% of the total number registered in the civil and electoral roll for the corresponding circuit.

b. Revocatory referendums of popularly elected positions and magistratures.

In the general principles set forth by the Constitution - Article 6 - the government of the Bolivarian Republic of Venezuela and the political entities it comprises are deemed democratic, participative, elective, decentralized, alternative, responsible, pluralist and their mandates revocable.

The nature of revocable mandates is founded on the possibility of calling revocatory referendums, as provided in Article 72 of the Constitution, whereby, once half of the period for which an official was elected has elapsed, a number of not less than 20% of the voters registered in the corresponding circuit can request the calling of a referendum to revoke her/his mandate.

However, in order to revoke a mandate an equal or greater number of voters than those who elected the official is required, provided a number of voters equal to or greater than twenty-five percent of the registered voters votes in the referendum, and the absolute absence shall be immediately covered, pursuant to the provisions of the Constitution itself and the law.

What is established by law is what is provided in respect of the revocation for the collegiate bodies, and it warns that no more than one request for revocation of the mandate may be made during the period for which the official was elected.

c. Approval referendums.

In regard to approval referendums, the Constitution has recourse to a wide range of assumptions associated with the approval of laws or treaties, creation of political-territorial entities and approval of the convoking of a Constituent National Assembly, as well as draft reforms and amendments. However, in regard to the means for reforming the Constitution, and in spite of their in fact being approval referendums, such popular consultations will be the subject of a separate analysis in light of their transcendence in the political life of the Republic.

c.1. Referendums to approve laws.

However, Article 73 of the Constitution incorporates society's direct participation in the legislative formation process, upon allowing that draft laws under discussion by the National Assembly be submitted to a referendum when thus decided by at least 2/3 of the members of the Assembly.

To approve such draft laws, at least 25% of the voters registered in the civil and electoral roll must vote and approval shall be by

simple majority, whereupon the corresponding draft shall be passed as a law.

Moreover, the Constitution provides special protection for the legislative initiative granted to society pursuant to its Article 204.7[9], upon establishing that draft laws presented by popular initiative must be discussed at the latest during the period of ordinary sessions following the one during which it was presented, and in the event that its debate is not begun within such lapse, the draft will be submitted to an approval referendum according to the law.

c.2. Referendums to approve international treaties, conventions or agreements.

Finally, the sole subsection of Article 73 refers to the referendum on international treaties, conventions or agreements that could compromise national sovereignty or transfer competences to supra-national organs. To such end, the initiative corresponding to the President of the Republic in Cabinet is conceded to two thirds (⅔) of the members of the Assembly or to fifteen percent (15%) of the voters registered on the civil and electoral roll.

c.3. Referendums to approve the creation of federal territories.

The Constitution sets forth a territorial political division of the Republic into States, Capital District, federal dependencies and federal territories and Municipalities, and remits their regulation to law, but indicates that although national legislation my order the creation of federal territories in determined areas of the States, their remainder in force is subject to an approval referendum on the respective entity, in the exact terms of Article 16 of the Constitution.

c.4. Referendums to approve the creation or segregation of Municipalities.

The initiative for the creation, merger or segregation of municipalities, apart from the hypothesis for reserved initiative established in Article 12 of the Organic Law of Municipal Public Power (hereinafter OLMPP)[10], corresponds among other presumptions, to a number of voters residing in the municipalities to which the affected territory that is no less than fifteen percent (15%) of those registered in the Permanent Electoral Registry.

Before being passed, the draft law for the creation, merger or segregation of municipalities shall be submitted to a referendum with the participation of voters from the municipalities involved, that will approve the measure if twenty-five percent (25%) of the citizens

[9] Article 204, sets forth that "(...) The initiative for laws corresponds: (…) 7. To not less than zero point one percent of those registered in the civil and electoral roll (…)".

[10] This presumption refers to the fact that *"(…) By reasons of national interest relative to frontier development or particular demands derived from the Nation's economic and social development plan, the Legislative Councils may create, exceptionally, special regime municipalities, in attention to the initiative reserved to the National Executive by organ of the President of the Republic in Cabinet. Even though the communities aspiring to such category do not meet the requirements established in Article 10 hereof, the creation law will define the special regime in attention to the grounds for the initiative (…)"* (Special Official Gazette of April 10, 2006).

registered in the Permanent National Registry cast their vote and if the voting in favor of the creation, merger or segregation is greater than fifty percent (50%) of the votes validly cast.[11]

c.5. Approval referendums for the creation or segregation of Metropolitan Districts.

The initiative for the creation of a Metropolitan District corresponds to the margin for other organs, to fifteen percent (15%), at least, of the citizens registered in the Electoral Registry of the affected municipalities. Once the initiative is admitted by the Legislative Council or by the National Assembly, as applicable, and the technical reports relative to the feasibility of the Metropolitan District have been conducted, a plebiscite will be called among the affected population, and if twenty-five percent (25%) of the voters registered in the Electoral Registry cast their vote and more than fifty percent (50%) vote in favor, the Legislative Council or the National Assembly will prepare a law for the corresponding creation, following the guidelines of the technical reports approved in the referendum.[12]

c.6. Approval referendums for the creation of parishes or other local entities.

Parishes and other local entities within the municipal territory can only be created, through an approved ordinance with a minimum three quarters (¾) of the members of the Municipal Council, with the organization, functions, attributes and resources conferred on them at the moment of their creation, based on the sociological, cultural and economic characteristics of the settlement in the municipal territory, without prejudice to the governing unit and the Municipal administration.[13]

The initiative for their creation corresponds, among others, to the citizens registered in the Electoral Registry, in a number not less than fifteen percent (15%) of those residing in the municipal territory that will serve as a basis for the local entity, by means of a written request to the Municipal Council.

The creation project must be notified publicly and subjected to consultation among the people settled in the territorial space of the parish or proposed territorial local entity.[14]

d. Abrogatory Referendums.

The Constitution also recognizes the citizens' right to be controlling political agents of the legal code, thus its Article 218 recognizes that *"(…) laws are repealed by other laws and are abrogated by referendums, except for the exceptions established herein (…)"*, and for this reason in its Article 74 it

[11] See: Articles 14 and 15 of the OLMPP.

[12] See: Articles 21 and 22 of the OLMPP.

[13] Parishes and other local entities within the municipal territory are designated areas created for the purpose of decentralizing the municipal administration, promoting citizens' participation and improved municipal public services (See: Article 30 of the OLMPP).

[14] See: Articles 30 to37 of the OLMPP

enshrines that laws whose abrogation has been requested at the initiative of no less than ten percent (10%) of the voters registered in the civil and electoral registry or by the President of the Republic in Cabinet shall be submitted to a referendum.

Decrees with rank and force of law issued by the President of the Republic in exercise of the competency contained in Article 236.8 of the Constitution can also be submitted to an abrogatory referendum, in which case the initiative corresponds only to no less than five percent (5%) of the voters registered in the civil and electoral registry.

In any of the above-mentioned cases the constituent considered that for the abrogatory referendum to be valid it is necessary that at least forty percent (40%) of the voters registered in the civil and electoral registry cast their ballot.

Finally, it must be emphasized that the Constitution itself excludes budget laws, those that establish or modify taxes, those of public credit and amnesty, as well as those that protect, guarantee or develop human rights and those that approve international treaties from this political control; and limits their execution over one same matter to one abrogatory referendum per constitutional period.

e. Referendums at the Municipal level.

Notwithstanding having made observations to this effect *ut supra*, it must be pointed out that for the OLMPP, the request and validity of the consultative, abrogatory or approval referendum must comply with the requirements set forth in the Constitution of the Bolivarian Republic of Venezuela and in electoral legislation; and this must be done before the National Electoral Council, which will organize, administer, direct and supervise all acts relative to the referendums, but the call to a referendum on the draft of an ordinance or any matter subject to consultation may only be made once in the same constitutional period.[15]

2.2. Constitutional reform mechanisms.

The Constitution enshrines the amendment, the reform and the National Constituent Assembly as means for revising its Text, pursuant to Articles 340, 342 and 347 of the Constitution of the Bolivarian Republic of Venezuela, which not only recognize the popular initiative in the event of their implementation, but submit their validity to control by the citizens, exercised through a set of approval referendums.

a. The amendment.

The amendment whose purpose is to add or modify one or several articles of the Constitution, without altering its fundamental structure - Article 340 - may derive from the initiative of 15% of the voters registered in the civil and electoral registry, from 30% of the members of such Assembly or from the President of the Republic in Cabinet; but subjects its approval,

[15] See: Article 273 of the OLMPP.

pursuant to Article 341.3 of the Constitution, to being submitted to a referendum on such amendment within thirty days following the formal reception by the National Assembly, as provided in the Constitution and in the law relative to the approval referendum.[16]

b. The constitutional reform.

The purpose of the Constitutional Reform is to partially revise the Constitution and substitute one or more of its norms which do not modify the structure and fundamental principles of the Constitutional text - Article 342 - the initiative for its presentation to the National Assembly authorized through an agreement approved by the votes of the majority of its members, to the President of the Republic in Cabinet; or a number no less that fifteen percent of the voters registered in the civil and electoral registry who request it.[17]

The draft constitutional reform approved by the National Assembly will be subjected to a referendum within thirty days following its sanction. Although the referendum will pronounce jointly on the Reform, the Constitution allows that up to a third of the Reform be voted on separately, if thus approved by a number no less than one third of the National Assembly or if in the reform initiative it had been thus requested by the President of the Republic or a number no less than five percent of the voters registered in the civil and electoral registry.

The constitutional reform will be declared approved if the number of affirmative votes is greater that the number of negative votes, with the caveat that the reform initiative that is not approved cannot be presented again during the same constitutional term to the National Assembly.

c. The National Constituent Assembly.

Article 347 of the Constitution reiterates the principles contained in Articles 2, 3 and 5 upon establishing that the people of Venezuela are the custodians of the original constituent power and in exercise of such power, may call a National Constituent Assembly in order to transform the State, create a new legal code and draft a new Constitution.

The initiative for calling a National Constituent Assembly may be taken by the President of the Republic in Cabinet; the National Assembly, through the agreement of two thirds of its members; the Municipal Councils in

[16] Pursuant to Article 341 of the Constitution *"(…) Amendments to the Constitution will be processed as follows: (…) 1.- The initiative may emanate from fifteen percent of the citizens registered with the civil and electoral registry, from thirty percent of the members of the National Assembly or from the President of the Republic, in Cabinet. 2.- When the initiative emanates from the National Assembly, the amendment shall require approval by a majority of the members of that body, and shall be debated in accordance with the procedure established under this Constitution for the enactment of laws. 3.- The Electoral Power shall submit the amendments to a referendum within 30 days of formally receiving the same. 4.- Amendments shall be deemed approved in accordance with the provisions of this Constitution and the law concerning the approval referendum. 5.- Amendments shall be numbered consecutively and shall be published beneath the Constitution without altering the text of the latter, but with an annotation at the bottom of the amended article(s) of the number and date of the amendment modifying the same. (…)".*

[17] Pursuant to Article 343 of the Constitution, the Constitutional Reform initiative shall be processed by the National Assembly as follows: The draft constitutional reform shall be debated for the first time during the legislative session during which it is submitted. A second debate title by title or chapter by chapter, as applicable. A third and last debate article by article. The National Assembly shall approve the draft constitutional reform in a period of no more than two years, counted as of the date the reform application was submitted and approved. The draft constitutional reform shall be approved with the vote of two thirds of the members of the National Assembly.

their town meetings, by the vote of two thirds of same; or fifteen percent of the voters registered in the civil and electoral registry.

The constituted powers shall not in any way obstruct the decisions of the National Constituent Assembly.

2.3. Regulatory process.

a. National Legislation.

The legislative initiative constitutes a political right according to Article 204.7 of the Constitution, which establishes: *"(…) The initiative for introducing legislation belongs to: (…) 7.- The voters, in a number at least equivalent to zero point one percent (0.1%) of all those registered in the civil and electoral registry (…)"*.

Moreover, the citizens' participation is recognized by the Constitution in the process for the formation of national legislation - Article 211 - since the National Assembly or the Permanent Commissions, during the discussion and approval procedure for draft laws, shall consult not only other State organs, but also the citizens directly and organized society, to hear their opinion regarding the same. Thus representatives of organized society have a voice in the discussion of the laws, in the terms set forth in the Regulations of the National Assembly.

b. State Legislation.

According to constitutional principles, each state constitution has guaranteed the right to participate, pursuant to the aforementioned presumptions, but in each case the citizens' participation must be organized and encouraged and the mechanisms implemented that guarantee the inclusion of the opinions that emanate from the different sectors, in the exercise of the functions inherent to the state legislative organ and in the execution of the competences assigned to the States.

c. Municipal Legislation.

In municipal matters there is a broad system of controls and intervention by the citizens, including the following means of participation: (i) the legislative initiative, (ii) plebiscites or neighborhood assessment, and (iii) the participative budget.

(i) **the legislative initiative** is set forth in Article 274 of the OLMPP, according to which a percentage of no less than zero point one percent (0.1%) of the Municipality's voter can present projects for ordinances or amendments to those already in force. Such projects must be submitted to the consideration of the Municipal Council for their admission or rejection, but the Municipal Council must set a previous meeting with the presenters of the legislative initiative in order to discuss their content and, subsequently, the Council must, within the following thirty days, pronounce on their admission or rejection[18]; once a project is admitted, its debate must begin within a term of thirty days, the breach of which

[18] The Municipal Council shall provide reasons for the rejection of the initiative when applicable.

will signify that the project be submitted to a plebiscite, as provided in the electoral legislation.

(ii) **plebiscites or neighborhood assessment**, generally speaking, signify that during the process of discussion and approval of ordinances, the Municipal Council shall consult the Mayor, the other organs of the Municipality, the citizens, the organized society of its jurisdiction, lending attention to the opinions issued.[19]

The Municipal Council shall also open space for the debate and interchange of opinion of the citizens regarding matters of local interest, for which, among others, the neighborhood, professional, social, cultural, educational and sporting organizations of the community will be called to participate, and the issues will be recorded in the agenda and at each session the public present may ask questions, give opinions and make proposals, and the Municipal Council is under obligation to give the local people a timely and reasoned response to such proposals.

In any event, the Municipal Council shall consult the citizens and organized society during the debating and approval process regarding the draft ordinances, in order to encourage the incorporation of their proposals, bearing in mind that the violation of such requirement implies annulment of the respective legal instrument.[20]

(iii) **the participative budget** is the result of the use of the processes by means of which the Municipality's citizens propose, debate and decide upon the preparation, execution, control and evaluation of the annual municipal investment, with a view to using it for the development of Municipal projects, attending to the requirements and proposals of the communities and their organizations in the Local Public Planning Council.[21]

Pursuant to the Law of Local Public Planning Councils[22], the consolidated municipal investment budget shall be prepared in accordance with the priority requirements to be presented by the organized communities, as estimated by the town hall in the budget for the corresponding sector. In this regard, the town halls are obliged to execute the projects of the organized communities, that will be charged against their corresponding

[19] See: Articles 54.1, 264, 265, 266 and 267 of the OLMPP.

[20] The law moreover indicates that the acts of general effect that *"affect the urban development and environmental conservation of the Municipality or of the parish, shall be previously consulted by the municipal authorities among the local organizations and others of the organized society. Failing this they will be deemed absolutely null and void"* - Article 267 of the OLMPP-.

[21] Article 182 of the Constitution provides that *"(…)The Local Public Planning Council is hereby created, presided over by the Mayor and consisting of municipal Council members, Chairpersons of Parish Boards and representatives of neighborhood organizations and other organized social groups, in accordance with such provisions as may be established by law. (…)"*. On its part, Article 2 of the Law of Local Public Planning Councils sets forth that *"(…) The Local Public Planning Council is the organ in charge of the integrated planning of the Municipality and of designing the Municipal Development Plan and other municipal plans, guaranteeing citizens' proactive participation in their preparation, execution, follow-up, evaluation and control, as well as their coordination with the National Planning System, pursuant to the Constitution of the Bolivarian Republic of Venezuela and the law. The Local Public Planning Council shall respond to the particular characteristics of each municipality (…)"*.

[22] Official Gazette Nº 38.591 of December 26, 2006.

assignment percentages, by reason of the laws that grant and transfer recourses for the organized communities.[23]

In any event, pursuant to Article 15 *ejusdem*, the municipal investment budget shall be directed towards the human, social, cultural and economic development of the municipality, taking into account the population and poverty variables of each community, and it shall cover *"(…) 1. Priority projects presented by the organized communities; 2. General urbanistic, infrastructure, services and roads projects; 3. The emergency fund for attending to natural disasters, public and unforeseen calamities. Such fund shall be administered by the mayor, after prior approval by the municipal council, with the participation of the local public planning council, which will conduct the respective follow-up, in order that the resources are invested in the manner referred to herein. The respective ordinance that regulates the matter will determine the percentage corresponding to the emergency fund (…)"*.

d. Sublegal regulations.

The exercise of the regulatory powers of the Public Administration - particularly concerning the regulation of laws and sectorial regulations - has also been the subjected to a reshaping of its conception, due to the inclusion of non-binding participation in their drafting, even submitting the respective regulation to annulment if it is not achieved through a consultation procedure.

Thus, the Organic Law of Public Administration (hereinafter OLPA)[24], by providing that the exercise of the regulatory power corresponds to the President of the Republic in Cabinet, and apart from enshrining limitations as to the matters to be regulated, subjects their drafting to a procedure.

The drafting of the regulation of laws shall begin at the ministry competent in the matter, with the preparation of the corresponding draft, which will be accompanied by a technical report and a report on the impact or budgetary importance, and on the basis of such draft, apart from the reports, the corresponding opinions and as many studies and considerations as are deemed necessary shall be collected to guarantee the effectiveness and legality of the text.

Once the text is prepared it will be submitted to public consultation in order to guarantee the people's right to participate, pursuant to Title VI of the OLPA and the regulation has been approved by the President of the Republic in Cabinet, it shall enter into force upon publication in the Official Gazette of the Bolivarian Republic of Venezuela, unless the regulation provides otherwise.

[23] See: Articles 12, 14 and 15 *ejusdem*. Moreover, Article 231 of the OLMPP establishes that: *"(…) The investment budget shall be directed towards the human, social, cultural and economic development of the Municipality, and shall be drafted according to the priority needs presented by the organized communities, in accordance with the estimates of the mayor in the budget for the respective sector and the general urbanistic, infrastructure, services and roads projects. To such end, the following procedure shall be followed: In the month of July every year the mayor will deliver to the Local Public Planning Council the total investment figure or amount for each sector, including all appropriate details. Between the months of August and September the participative budget will be enacted pursuant to this Law (…)"*.

[24] Special Official Gazette Nº 5.840 of July 31, 2008.

However, the provisions of the aforementioned Title VI of the OLPA, are limited to defining the procedure for the consultation of sectorial regulations.

In this regard, the legislator has established that when the public organs or entities, in their role of sectorial regulation, promote the adoption of regulatory norms or those of any other hierarchy, they shall initiate the corresponding public consultation process and remit the draft to the organized communities. The instrument that remits the corresponding draft shall indicate the period during which written observations will be received, which period will begin as of the tenth business day following the delivery of the corresponding draft.

In parallel to this, the respective public organ or entity shall publish in any communications media the initiation of the consultation process, indicating its duration, but in any event, it shall inform same at its Internet site, where the documents in consultation shall be on display.

Once the consultation process is open, anyone may present written observations and comments on the respective draft, and when the period for receiving observations has expired, the public organ or entity may fix a date upon which its officials, specialists in the matter on hand, are called and the organized communities interchange opinions, ask questions, make observations and propose the adoption, rejection or modification of the proposed draft or discuss a new draft.

Although the result of the consultation process is participative but not binding, Article 140 *ejusdem*, in protection of the participation principle, establishes that no public organ or entity may approve norms it is competent to resolve, nor remit to another instance regulatory projects that have not been consulted, pursuant to the above-mentioned procedure and it affirms categorically that the norms approved by the public organs or entities or proposed by the latter to other instances shall be absolutely null and void if they have not been consulted according to the aforementioned procedure, thus guaranteeing that the communities are directly aware of the regulations to be imposed and the responsibility political of the state organs or entities in assuming positions that are contrary to the will of the people.

Nevertheless, the law itself excludes from the above prior process those cases that are clearly emergencies, by reason of the State's obligation regarding the security and protection of society or in the cases of special legislation provided in the Constitution of the Bolivarian Republic of Venezuela, the President of the Republic, State Governor or Municipal Mayor, as applicable, may authorize the approval of norms without prior consultation and in such case the organized communities shall be immediately consulted about the norms approved, following the same procedure mentioned above; the result of the consultation shall be considered by the instance that approved the norm and it may ratify, modify or eliminate it.

Finally, it is important to point out that pursuant to Article 2 of the OLPA, such procedures are applicable to all the Public Administration,

including states, metropolitan districts and municipalities, which shall develop their content within the scope of their respective competencies and shall additionally apply to other organs and entities of the Public Power.

2.4. Participation in the public administration

Broadly speaking, public administration has been defined as *"(…) a set of rules and decisions aimed at encouraging and coordinating actions whose public nature is conditioned to pursuing collective goals and which is undertaken within the framework of particular juridical-political restrictions. Thus it is understood that the public administration should concentrate on two core components: the economy of means and the effectiveness of results (…)"*[25], thus such description would allow for the inclusion, within the framework of means of political participation object of study in the above section, of participation in regulatory formation processes.

Nevertheless, in regard to the proposed systematization, it is more advantageous to assume a restricted criticism of the public administration as *"(…) the public authority's mobilization of its resources to produce concrete and specific and individual results. The authority disposes of means such as persons, materials, a brand image or financial credits, among others, which it uses to transform them into goods and services (…)"* or, in the words of Peter Aucoin, *"(…) management has replaced administration as the favored term for many theoreticians, particularly for those practicing, because it implies an active and even practical approach to the tasks performed by civil servants, highlighting an emphasis given, among others, to: being strategic, exercising leadership, setting priorities, creating a vision, setting missions, encouraging innovation, assuming risks, promoting performance and being an entrepreneur (…)"*.[26]

The legislative development contained in Article 62 of the Constitution should be tackled along this line of ideas, since *"(…)The participation of the people in forming, carrying out and controlling the management of public affairs is the necessary way of achieving the involvement to ensure their complete development, both individual and collective. It is the obligation of the State and the duty of society to facilitate the generation of optimum conditions for putting this into practice (…)"*.

However, in the Venezuelan legal code there has been a very broad regulatory development of the means for the peoples' proactive participation in the exercise of its sovereignty in the public administration, such as the instances of citizens' attention, self-administration, joint administration, the cooperatives in all their forms including those of a financial nature, savings funds, community enterprise and other association formats guided by the values of mutual cooperation and solidarity, among others, however we will comment only on those which because of their development and implementation in the future of the social reality of the Nation, merit further study.

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[25] Albi, Emilio; González-Páramo, José M. y López Casanovas, Guillem. *Gestión Pública. Fundamentos, Técnicas y Casos*. Editorial Ariel, SA, 1997, Barcelona, España, 1997, p. 9.

[26] Aucoin, Peter. *Fundamentos de la Administración y Gestión Públicas. Material docente preparado para el Diplomado de Administración Pública*. Centro de Estudios de Economía y Planificación. MEP. Cuba. 1997, P. 8; and Meny, Ives y Jean-Claude Thoenig. Las Políticas Públicas. Spanish version by Francisco Morata, Barcelona. Ariel Editorial. 1992.

a. General Principles.

From a systemic perspective of the legal code currently in force, the OLPA, whose purpose is to establish the principles, bases and guidelines governing the organization and functioning of the Public Administration, as well as to regulate administrative undertakings, create mechanisms to encourage the people's participation and the control, follow-up and evaluation of public policies, plans and projects, and establish the basic norms regarding the Public Administration's archives and records, it is essential to the scope of their content, since it is applicable to the public administration of all the territorial political entities and additionally to the other organs and entities of Public Power.

In relation to the encouraging of citizen participation, Article 138 *ejusdem*, sets forth as follows:

"(…) Article 138. The organs and entities of the Public Administration shall encourage citizens' participation in public administration.

People may, either directly or through organized communities, present proposals and give their opinion on the administration of the organs and entities of the Public Administration, as well as participate in the preparation of the regulatory instruments.

Public organs and entities shall carry a record of the organized communities whose purpose is associated with the corresponding sector (…)".

To achieve such aims, the above-mentioned law sets forth - Articles 141 and 142 - as an obligation of the public administration, that it establish systems that provides the population with the broadest, most timely and truthful information on its activities, in order that it exercise social control over the public administration.[27]

It also guarantees that anybody may request of the organs and entities of the Public Administration any information deemed necessary on their activities pursuant to and with the exceptions established in the legislation in force, and it is their duty to keep the scheme of their organization and that of the independent organizations or attached entities permanently updated and at the disposal of the people, at the corresponding information units, as well as information booklets on the administrative procedures, services and applicable benefits within the scope of their competence.[28]

b. Characteristics.

As indicated above, the principles of participation in the public administration are applicable to all the entities and organs that exercise

[27] Article 11 *ejusdem*, obliges the organs and entities of the Public Administration to use technologies developed by science, such as the electronic or information and telemetric in their organization, functioning and relationship with the people. Each organ and entity of the Public Administration shall set up and maintain an Internet site that shall contain, amongst others, information deemed relevant, the data corresponding to their mission, organization, procedures, norms that regulate them, services that they render, documents of interest to the people, location of their offices and contact information.

[28] This is also a result of the guarantee of the right to petition, regulated by Article 9 *ejusdem,* according to which the Public Administration officials are obliged to receive and attend, without exception, the petitions or requests made by the people, by any written, oral, telephonic, electronic or computerized means; as well as timely and appropriately responding to such requests, independently of the right of the people to exercise the corresponding administrative or judicial resources, in accordance with the law.

Public Power, but is on the municipal level that a series of institutions has been developed and consolidated that have been adopted by the states in their scopes of competence, therefore such manifestations of the principle of participation will be observed from the local ambit whose essential content is regulated by the OLMPP, not without referring to other regulatory texts that broaden or incorporate new participative formats.

In Venezuela the Constitution affirms that the Municipalities are the primary political unit of the national organization and states that *"(…)The actions of a Municipality within the scope of its competence shall be carried out by incorporating citizen participation into the process of defining and managing public affairs and monitoring and evaluating the results achieved, in an effective, sufficient and timely manner, in accordance with law (…)"* - Article 168 - and this is due to the fact that the proactive participation of the people in the formation, execution and control of the public municipal administration is deemed a means necessary for guaranteeing their complete development, both individual and collective, within the Municipality.

For this reason, the municipal authorities shall encourage and guarantee the citizens' participation in the public administration and facilitate the forms, means and procedures in order that the participation rights are achieved effectively, sufficiently and timely, recognizing the citizens' right to:

(i) Obtain general and specific information on the policies, plans, decisions, actions, budget, projects and any others within the scope of the public municipal activity;
(ii) Accede to the administrative files and records, under the applicable terms of the national legislation;
(iii) Make petitions and proposals and receive timely and appropriate responses;
(iv) Participate in the taking of decisions, to which effect the municipal authorities will generate negotiation mechanisms, sufficient and necessary information space and levels of evaluation; and
(v) The assistance and support of the municipal authorities in their activities associated with the training, teaching and education for the purpose of developing and consolidating the culture of democratic and proactive participation in public affairs, with no more limits than those issued out of public interest and the safeguarding of public patrimony.[29]

Nevertheless, such means of participation shall be developed according to the reality and conditions of each Municipality, using the corresponding

[29] In this regard, Article 252 *ejusdem*, establishes that *"(…) the rights to participate in local administration are exercised through the actions of citizens, organized society and their different expressions, among them: 1. Obtaining information on the mayor's government plan, the Municipal Development Plan, the mechanisms for the preparation and discussion of the ordinances and particularly the drafting and execution of the local budget; approval and execution of public works and services, the content of the administrative report and the rendering of accounts, in terms that can be understood by the citizens. 2. Presenting and discussing priority community proposals in the preparation of the works and services investment budget, to which effect the municipal government shall establish sufficient and timely mechanisms. 3. Participating in the taking of decisions, to which effect the municipal authorities shall generate negotiation mechanisms, sufficient and necessary information spaces and levels of evaluation (…)"*. Similarly, Article 253 *ejusdem*, establishes that *"The Municipality is obliged to create and maintain citizen training programs aimed at strengthening the capabilities of the members of the communities and incorporating the citizens and other organizations of society who express their wish to participate in such programs."*

legal instruments to indicate the requirements, procedures, periods, conditions and other elements that are required to render effective their performance in the Municipality, which demonstrates their instrumental and merely referential nature.

For this reason Article 258 of the OLMPP indicates that the legal listing of the people's means of participation in the exercise of their sovereignty - defined as those by means of which citizens may, individually or collectively, express their approval, rejection, observations, proposals, initiatives, complaints, claims and, in general, express their wishes in respect of matters of the collective interest - does not exclude the acknowledgement and development of other forms of participation in the political, economic, social and cultural life of the Municipality.

c. Development and implementation.

The following institutions should be mentioned, apart from those already noted - such as the participative budget, the referendums, the legislative initiative or the social comptrol to which reference will later be made - are among the means of citizen participation:

c.1. Public hearings.

As opposed to their historical conception, public hearings are meetings of the sovereign people to freely discuss the matters that interest or affect them, the initiative to call them corresponding to the Municipal Council, the Parish Boards by agreement of the majority of their members, the mayor and the citizens, pursuant to the respective ordinance, and in order to validate their decisions, the OLMPP establishes that the approval must be reached by the majority of those present and in regard to matters pertaining to the scope of their jurisdiction, without prejudice to the provisions of the respective legislation.[30]

c.2. Citizens' Assemblies.

The Citizens' Assembly is a means of local and deliberative participation, in which all the citizens have the right to participate by themselves, and their decisions shall be binding.

The Citizens' Assembly will refer to matters defined by the corresponding law and shall be convened expressly, publicly and in advance, and its decisions will be binding for the authorities, insofar as they contribute to strengthening governability, encouraging planning, decentralization of services and resources, but never contrary to the legislation and the ends and interests of the community and of the state.

However, since the legislator submitted everything referring to initiative, procedure, scope, matters, validity, binding effect and commission of control and follow-up, to the special law dealing with the

[30] See: Articles 260 and 261 of the OLMPP.

matter, in practice the functioning of the Citizens' Assemblies has been partially verified by the entry into force of the Community Councils Law (hereinafter CCL).[31]

Thus with the entry into force of the CCL[32], a level of participation, articulation and integration was achieved among the different community organizations, social groups and citizens that allows organized society to exercise public administration and social comptrol functions.

In this regard, Article 4.5 of the CCL reiterates that the Citizens' Assemblies are the primary instance for the exercise of the people's power, proactive participation and their decisions are of a binding nature for the respective community council.

The law also recognizes the Citizens' Assembly as the maximum decision level of the Community Council, made up by the inhabitants of the community, older than fifteen, and whose attributes are confined basically[33] to the following matters: approve the community's cohabitation rules; approve the statutes and the deed of incorporation of the Community Council, which shall contain: the name of the Community Council, the geographical area it occupies, the number of families that live there, a list of the participants in the Meeting (Name and surname, ID card number), place, date and time of the Meeting, the Meeting's agreements, results of the election of the spokespersons, and other members of the organs of the Community Council; approve the Community Development Plan; approve the projects presented to the Community Council in benefit of the community, as well as the integration of the projects to resolve the similar needs of other communities and levels of government, under the sustainable orientation of endogenous development; exercise social comptrol; adopt decisions essential to community life; choose the members of the Promoting Commission; elect the members of the Electoral Commission; elect the spokespersons of the executive organ; elect the members of the Social Comptrol Unit; elect the members of the Financial Administration Unit; revoke the mandate of the spokespersons and other members of the Community Council organs, pursuant to the Regulations hereof; evaluate and approve the financial administration; define and approve the mechanisms necessary for the functioning of the Community Council; form the Community Constituent Meeting, whereby, for the first time, the spokespersons of the work committees and other members of the economic-financial and control organs of the Community Council are elected[34]; and determine and elect the work groups and spokespersons

[31] See: Articles 262 and 263 of the OLMPP.

[32] Special Official Gazette Nº 5.806 of April 10, 2006.

[33] See: Article 6 of the CCL.

[34] Pursuant to Article 19 *ejusdem*, whereby *"(…) The Community Constituent Meeting shall be deemed validly formed with the attendance of at least twenty percent (20%) of the members of the community over the age of fifteen (15) (…)"*.

of the work groups of the respective Community Council.[35]

c.3 The Community Councils.

The community councils are jurisdictional levels of participation, articulation and integration among the different community organizations, social groups and the citizens, which allow organized people to directly exercise the administration of public policies and projects aimed at responding to the needs and aspirations of the communities in the construction of a fair and socially just society.[36]

The legal nature of the Community Councils is that of legal entities of an associative character, whose main purpose is to encourage citizens' participation in community-specific matters where they are incorporated and their members jointly form the so-called "*Citizens' Assemblies*".

c. 3.1. Organizational structure.

For its functioning, the Community Council is composed of an executive organ, which is made up of spokespersons from each work committee; a Financial Administration Unit as an economic-financial organ and the Social Comptrol Unit as a control organ - Articles 7, 8, 10 and 11 of the CCL.

The executive organ is the jurisdictional level of the Community Council, in charge of promoting and articulating the organized participation of the community members in the different work committees and will meet to plan the execution of the decisions of the Citizens' Assembly, as well as to hear the activities of each of the committees and work areas.

On its part, the Financial Administration Unit or Community Bank is an organ made up of five (5) inhabitants of the community elected by the Citizens' Assembly, which functions as a financial execution entity of the Community Councils for administrating financial and non-financial resources, that serves as an investment and credit entity, and acts as financial intermediary for the funds generated, assigned or collected.

The Community Bank will belong to a Community Council or an Association of Community Councils, in accordance with their development and the needs they establish, and all the citizens will be partners of the Community Bank who live in the geographical area defined by the Citizens' Assembly and who make up the Community Council or Association of Community Councils. In this sense, the law states that the Community Bank will acquire

[35] Article 9 of the CCL, sets forth that *"(…) The Citizens' Assembly determines and elects the number of spokespersons according to the number of work committees make up the community, such as: 1. Health Committee. 2. Education Committee. 3. Urban or Rural Land Committee. 4. Housing and Habitat Committee. 5. Social Protection and Equality Committee. 6. Popular Economy Committee. 7. Culture Committee. 8. Integrated Security Committee. 9. Communications and Information Committee. 10. Recreation and Sports Committee. 11. Nutrition Committee. 12. Water Technical Committee. 13. Energy and Gas Technical Committee. 14. Services Committee. 15. Any other deemed necessary by the community according to its needs (…)".*

[36] The Community Councils substituted the so-called Parish and Community Councils regulated by Articles 112, 113 and 114 of the OLMPP and Article 8 of the Law of Local Public Planning Councils.

the legal figure of a cooperative and will be governed by other laws, among them, the Special Law of Cooperative Associations, the Law of Creation, Stimulation, Promotion and Development of the Micro-financial System, being excluded from regulation by the General Law of Banks and Other Financial Institutions.

Finally, the Social Comptrol Unit is an organ comprised by five (5) inhabitants of the community elected by the Citizens' Assembly to exercise social comptrol and supervision of the handling of the resources assigned, received or generated by the Community Council, and also of the public investment programs and projects budgeted and executed by the national, regional or municipal government.

c.3.2. Competencies.

The competencies of the Community Councils as administrative entities of the municipal public services must be in accordance with the provisions of Article 184 of the Constitution, which is developed by the CCL, on recognizing the financial autonomy of the Community Councils to administer their own economic resources; to elect their organs, to wit, the executive organ comprising the spokespersons in accordance with the work committees created, the financial administration unit - through the Community Bank - and the social comptrol unit and for the administration of the matters of interest for the community, which comprises the regulatory autonomy to issue operational rules.[37]

In this sense, the Community Councils are competencies for administrating local public services, drafting the Community Development Plan and promoting alternative and joint economic formats, for the interchange of goods and services. In respect of this last supposition, the law highlights the relationship between municipal public services and the Community Councils, since in the very definition of community included in the law, one of the relevant elements of the community is the presence of a group of people who " *use the same public services*" and include within their own resources those "*generated by the administration of the public services that are transferred to them.*"[38]

Similarly, other legislative instruments incorporate the Community Councils in the citizen participation processes. Such is the case of the Law for the Defense of Persons in their Access to Goods and Services[39], according to which people are entitled to constitute popular participation associations or organizations which represent the will of their associates to contribute to the defense of their rights and interests, recognizing that the Community Councils through the Social Comptrol Committees

[37] See: Articles 6, Numbers 1 and 2, 10, 12 y 22 *ejusdem.*

[38] See: Articles 4.1, 22.12 and 25.3 *ejusdem*.

[39] Official Gazette Nº 5.889, of July 31, 2008.

for Supply, constitute a level of participation responsible for promoting in the community the defense of their economic and social rights and interests, this being the instrument for supervising the control, monitoring, verification and vigilance relative to the supply of staple goods and services and of any other nature of the collective interest throughout the chain of distribution, production and consumption.[40]

c.3.3. Administration of resources.

Article 25 of the CCL sets forth that the Community Councils shall directly receive the following resources:

"(…) 1.- Those transferred by the Republic, states and municipalities.

2.- Those arising from the provisions of the Law for Creation of the Intergovernmental Decentralization Fund (FIDES) and the Law of Special Economic Assignments derived from Mines and Hydrocarbons (LAEE).

3.- Those arising from the administration of public services transferred to them by the State.

4.- Those generated by their own activity, including the product of the financial handling of all their resources.

5.- The resources received from donations according to the provisions of the legal code.

Any others generated by financial activity allowed under the Constitution and the law (…)".

The handling of such financial resources shall be oriented pursuant to the decisions approved by the Citizens' Assembly. Moreover, whosoever administers the resources referred to in the CCL shall be obliged to carry a record of their administration, with the supports that show the income and disbursements and have it available for the Social Comptrol Unit and other members of the community, through the proceeding established in the Organic Regulation of the Autonomous National Fund Service of the Community Councils.

It is also established that the members of the organic financial instrument will incur in civil, criminal or administrative liability for acts, facts or omissions contrary to the legal provisions that regulate such matter. [41]

c.4. Self-Management and Participatory Empowerment.

By Self-Management and Participatory Empowerment we understand the right of the citizens to require and use local public services and to participate in

[40] Article 91 *ejusdem*.

[41] See: Articles 26 and 27 of the CCL and Articles 4, 5, 6 and 15.4 of the Organic Regulation of the Autonomous National Fund Service of the Community Councils.

the design of plans and projects for their installation, execution, administration and evaluation and even the organized administration of public services, in any event obliged to contribute to the maintenance, conservation and improvement of their quality.[42]

In this regard the Constitution expressly provides that the law shall create mechanisms that decentralize and transfer to the communities and organized local groups, as follows:

"(…) Article 184. Open and flexible mechanisms shall be created by law to cause the States and Municipalities to decentralize and transfer to communities and organized neighborhood groups services the latter manage and demonstrate the ability to provide, promoting:

(1) The transfer of services in the areas of health, education, housing, sports, culture, social programs, the environment, maintenance of industrial areas, maintenance and upkeep of urban areas, neighborhood prevention and protective services, construction of works projects and providing of public services. To this end, they shall have the power to enter into agreements, whose content shall be guided by the principles of interdependence, coordination, cooperation and shared responsibility.

(2) Participation by communities and citizens, through neighborhood associations and nongovernmental organizations, in the formulation of investment proposals for presentation before the state and municipal authorities in charge of preparing the pertinent investment plans, as well as participation in the execution, evaluation and control of works projects, social programs and public services within their jurisdiction.

(3) Participation in economic processes, stimulating manifestations of the social economy, such as cooperatives, saving funds, mutual funds and other forms of association.

(4) Participation by workers and communities in the running of public sector business enterprises, through self-management and joint management methods.

(5) Creation of community service enterprises, organizations and cooperatives as mechanisms to generate employment and social Welfare, providing for their permanent existence through the design of policies whereby these groups are given means of participating.

(6) Creation of new decentralized organs at the parish, community, ward and neighborhood levels, with a view to guaranteeing the principle of shared responsibility in the public administration of local and state governments, and developing process of self-management and joint management in the administration and control of state and municipal public services.

(7) Participation by communities in activities to establish closer ties with penal institutions and ties between the latter and the general population (…)".

On the basis of the partially transcribed constitutional provision, Venezuelan legislation allows that the administration of public services be conducted

[42] See: Article 255 of the OLMPP.

through (i) concessions, (ii) through social economy enterprises or by means of (iii) the mixed participation in their administration.

c.4.1. Administrative concessions.

This form of administration of municipal public services is mainly regulated by Article 73 of the OLMPP, whose content allows for the concession of such services to private parties and defines the minimum conditions for their admissibility.

In this regard, Article 73 *ejusdem* establishes that the rendering of municipal public services by private parties shall only be conceded through a bidding procedure and the concession contract shall contain the following minimum conditions: *"(…) 1.- The term of the concession shall not be longer than twenty years. 2.- The price paid by the concessionaire for the rights granted by the concession and participation of the Municipality in the profits or gross income from the exploitation of the concessions. The respective concession contract shall specify the periodical review mechanisms of such advantages granted to the Municipality. 3.- The performance bond posted by the concessionaire in favor of the Municipality and accepted by the latter, which shall be updated periodically during the term of the concession. 4.- The Municipality's right to periodically review the terms of the contract to adapt them and include possible technological advances. 5.- The Municipality's right to temporarily intervene the service and assume its rendering for the account of the concessionaire, under previously established circumstances (…)".*

In any event, the approval of such concessions corresponds to the Municipal Council, pursuant to Article 95.10, whereby *"(…) The following are duties and attributions of the Municipal Council: (…) Approve the public service concessions or use of assets of the public domain (…)".*

c.4.2. Management through social economy enterprises, communities and organized neighborhood groups.

Pursuant to Article 308 of the Constitution[43], the State shall protect and promote small and medium-sized industry, cooperatives, savings funds, as well as the family enterprise, the micro-enterprise and any other form of community association for work, savings and consumption, under the regime of collective ownership, in order to strengthen the country's economic development, basing this on popular initiative.

Under such principles, the OLMPP encourages the administration of public services through non-traditional manners, such as the so-called social economy enterprises, as arises from Article 70 *ejusdem*, which sets forth that the Municipalities are under the obligation *"(…) to encourage the creation of social economy enterprises, such as cooperatives, savings*

43 The Article in question provides that *"(…)The State shall protect and promote small and medium-sized manufacturers, cooperatives, savings funds, family-owned businesses, small businesses and any other form of community association for purposes of work, savings and consumption, under an arrangement of collective ownership, to strength the country's economic development, based on the initiative of the people. Training, technical assistance and appropriate financing shall be guaranteed (…)".*

funds, mutual funds and other associative formats. It shall also promote the constitution of self-managed and participatory empowered companies to facilitate the participation of the workers and the communities and guarantee the citizens' participation in the municipal administration (…)".

This institutionalizes the direct participation of the inhabitants of the Municipality in the administration of local public services through enterprises conceived under the regime of collective ownership, whereby the users themselves become suppliers of municipal public services.

Nevertheless, the legal provision allows for the inhabitants of the Municipality themselves to directly assume the administration of such services, independently of company formats, through formats that are typical of citizens' participation, such as the Community Councils.

In regard to the transfer of competencies to the communities and organized local groups such provision is subject to national legislation, the Ordinances that regulate the matter and what has been developed in the state Laws, which shall establish the procedure for the transfer and the methods for supervision of public services.[44]

Therefore, it must be borne in mind that the administration of public services is subject to the communities' and the organized local groups' capacity to administrate them[45]. The Municipality will in any event keep its authority to intervene or re-assume the rendering of the transferred public service, when the service is not provided or is provided deficiently[46].

Although the OLMPP did not regulate the form in which such administration is to be exercised, it is a fact that the sectorial legal codes (national laws) define the conditions for the administration of such services, and therefore the communities and organized local groups shall be subject to same.

c.4.3. Mixed participation in administration.

Within the context of the OLMPP, the joint participation of civil society and administration of the management of public services may be affirmed and even, attending to the general principle of freedom of administration contained in Article 69 *ejusdem*, the administration

44 Articles 281 and 291 provide as follows *"(…) Article 281: The State Legislative Council, in the respective law, shall establish the procedure for the transfer and the form of supervision of the public services to be decentralized and transferred to the municipalities, to the communities and to the organized local groups (…). Article 291: The Legislative Councils shall approve the transfer procedures and the forms of supervision of the public services to be centralized and transferred to the municipalities, the communities and local groups, at latest within one year immediately following the entry into force of this Law (…)".*

45 In this regard, Article 278 of the OLMPP, establishes that *"(…) The communities and organized local groups that request the decentralization or transfer of a municipal public service shall at a minimum evidence: Legal capacity. 2. Professional or technical training in the area related to the service. 3. Prior experience in the administration of public services or in areas related to the requested service. 4. Evidence by certification issued by the Municipality of the citizens' training plans. 5. Evidence by certification issued by the Municipality of course in the area. 6. Legitimacy before the community involved. 7. Presentation of the project. 8. Any other determined by law, regulation and ordinance (…)".*

46 Article 280 *ejusdem*, establishes that *"(…) The Municipality may intervene the service or re-assume the rendering of the transferred or decentralized public service to communities or organized local groups, when the service is interrupted or rendered deficiently. The favorable vote of the absolute majority of the members of the Municipal Council will be needed for such measure to proceed (…)".*

of public services may be carried out by National, State, Municipal Administrations and by the organized communities.

In this sense it should be borne in mind that in those matters in which competencies typical of the Municipalities are exercised it will be necessary to previously subscribe to inter-administrative agreements that empower and regulate the participation of the corresponding organs and entities.

c.5. The Missions.

The social missions were conceived by President Hugo Rafael Chávez Frías in 2003, with the purpose of deepening the process of political, social and economic changes in Venezuela and consolidating participative social democracy, being, from a governmental perspective, the greatest effort seen in the political history of the country to affront poverty and consolidate a society of free and equal citizens, since its fundamental purpose is to face off the causes and consequences of poverty and exclusion, with the proactive participation of the people.

The missions were created within the framework of the economical crisis produced by the general strike that arose because of the implementation of profound changes in the economical, social and political power structure that had been consolidating itself in the Republic since colonial times.

Once control was consolidated over the economic resources arising from the exploitation of petroleum - affected by the so-called oil strike of the country's biggest company (PDVSA) during almost two months, it was possible for the national government, together with the regional authorities (state and regional) and fundamentally with the immediate commitment of the majority excluded from assuming a proactive role in the transformation of their lives and of Venezuelan society as a whole, upon implementing a system of public administration called the "Bolivarian missions."

The Bolivarian missions are a revolutionary model of implementation of public policies - administration - which intertwine the facilitation of state processes with the participation of the people in their administration, which allows for a mobilization towards the places furthest from the traditional centers of power (capitals or high economic activity centers), achieving the complete transformation of the social map of the country, which has permitted such significant progress as the full literacy of the Venezuelans, access to different levels of education, access to a better health system, improved farming and food supply and integrated agrarian reform.

Thus the Robinsón, Ribas, Sucre, Barrio Adentro, Barrio Adentro Deportiva, Vuelvan Caras, Mercal, Guaicaipuro, Zamora, Culture Missions and more recently Negra Hipólita, represent one of the greatest advances that the Bolivarian Government has developed as a social guarantee for the people of Venezuela.

Although not part of this work, it is obviously impossible not to refer to the scope and importance of some of the above-mentioned missions, since

their implementation constitutes the synthesis of the participative democracy contained in the Constitution of the Bolivarian Republic of Venezuela.

In this regard it is suffice to mention the Barrio Adentro Mission as an integrated program that provides health services in the communities themselves, where the doctors move into the poorest areas and have the equipment necessary to treat the principal afflictions and offer free medicine for their treatment. In this way sectors that had never received the State's care benefited in their own communities, not only from consultations and family visits, but that the doctors carry out activities in pro of the health, together with the Health Committees and other organizational expressions of the communities, and promote the training of community health promoters. In parallel, the Barrio Adentro Mission articulates with sporting and cultural activities and encourages the consolidation of basic and essential services, such as drinking water and cleanliness, as well as nutrition programs, all for the purpose of guaranteeing nutrition and balanced meals or completely free orthodontic and ophthalmological services.[47]

Finally we would mention Mission Zamora, whose prime purpose is to give land to the people in order to guarantee food supply for the least favored in support of the social economy and endogenous development.

2.5. Social Comptrol.

Social comptrol refers to the system whereby the communities exercise control, supervision and evaluation of compliance with the purposes of the public programs and works developed by the administration or individuals with public assets or resources.

Thus the realization of the principle of participation is present in the exercise of social comptrol, which recognizes the right to intercede in the design, planning, execution, evaluation and control of public policies taken on by the different organs and entities of the centralized or decentralized Public Administration at any of its political-territorial, and so arises as an essential way to oppose and correct phenomena such as corruption and bureaucracy.

The legal grounds for Social Comptrol are to be found in the Constitution of the Bolivarian Republic of Venezuela, basically in the already noted Articles 62 and 63, the latter of which states that "*the voters have the right to have their representatives publicly, transparently and periodically account for their administration according to the program presented*".

Nevertheless, aspects related to social comptrol are also mentioned in Articles 141 and 184 of the Constitution[48]. In parallel with the constitutional norms, other legal instruments regulated the constitution and functions of

47 See the following website consulted on January 30, 2009, for the content and scope of the Missions: http://www.minci.gov.ve/pagina/2/5691/completa.html

48 According to which: *"(…) Article 141. Public Administration is at the service of the citizen and is based on the principles of honesty, participation, expeditiousness, efficacy, efficiency, transparency, accountability and responsibility in the performance of public functions, being fully subject to the law and to rights (…)"* and Article 184 whose complete text is transcribed *ut supra*, but it refers to the legislator's obligation to create open and flexible mechanisms so that the States and Municipalities can decentralize and transfer to the communities and organized local groups the services that are to be administered by the latter after first demonstrating their capacity to render them.

the aforementioned Article 138 of the OLPA; Articles 58, 59 and 60 of the Organic Law of Public Planning.[49]

Articles, 1, 6, 14.9, 75 and 76 of the Organic Law of the Office of the Comptroller General of the Republic and the National System of Fiscal Control[50] merit special attention, according to which the Office of the Comptroller General of the Republic, as an organ of the Citizens' Power, to which corresponds the control, supervision and assessment of public income, expenditure and assets, as well as over the operations relative to them and whose actions are aimed at the execution of audits, inspections and any kind of fiscal review of the organs and entities subject to their control, shall encourage citizens' participation in the exercise of control over public administration.

To such effect, all the organs that make up the National System of Fiscal Control shall adopt the measures necessary to encourage the citizens' participation in the exercise of control over public administration. Thus the Comptroller General of the Republic, by resolution to be published in the Official Gazette of the Bolivarian Republic of Venezuela, shall issue rules aimed at encouraging citizens' participation, making special emphasis on attending the communities' initiatives in the process of citizens' participation in fiscal control; order, direct systematize and evaluate the citizens' complaints; establish strategies for the promotion of citizens' participation to support in the supervision of fiscal management; and promote citizens' control mechanisms over high impact economic, financial and social projects.

Nevertheless, the broadest development of this matter is to be found in the OLMPP, whereby citizens have the right to organize themselves in social comptrollers with the purpose of controlling local government and the municipal comptrollers are obliged to involve the citizens in the work of monitoring public administration and evaluation of the performance of the entities and organs of municipal public administration.

Thus, through the social comptrollers it is possible to materialize part of the social control referred to in Article 269 *ejusdem*, defined as a mechanism by means of which every citizen, individually or collectively participates in the

49 The Articles mentioned establish *"(…) Article 58. Social participation is understood to be the social sectors' right to be duly informed, to prepare budgets, to identify priorities and recommend means of participation for participating in the construction, feasibility and perfection of planning. Article 59. Without prejudice to the provisions in the Constitution and respective laws, the organs and entities of the Public Administration shall encourage citizens' participation in planning. For such purpose the people may, either directly or through organized communities or legally constituted non-state public organizations, present proposals and forward opinions on the planning of the organs and entities of the Public Administration. Article 60. The organs and entities of the Public Administration are obliged to supply the social sectors with full and timely information on their development plans and other programs and projects (…)"* (Official Gazette Nº 5.554 of November 13, 2001).

50 Such norms establish: *"(…) Article 1. The purpose of this Law is to regulate the functions of the Office of the Comptroller General of the Republic, the National System of Fiscal Control and the citizens' participation in the exercise of the comptrol function. (…) Article 6. The organs comprised by the National System of Fiscal Control shall adopt, pursuant to the Constitution of the Bolivarian Republic of Venezuela and the Laws, the measures necessary for encouraging citizen participation in the exercise of control over the public administration. (…) Article 75. The Comptroller General of the Republic, by resolution to be published in the Official Gazette of the Bolivarian Republic of Venezuela, shall issue rules aimed at encouraging the participation of the citizens, making special emphasis on the following aspects:. Attending to the initiatives of the community in the process of citizens' participation in fiscal control. 2. order, direct, systemize and evaluate citizens' complaints. 3. establish promotion strategies for citizens' participation as support in supervising fiscal management. 4. promote mechanisms for citizens' control over high-impact economic, financial and social projects. (…) Article 76. The organized communities, as well as the organizations that represent sectors of society, may present candidates to hold positions in the fiscal control organs of the entities and organs mentioned in Article 9, Numbers 1 to 11 of this Law (…)"* (Official Gazette Nº 37.347 of December 17, 2001).

supervision and control of the municipal public administration, in the execution of programs, plans and projects, in the rendering of municipal public services, as well as in the conduct of public officials, in order to prevent, rationalize and promote corrective measures.

Thus Social Comptrol is not limited to just one aspect of the lives of the citizens, neither is its purpose to control projects a posteriori, but rather is a process that covers the conception and execution of any project, and being aware of how and why the funds are going to be invested.

Finally we would point out that pursuant to Article 6.5 of the CCL comptrol social corresponds to them, without prejudice to the existence of other organizations that may exercise it.

2.6. The process of forming Public Power.

For those cases in which the appointment of the titleholders of the organs of Public Power, is not the product of a popular election, there is also the possibility - and need within the constitutional framework - for the citizens' participation in their selection.

Thus, evidence of the principle of society's participation is the matter regulated by Articles 295 and 296 of the Constitution, which establish that the Nomination Committee of candidates to form the National Electoral Council, will be composed by representatives of the different sectors of society, pursuant to the law, and that the National Electoral Council will be made up of five persons not associated with organizations whose purposes are political, three of whom will be nominated by the civil society, one by the faculties of legal and political sciences of the national universities, and one by the Citizens' Power.

Similarly, in respect of the integration of the Supreme Tribunal of Justice, Article 264 *ejusdem* establishes that the candidates for justices of the Supreme Tribunal of Justice may present themselves as nominees before the Judicial Nominations Committee of their own initiative or through organizations associated with judicial activities, and such Committee, after hearing the community's opinion, shall make a pre-selection for presentation to the Citizens' Power, which will make a second pre-selection to be presented to the National Assembly which will make the final selection, bearing in mind that the citizens may make reasoned objections to any of the nominees before the Judicial Nominations Committee or before the National Assembly.

Finally, in respect of the integration of the Citizens' Power, Article 279 de la Constitution provides that the Republican Council of Morals will call a Nominee Evaluation Committee of the Citizens' Power, which shall be composed of representatives of the different sectors of society, will advance the public process the result of which will be obtained a short lit for each organ of the Citizens' Power, which will be submitted for consideration by the National Assembly and, with the favorable vote of two thirds of its members, will choose within a lapse of no more than thirty calendar days, the head of the organ of the Citizens' Power who is under consideration or otherwise, the Electoral Power will submit the short list of three candidates to a plebiscite.

2.7. Participation of the indigenous people.

The right of participation of the indigenous people is enshrined in Article 119 of the Constitution, which reads as follows: *"(…)The State recognizes the existence of native peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life. It shall be the responsibility of the National Executive, with the participation of the native peoples, to demarcate and guarantee the right to collective ownership of their lands, which shall be inalienable, not subject to the law of limitations or distrait, and nontransferable, in accordance with this Constitution and the law (…)"*.

The OLMPP establishes that the legislation that is developed by the Legislative Councils and the municipal councils shall establish different regimes for the organization, government and administration of the municipalities, including in respect of the determination of their competencies and resources, in attention to the condition of the population, economic development, capacity to generate their own fiscal income, geographical situation, historical and cultural elements and other relevant factors, as well as the options for the organization of the regime for government and democratic administration corresponding to the indigenous municipalities and the municipalities with an indigenous population, according to the nature of local government and the characteristics of the respective federal entity.

The existence of Indigenous Municipalities is enshrined as the organization of the governmental and local administration regime, whereby the indigenous people and communities define, execute, control and evaluate public administration pursuant to the plans provided in the territorial jurisdiction, taking into account the social, political and economic organization, usages and customs, languages and religions, in order to establish a municipal administration that guarantees proactive participation within the framework of their social-cultural development. The municipal organization of the indigenous municipalities will be democratic and shall respond to the nature of the local government itself.

It is also set forth that the indigenous people and communities shall participate politically in the municipalities in whose jurisdiction their community is settled and, in such regard, the indigenous representation shall be guaranteed in the Municipal Council and in the Parish Boards. In the indigenous municipalities, those who aspire to the position by popular election of mayors, council members and members of the parish boards shall be elected pursuant to the usages and customs of each indigenous people and community, in attention to the provisions of the Constitution of the Bolivarian Republic of Venezuela, in accordance with the laws that regulate the indigenous electoral matters.[51]

[51] See: Articles 11, 47, 49, 50 and 51 of the OLMPP.

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ANNEX

MOST RECENT ELECTIONS IN VENEZUELA

Relevant introduction note: Venezuela is ruled by a statutory legal system (with roman-germanic roots, and French's codification influence, and should be categorized as ruled by Civil or Continental Law. Also, according to its current Constitution, has five (5) branches: **Executive Power** (based on the grounds of a classic presidential system); **Legislative Power** (National Assembly: a sole chamber); **Judicial Branch** (Supreme Tribunal of Justice, and its Constitutional Chamber); **Citizen Power** (Republican Moral Council: integrated by The Attorney General Office (independent); General Auditor of the Republic and Defendant of the People (e.g. European Ombudsman), and the **Electoral Power** (National Electoral Council) main subject of this paper.

I. CONSTITUTIONAL AMENDMENT REFERENDUM (2009)

a) Scope:

The 2009 referendum was a vote in which the people approved Amendment No. 1 (*Enmienda No. 1*) of the Constitution of the Bolivarian Republic of Venezuela; this abolished term limits for the offices of President, State Governors, Mayors and National Assembly deputies.

The current Constitution (herein and after CBRV), enacted in 1999 (Approved by Referendum), previously established a three-term limit for deputies and a two-term limit for the other offices. The proposed Amendment was put to a Referendum on 15 February 2009 and endorsed by 54% of the electorate, with approximately 70% of registered voters participating.

Due to the Constitutional Amendment Referendum (held on February 2009), The National Electoral Council (herein and after CNE, "*Consejo Nacional Electoral*", by its acronym in Spanish, which is considered an independent branch pursuing article 292 of CBRV) deployed a fully automated electoral process (in the past, there were also automated devices but limited to major cities. This Referendum was the second occasion that the whole nation was covered by this high technology, i.e. Voting machines SAES 3000, SAES 3300 and SAES 4000, provided by the international company "*Smartmatic*").

The biggest challenge for this election (in this particular case, a Referendum aimed to approve the Constitutional Amendment) was the time period between last elections held in Venezuela on November 23, 2008 and the date of the referendum set for February 15, 2009. In less than three months 34.669 voting machines were ready for the process. There are 16.949.033 registered voters.

The **question** drafted by the CNE, and **submitted to the voters** trough Referendum, was:

> *"Do you approve the amendment of articles 160, 162, 174, 192 and 230 of the Constitution of the Republic, as processed by the National Assembly, which increases the political rights of the people, with the purpose of allowing any citizen incumbent in an elected office, to be nominated as candidate*

for the same office, for the period of time established constitutionally, his or her possible re-election depending exclusively on popular vote?"

b) Provisions of the Amendment:

The full title of the law was Amendment No. 1 of the Constitution of the Bolivarian Republic of Venezuela (*Enmienda No. 1 de la Constitucion de República Bolivariana de Venezuela*). It was approved by a majority of the members of The National Assembly. The amendment affects Articles 160, 162, 174, 192 and 230 of the CBRV.

They are amended as follows (published in the *Official Gazette Nº 5.908 Ext. 19 February, 2009).*

Article 160:

Previous:

"*The governor shall be elected for a four-year term by the majority of the votes cast. The governor may be re-elected immediately* **and only once for one more term"**

Current:

"The governor shall be elected for a four-year term by the majority of the votes cast. The governor may be re-elected."

Article 162:

Previous:

"The regional legislators shall be elected **for a maximum of two terms in a row"***.*

Current:

"The regional legislators may be re-elected"

Article 174:

Previous:

"*The mayor shall be elected for a four-year term by the majority of the votes cast and may be re-elected immediately* **and only once for one more term***."*

Current:

"The mayor shall be elected for a four-year term by the majority of the votes cast and may be re-elected."

Article 192:

Previous:

"The deputies for the National Assembly are elected for a five-year term with the possibility of re-election **for a maximum of two terms in a row"***.*

Current:

"The deputies for the National Assembly are elected for a five-year term with the possibility of re-election".

Article 230:

Previous:

"The presidential term of office lasts six years. The President of the Republic may be re-elected **immediately and only once for one more term.***"*

Current:

"The presidential term of office lasts six years. The President of the Republic may be re-elected."

c) Audits:

In order to prove the well functioning of the electoral system, the **CNE along with international observers and representatives of different political actors**, carried out several evaluations to the system. The solution's software and hardware is being tested as well as the data tallying and transmission.

Results from these tests were endorsed by political parties, observers and the CNE.

Engineering Test (January 25, 2009): The Electoral Power (CNE) validated the technological infrastructure through which the electoral data will be transmitted: fixed telephone lines, mobile and satellite. In a joint effort from CNE, CANTV (Stated owned telephone company) CADAFE (State owned electricity and power company), CEOFAN (Operational Center of National Army) officials and the educational agencies (local agencies in charge of public schools) around the country the transmission technological platform was checked proving to be 100% effective.

Voting Software audit (January 8 to 12, 2009): Technicians from the political parties and the Electoral Power (CNE) evaluated the machine programming.

Hardware audit (January 20 to 30, 2009): Technicians from the political parties and the CNE carefully evaluated the voting machine hardware in order to check all of its physical components: mother board, network cards, tactile membranes and touch screens.

Closing audit (February 15, 2009): At the end of the electoral process there was a closing audit, which consists in opening more than 54% of the ballot boxes where voting receipts are, in order to compare those results to the ones from the printed and transmitted precinct count report.

d) Other highlights regarding the electoral process:

The Venezuelan constitutional amendment referendum that was held on February 15, 2009 was carried out using 100% auditable technology. This is the eighth time that high technology solution is used in Venezuela and the third referendum process with *touch screens*.

During this election (Referendum aimed to constitutional amendment) 16.949.033 Venezuelans had the opportunity to exercise their right to vote.

II. Regional Elections 2008 (Electing Governors, Mayors, Local Law makers, councilors and indigenous deputies):

a) Scope:

The Venezuelan Regional Elections held on November 23, 2008, was the seventh occasion when high and advanced technology has been used in order to run electoral process in the whole nation. Voters had to choose 22 *Governors*, 328 *Mayors*, 233 *deputies* to the state legislative councils (local law makers), 8 indigenous deputies to the legislative councils (local law makers on behalf of indigenous population remote to major cities) and 13 city councilors to the metropolitan councils (Caracas, the Capital City) ; all of it in one day and at a national level.

In the whole process were 1.497 new electoral polling stations installed, for a total of 34.899 (only 60 were operated manually) which were distributed in 11.455 voting centers (448 more than in the last election held in 2006 i.e. presidential election)

As we stated above, during this election 603 posts were in stake. These included: 22 governors, 328 mayors, 233 deputies to the state legislative councils, 8 indigenous deputies to the legislative councils and 13 city councilors to the metropolitan councils.

The 2008 Regional Elections had more than 8 thousand nominations (the exact number is 8.294) out of which 2.505 correspond to executive posts and 5.789 to collegiate bodies. Some 54 political parties took part in this election, but actually there were 786 nominating organizations including groups at a national, regional and municipal level. Besides, there were 295 independent candidates.

b) Audits:

The Electoral Power (CNE) organized different tests to endorse the auditable voting system for this Regional Elections. In most of the tests performed on the voting machine's hardware and software, as well as in the transmission and tallying of results, different technical representatives from the political parties approved the proper functioning of the automated voting system.

Among the tests carried out for this election we find: the engineering test (October 5), voting machine's hardware and software audit (from October 6 to 13), machine production and automated system audit (from October 26 to November 30), tallying process audit (between November 10 to 14), infrastructure audit (November 7), voting drill and pre-dispatchment audit (November 16), closing audit (election day, November 23) and post-election audit (from November 23 to 30)

Engineering test (October 5, 2008): The Electoral Power (CNE) validated the technological infrastructure through which the electoral data will be transmitted: fixed telephone lines, mobiles and satellites. In a joint effort from CNE, CANTV (Stated owned telephone company) CADAFE (State owned electricity and power company), CEOFAN (Operational Center of National Army) officials and the educational agencies (local agencies in charge of public schools) around the

country the transmission technological platform was checked proving to be 100% effective.

Voting software audits (from October 6 to 13, 2008). Technicians from the Electoral Power and the political parties evaluated the machine's programming.

Hardware audit (From October 6 to 13, 2008): Technicians from CNE and from the political parties carefully evaluated the voting machine's hardware in order to check all of its physical components: mother boards, network cards, touch-sensitive membranes and touch screens.

National electoral drill (October 26, 2008): This test helps correct logistic flaws detected during the engineering test and to check and endorse the well functioning of the transmission, engineering and tallying means, the technological and logistics platform for the well functioning of the polling stations, distribution of the electoral roll, polling members' participation and deployment of voting machines. Electors participated in 2,740 pilot voting centers (2 fully working pilot centers were functioning in each state) and the test managed to be 99% effective.

III. VOTING PROCESS:

Either for the Referendum election or the Regional Election, the voting process applied was:

1) The elector presses in the electronic ballot the oval(s) corresponding to the candidate(s) of his/her choice, verifying on the screen that his/her choice matches.
2) If the elector is not satisfied, he/she can correct it by pressing the wrong choice on the screen and the right choice on the ballot.
3) The elector then presses the tick box "Vote" on the screen; if the selection is incomplete the voting machine will emit an alert so that the elector may complete it, and if he/she doesn't do so, the non selected votes will be counted as "Null" (conscious null votes).
4) The voting machine emits a voting voucher, which the elector verifies, folds and introduces in ballot box.

THE REGULATORY BASIS OF THE VENEZUELAN ELECTORAL SYSTEM

The 1999 Constitution of the Bolivarian Republic of Venezuela

Title I: Fundamental principles

Art. 2	➡	Democratic and social state of law and justice (Participatory democracy >< representative democracy)
Art. 5	➡	Principle of people's sovereignty (Mechanisms of direct participation by the people ➡ active and passive referendums and suffrage)
Art. 6	➡	A Government that is democratic, participatory, elective, decentralized, alternative, responsible, pluralist and of revocable mandates (all mandates)

Title III: Duties, human rights and guarantees

Chapter IV: Political Rights

Art. 62	➡	The people's right to participate in public affairs
Art. 63	➡	Suffrage ➡ right (not a duty). Principles of personalization and proportional representation
Art. 64	➡	Active suffrage: 18 years (minimum voting age) Resident foreigners may vote parish, municipal and state elections
Art. 65	➡	Passive suffrage: >< if convicted of crimes - politically ineligible - or offenses against public property - administrative ineligibility
Art. 66	➡	Rendering of accounts by popular representatives (imperative mandate)
Art. 67	➡	Right of association for political purposes Prohibition against financing of political associations with public funds
Art. 70	➡	Means of people's participation in the exercise of sovereignty in political, social and economic matters

Second Section: Popular Referendum

Art. 71	➡	Consultative referendums
Art. 72	➡	Revocatory referendums
Art. 73	➡	Approving referendums
Art. 74	➡	Abrogatory referendums

Electoral Power	➡	Exercised by the National Electoral Council (NEC) as governing body

Title V: Chapter V (Org. of the National Public Authority)

Arts. 292-298	➡	Relevant aspects [Art. 203]: - Regulatory power of electoral laws - Annulment of elections - Organize elections for public authorities, unions, professional associations and organizations for political ends - Civil and electoral registry

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Principal legal regulations

1) Organic Law of the Electoral Authority (2002)
   ↳ organizational

2) Organic Law of Electoral Procedures (2009)

Art. 7	➡	Unipersonal positions: relative majority without second round (majority system)
Art. 8	➡	Mixed electoral system ("parallel"): personalization of suffrage for nominal positions - circuits - and proportional representation for listed positions (D'Hondt System)
Arts. 14 and 15	➡	Nominal positions privileged in distribution of positions.
Art. 47	➡	Nomination by political organization, electoral groups, own initiative and indigenous communities
Title VI, Chapter III	➡	Possibility of financing by the NEC for the publishing of electoral propaganda

DEALING WITH ELECTION COMPLAINTS



DEALING WITH ELECTION COMPLAINTS IN NEPAL

Justice Khil Raj Regmi[1]

Chair of this session,
Honorable Chief Justices and Justices,
Distinguished Delegates,
Ladies and Gentlemen.

It is my great pleasure to be here as a speaker in this august assembly. I would like to place on record my sincere thanks and appreciation to the organizers for inviting me to the 7th Conference of Asian Constitutional Court Judges being held in Jakarta, the beautiful city of Indonesia. I have brought with me the greetings of the Nepali judicial community to Honorable Chief Justice Mohammad Mahfud MD, Chief Justice of the Constitutional Court of Indonesia, other justices and judges of this wonderful country and distinguished delegates participating in the Conference. I also thank the organizers for doing the needful to make our stay comfortable in Jakarta.

The theme of the 7th Conference is rightly devoted to elections and constitutional and legal issues related to it. Periodic elections, not only allow sovereign people to exercise their political rights to elect their own rulers, but also open up a process whereby they get involved in the governance of the state. Elections, therefore, add vibrancy to representative democracy, if they are held in an impartial and healthy manner.

Yesterday, and today we listened to distinguished speakers who shared their experiences on the concept of election in comparative setting and problems and shortcomings of law and practice related to it. In this session, I will bring the Nepalese experience on the election related complaints and the judicial response to them. Before I do that let me put to this august gathering the constitutional position of the Supreme Court of Nepal in essence. The Supreme Court is the final court of appeal and is vested with the power to judicial review. It also issues prerogative writs. The constitutional issues that come to the Court in the form of individual or public interest petitions are handled by the Special Bench (which deals with constitutional matters).

[1] Justice, Supreme Court of Nepal. The speech is delivered by Justice Regmi at the 7th Conference of Asian Constitutional Court Judges, Jakarta, Indonesia, 14th July, 2010.

The Third People's Movement of April 2006 culminated in the promulgation of the present Interim Constitution, 2007 which promised to establish a republican and federal form of government and provided for a Constituent Assembly to draft a new Constitution. The election for the Assembly was held in 2008. The Interim Constitution has also introduced changes in the electoral system. A mixed system of first-past-the-post and proportional representation now fills up the 601-seats in the Constituent Assembly. The proportional representation system has made the Constituent Assembly inclusive with representation of various marginalized and disadvantages communities.

A healthy representative system can be established only when the elections are free and fair. For this to happen, the independence of the body that conducts election is crucial. The Interim Constitution provides for the appointment of the Election Commissioners by the President on the recommendation of the Constitutional Council. Under the Interim Constitution, Election Commission conducts, supervises, directs and controls the election to the Constituent Assembly, any referendum to be held under the constitution and elections to the local authorities. To operate these functions smoothly a host of laws are also enacted.[2]

In order to ensure fairness and impartiality, Nepal has for quite some time used the services of the lower court Judges and Officers of the Nepal Judicial Service for the conduct of election. These judges and officers are deputed to work as Returning Officers with the permission of the Judicial Council and the Judicial Service Commission respectively. The observation and monitoring of election by independent observers- both domestic and international- is a more recent best practice. During the Constituent Assembly election held in 2008, more than 60,000 national and over 800 international observers went to different parts of the country to observe election.

Now, coming to the election related complaints, I take the view that it should be examined in the broader ambit of election. This starts with the validity of electoral laws, registration or de-registration of the political party with the Election Commission, eligibility in the election, preparation of electoral rolls and the like. These issues have come to the Supreme Court in one way or the other in matters such as registration or de-registration of a political party,[3] the right to use election symbols,[4] qualification or

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[2] For this purpose Election to the Members of the Constituent Assembly Act, 2007, Election Commission Act, 2007, Election (Offences and Punishment) Act, 2007, The Constituent Assembly Court Act, 2007, The Electoral Rolls Act, 2006, Local Bodies Election Process Act 1991, the Voters Identity Provision Act 1997, the Constituency Delimitation Act 1991, the Political Parties (Registration) Act 2001 and the rules to supplement them are in place.

[3] For instance, the 1990 Constitution, while laying down criteria for registration with the Election Commission, provided that the Commission shall withhold recognition of the political party which has been formed on the basis of religion, community, caste, tribe or region. In *Khagendra Jung Gurung* v *Chief Election Commissioner and Others* (NEPAL LAW REPORTER 1991, p114 decision no 4270) a party titled "National Janajati Party" was denied registration by the Election Commission on the above ground. When the matter came to the Supreme Court, it endorsed the action of the Election Commission to withhold registration. Similarly, in *Gopal Gurung v Election Commission and Others* (N.L.R. 1995 p 19 decision no 5030) the Supreme Court approved the decision of the Election Commission to withhold registration of a party called "Mangol National Organization" which denied membership to people other than those of mongoloid origin.

[4] This issue pertains to the provision of the 1990 Constitution which set a three percent threshold for obtaining the status of a national party. In *Purendra Aryal v Election Commission and Others* (N.L.R 1993 p 59 decision no 4690) the petitioner claimed that the "three percent rule" was against the right to form political party which embodied the Constitution and its preamble. Rejecting the claim the Supreme Court held that the said provision had intended to accord national orientation to political parties and make them more responsive to the people, and hence not against the structure of the Constitution. Similarly in *Prabhunarayan Chaudhary v Election Commission and Others* (N.L.R. 1994 p314 decision no 4905), the Supreme Court observed that the requirement that a party secure three percent votes did not mean that it could not contest an election before meeting the three percent threshold. It only meant that prior to crossing the three percent threshold, its candidates could not use uniform symbol for all its candidates as the national parties did.

disqualification of the voters,[5] publication of electoral rolls,[6] and authenticity of the fractions of the political organization or party.[7]

Now, following the promulgation of the Interim Constitution, the Constitution and other governing laws envisage the following types of disputes and provide for complaint handling institutional mechanism.

- Pre election offences and misconducts
- Election period offences and misconducts
- Post election offences and misconducts

These offences and misconducts are handled by different institutions such as the Constituent Assembly Court established by the Constitution, the Court designated under Election (Offences and Punishment) Act, 2007, Election Commission, Returning Officer, Polling Officer and the Monitoring Team.

The Constituent Assembly Court is a court created to specifically hear cases relating to the election to the Constituent Assembly. The Court consists of three judges who are drawn from amongst the sitting Justices of the Supreme Court. The Interim Constitution accords the Constituent Assembly Court a status similar to the Supreme Court. In addition, the Constituent Assembly Court Act, 2007 makes legal provisions for the jurisdiction and procedures for handling such cases. The disputes relating to the following matters fall upon the jurisdiction of the court.

- Invalidation of the election of a member of the Constituent Assembly;
- Offences relating to the election of the members of the Constituent Assembly; and
- Disqualification of a member of the Constituent Assembly

In general, the jurisdiction of the Court is exercised collectively by all three judges of the Court. Any decisions and orders issued by the Court shall be final. No judicial review may be made against its decisions.

A survey of case law shows that following the election to the Constituent Assembly held in 2008, seventeen cases were filed to the Constituent Assembly Court and sixteen of them are already disposed off. Among these, four cases related to the disqualification of the member and remaining thirteen claimed the invalidation of election both on account

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[5] For instance, in *Jagadish Chandra Pandey v Cabinet Secretariat and Others* (unpublished, writ no 3361 of the year 1996, decision dated 6/26/1998) the disqualification of the voter on the ground of lunacy, conviction in election offences mentioned in the Electoral Rolls Act 2006 was claimed to be against the 1990 Constitution. The Court rejected the contention on the ground that the Constitution had provided for qualification of the candidates and allowed parliamentary enactment providing qualification of the voters.The court further held that any person over the age of 18 years did not *ipso facto* acquire the voting right, but required to follow the procedure, and the time line of the law and get his/her name registered in the electoral rolls.

[6] In *Laxman Sharma v Election Commission and Others* (unpublished decision, writ no 3014 of the year 1993, decision dated 1/10/1994), observing that publication of the electoral rolls was a precondition for free and fair election, the Court ordered the Election Commission to get the rolls published through returning officers in each constituency.

[7] For instance in *Baburam Bhattarai v Election Commission and Others* (N.L.R 1997 p. 326 decision no 6394), when the Election Commission recognized one of the fractions the other fraction led by the petitioner filed a writ at the Supreme Court challenging the decision of the Commission for the lack of the jurisdiction. The Court found that even though this issue was tackled by adding a provision in Section 23(a)(1) in the Member of the House of Representative (Election) Act at a later date, at the time of decision by the Commission however, such a provision did not exist. On this ground, the Supreme Court held that the Commission lacked jurisdiction do decide as to which of the fractions enjoyed official status, and hence it issued a writ of certiorari and quashed the decision of the Election Commission.
The latest being the case of *Sarita Giri v Election Commission and others* (unpublished decision, Writ no 0623 of the year 2009, decision dated 9/3/2010.) where fractions after fractions had claimed the official status of the party and the decisions of the Election Commission given at different times also contradicted with one another. When this was raised, the Supreme Court, through a writ of mandamus, asked the Commission to take note of its earlier stands and also the rulings of the Supreme Court and the Constituent Assembly Court in cases filed by the same party, and take a reasoned decision.

of vote rigging and the opponent's involvement in election related offences. Out of the thirteen cases, in ten cases the petitioners prayed that the election be declared void on ground that the opponents had made unlawful influence on the voters or defamed the candidate or obstructed election campaign of petitioner or had made undue influence to employees during election time or received or gave ballot paper illegally and so on. The other three petitions claimed that the entire election process be declared void on account of making obstruction to the appointment of polling agents; irregularity and monopoly in the counting process, domination of one political party during the counting of votes and non-abidance to mandatory election procedures. One such case is *Hit Bahadur Tamang v Election Commission and Others*,[8] where the petitioner claimed that election in the eight polling stations, where ballot papers without the signature of the Polling Officers were found to have been used, should be held void and re-election in these stations be conducted. He further claimed that the Polling Officer had done this intentionally to raise the prospect of his opponent winning the election; it violated the provisions of the Election (Offences and Punishment) Act 2007. In this case, the Constituent Assembly Court rejected the petition on the ground that the votes without the signature of Polling Officer in the ballot papers were already declared invalid on the course of counting, and it also judged that the numbers of the invalid ballot papers did not make any difference on the whole result of that particular constituency.

All the four petitions seeking disqualification of a member of the Constituent Assembly pertained to the proportional electoral system. In this system, introduced for the first time in Nepal for the Constituent Assembly, the political party submits a closed list of candidates with the Election Commission prior to the conduct of election. And once the election is held, it, on the basis of the votes received during the election, sends the name of its candidate to the Commission for approval and seeks his/her declared elected. In the four petitions that the Constituent Assembly Court received, the petitioners challenged the selection of candidates by political party for the purpose of proportional electoral system and the approval given by the Election Commission to such selection on the ground that the political party as well as Election Commission did not follow the provisions stipulated by the Constitution, the electoral laws and the Charter of the concerned party. For instance in *Punnebajra Lama and Others v Election Commissions and Others*,[9] it was claimed that the decision of the Election Commission which declared four of the respondents elected on the basis of proportional representation should be quashed. In this case, it was contended that following the election to the Constituent Assembly, the President of the political party whom the petitioner belonged, had sent the name of these candidates to the Election Commission from the closed list without official endorsement by the said Party. Here, the CA Court took the view that it was an internal matter of the Party, and anybody challenging the decision should have the authority of the Party. Since the petitioner did not submit such authorization along with the petition, the Court considered this as an individual claim and hence dismissed the petition for the lack of *locus standi.*

Besides the Constituent Assembly Court, another forum envisaged by law for handling electoral disputes is the Designated Court. This Court formed under Election (Offences

[8] Petition no 4 of the year 2008, decision dated 31/12/2008, published in Collection *of Cases decided by the Constituent Assembly Court*, Kathmandu 2009 at p 41.

[9] Petition no 15 of the year 2008, decision dated 2/7/2008, in *ibid* at p 187.

and Punishment) Act, hears cases related to the election of state organs other than the election to the Constituent Assembly. This is in line with the practice of designating electoral tribunals to hear electoral disputes followed in Nepal.

Election is a process where in many instances on-the-spot decision is required. For this purpose, the Election (Offences and Punishment) Act, vests the Returning Officer, Polling Officer and the Monitoring Team with the power to punish any person on offences such as taking arms and using arms during election period, creating obstacles on election campaign, trespass into restricted areas, obstructing the counting of votes, using vehicles exceeding in numbers permitted by the Commission and so on. The Polling Officers and the Returning Officers in special circumstances can also cancel or postpone the election of the polling stations. It is incumbent upon the said Officers to report to the Election Commission of the emergent situation and take its directives on the matter. The Commission has the final authority to cancel and order re-polling in some polling stations or the entire constituency.

Coming to the lessons learnt and the best practices, I would like to submit that the democratic practices in Nepal are relatively new. But we have experienced many positive trends in the exercise of sovereign people's right to election. For instance, there is tremendous interest of the people in the election. This is corroborated by high turnout of the voters during the CA election (approximately 61% voters practice their voting right) and increasing participation of political parties and candidates.

Right from the beginning, Nepal emphasized on holding election by an independent body. The independence for the Election Commission and the involvement of judges and other officers of the Nepal Judicial Service for conducting election, and the creation of independent dispute settlement mechanism illustrates the emphasis to independence, impartiality and fairness of the electoral process.

In spite of the above being some positive trends, there are many areas where reform in policy, law and practice of election is required. Research have indicated the need to reform in matters such as maintaining law and order throughout the nation, voter education, capacity building of the human resource, autonomy of Election Commission including financial and security matters, reforms in preparing voters' list, monitoring of election process, strengthening of partnership among the Election Commission, the judiciary, monitoring agencies, especially the media and civil society, instant handling of criminal offences, and prompt dealing law-breakers and anti-social elements.

Finally, I am confident that the discussion being held here and the sharing of experiences of other countries will help to further reform the election process in Nepal to make it free, fair, participatory, inclusive and trustworthy.

I thank you all for your kind attention.



ROLE OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN IN MAINTENANCE OF THE CONSTITUTIONAL LEGALITY IN ELECTION PROCESS

Rogov Igor Ivanovich
Chairman of the Constitutional Council
of the Republic of Kazakhstan

Dear Mister President, dear participants of conference!

Ladies and gentlemen!

In system of state structures of the Republic of Kazakhstan providing observance of the election legislation in the course of the organisation and holding of elections, the special place is taken by the Constitutional Council. Carrying out within the powers the control over conformity of the current legislation to the country's Basic Law, the Constitutional Council of the Republic of Kazakhstan provides exact and steady observance of the principles of the suffrage fixed in the Constitution at acceptance and application of the election legislation.

One of the basic powers of the Constitutional Council of the Republic Kazakhstan is realised as the preliminary constitutional control, consideration of references about constitutionality of the carried out elections.

According to article 72 of the Basic Law of Kazakhstan in case of dispute the decision of a question on correctness of elections of the President and deputies of Parliament of the Republic is within the competence of the Constitutional Council. At the reference of corresponding subjects to the Constitutional Council, the introduction into a post of the President and registration of the selected deputies of Parliament must be suspended.

The mechanism of realisation of the given constitutional norms is established in articles 68, 84 and 100 of the Constitutional laws of the Republic of Kazakhstan «On elections in the Republic of Kazakhstan». Within ten days after summarising of elections under the reference of the President, Chairmen

of Chambers of Parliament, the Prime-minister and-or not less the one fifth part from the general numbers of deputies of the Parliament, the Constitutional Council is competent to consider a question on constitutionality of the held elections.

In case of receipt of the reference and its acceptance to the constitutional procedure, the Central election commission of the Republic of Kazakhstan transfers all materials connected with preparation and holding elections, to the Constitutional Council which by results of consideration accepts the final decision.

In case of a recognition by the Constitutional Council of the Republic of Kazakhstan that elections not corresponding to the Constitution, the Central election commission makes the decision on their recognition void and carrying out within two months of repeated voting.

On the basis of stated it is possible to draw a conclusion that the Constitutional Council is the arbitrator of an ultimate authority in case of occurrence of any disputes concerning constitutionality of the elections in the Republic of Kazakhstan.

The Constitutional Council of the Republic of Kazakhstan is allocated also by other powers allowing it to play a key role in maintenance of the constitutional legality. The constitutional Council faced time and again the questions, concerning legal aspects of elective process. Legal positions of body of the constitutional control of Kazakhstan, expressed in its decisions, in the subsequent were used for the further perfection of the elective legislation.

The Constitutional Council of the Republic of Kazakhstan accepts a number of the standard decisions, concerning selective process. They contain the analysis of principles, general provisions and the norms of the Constitution regulating realisation of suffrages of citizens.

Analyzing influence of decisions of the Constitutional Council of the Republic of Kazakhstan on development of the elective legislation, it is necessary to note its legal position concerning citizenship institute at realisation of the passive and active suffrage.

The Constitutional Council of the Republic of Kazakhstan in the decision from December, 1st, 2003 No.12 gives official interpretation of norms of articles 10, 12 of Basic Law concerning questions of acquisition and the termination of citizenship of the Republic of Kazakhstan, the rights, freedom and duties of citizens of Kazakhstan, foreign citizens and persons without citizenship. So, the Constitutional Council has established that the citizenship institute is a defining sign of the sovereignty, independence and the constitutional system of republic as, according to the Constitution, the people of Kazakhstan consisting of its citizens, are «a unique source of the government» and «carries out the power directly through a republican referendum and free elections, and also delegates realisation of the power to state structures». Thereupon only the citizen of Kazakhstan possesses full volume of the rights and the duties established for it by the Constitution, laws and other standard legal acts. Persons without citizenship or the persons who are citizens of other states are not supposed to posts of the President, deputies of Parliament and local state organs, judges,

etc.

By preparation and acceptance of the Constitutional law of the Republic of Kazakhstan from April, 14th, 2004 «On modification and additions in the Constitutional law of the Republic of Kazakhstan «On elections in Republic Kazakhstan» the legislator had been considered positions of decisions of the Constitutional Council concerning an establishment of restriction of the right of the citizen to be the elected works on the basis of outstanding or not removed, up the time of registration as the candidate, a previous conviction, change of principles of formation of territorial, district and local election committees, definition and appointment of "an electronic electoral system" and possibility of presence at a premise for voting of the expert by service of an electronic electoral system, formation of lists of political parties, etc.

The Constitutional Council of the Republic of Kazakhstan accepts also other decisions which concern questions of formation of party lists, registration of candidates and possibility of their repeated balloting in Parliament.

The role of the Constitutional Council of the Republic of Kazakhstan is shown as well in separate stages of selective process.

According to the Constitutional law of the Republic of Kazakhstan from September, 28th, 1998 «On elections in the Republic of Kazakhstan» during selective process disputes on infringements of the legislation on elections can be considered by court. According to article 78 of the Constitution of the Republic of Kazakhstan the court by consideration of such disputes does not have the right to apply laws and other legal acts striking the rights and freedoms of the person and the citizen fixed by the Constitution. If the court sees that the law or other legal act which is subject to application, restrains constitutional laws and freedoms of the person and the citizen, he is obliged to suspend court procedures and to address in the Constitutional Council with representation about a recognition of this act as the unconstitutional. It allows to warn cases of infringement of suffrages of citizens and by that, not to suppose Basic Law infringements at early stages of elective process.

Thus, activity of the Constitutional Council testifies to its considerable role in formation and development of the elective legislation of the Republic Kazakhstan which observance is the constitutional duty of all subjects of elective process. The spent reform of an electoral system pursuing the aims of its maximum approach to the international standards and use of the advanced information technology at elections, was carried out within the limits of principles and ideas of the Basic Law and legal positions of body of the constitutional control of Kazakhstan.

Dear ladies and gentlemen!

General election in any state is the direct form of expression of will of the people which are a unique source of the government. Strict following in this process to principles and positions of the Constitution and the elective legislation, is pledge of legitimacy of results of elections. It is assured that today it will be stated many fruitful ideas and recommendations concerning maintenance of the specified constitutional requirements.

Thank you for attention.

DEALING WITH ELECTION COMPLAINT IN THE LAO PDR

Khammy Xayavong
Chief Justice of the Supreme People's Court of
Lao People Democratic Republic

Since the 18th century, the Lao people have been struggling for their independence. The Lao People Revolutionary Party eventually achieved the complete liberation of the country on December 2, 1975 with the foundation of the Lao PDR and establishes the Supreme People Assembly to be a representative of the Lao people through out the country and the Supreme People Assembly changed is name to the National Assembly until present. According to the article 52 Constitution of the Lao PDR which provides that ***the National Assembly is the representative of the rights, powers and interests of the multi-ethnic people.*** Therefore, the people select the National Assembly member to be their representatives in the National Assembly.

The election processes begin after the National Assembly Standing Committee appoints the Election Committees which the appointment is then promulgated by a presidential Decree at least 120 days before the election. The Committee for the election of the National Assembly members composes of:

- National Election Committee;
- Provincial and capital election committee;
- District election committee;
- Committee at the level of polling units (Villages);

The National Election Committee proposes to all organization of the party and state and other organizations nominate a list of their candidate to the election committee to consider and approve. Then the national election committee will make official announcement of the name of candidate at least 60 days before the election. After the official announcement, the Party and the State and other organizations concerned begin to organize the campaign for their candidate and also the candidate has to organize the campaign for him/herself. The campaign will stop one day before election.

The voting for the National Assembly members start from 7:00 am to 5:00 pm. However, the committee at the level of polling units has the right to decide opening or closing before 7:00 am or after 5:00 pm according to the

real situation in the location. The Election Committee at the polling unit has to advise the rule and method relating to voting to all voters to ensure that they understand before opening the voting. After official closing for voting, the committee at the level of polling unit shall count the voting openly in front of witnesses, voters, but not the candidates; the journalists and the representative of candidate may observe and follow the counting of votes. The Committee at the level of polling unit has to record the result of voting which one of the record is the resolving the petitions relating to the voting that the committee at the level of polling unit dealt with, and also recording of the unresolved petition that the committee could not dealt with.

The election committees have the rights to resolve the complaint relating to the elections that the voters propose to the committee; in principle, the election committees at the level of polling units have to resolve the complaints related to the election. However, the complaint relating to the activities of the election committee must be resolved by the upper election committee.

The election committee at the level of polling unit shall deal with the requests or petitions that voters propose to the committee. However, if the committee could not deal with such petition or request, the committee shall propose to the higher committee for considering.

The voters have the rights to appeal the decision of the election committee to the higher level of the election committee (Administrative Appeal). In case of the voters disagree with the final decision of the election committee; the voters can bring the petition to consider in the court. Due to the fact that the Lao PDR do not have the administrative court or constitutional court, the civil chamber in the people court has the rights to consider the case relating to the administrative relationship including the cases involving the mistake in the list of person eligible for election, which the election committee was not able to solve.

The voters also have the rights to propose the dismissal of the members of the National Assembly if he or she found to be unworthy or to have engaged in disgraceful behavior. The proposal shall propose to the National Assembly though the National Assembly Standing Committee. The dismissal must be approved by the majority of the National Assembly members attending the session.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

DEALING WITH ELECTION COMPLAINTS IN AUSTRIA

Dr. Brigitte Bierlein
Vice-President of the Constitutional Court of Austria

The jurisdiction of the Austrian Constitutional Court on electoral disputes is regulated by Art. 141 of the Austrian Federal Constitution Act *(Bundes-Verfassungsgesetz, B-VG)*[1] and comprises three different types of powers: the review of elections (i.e. jurisdiction on electoral disputes in a narrower sense), decisions on the loss of a seat as well as decisions on challenges of the results of popular initiatives, consultations of the people or referenda.

[1] Art. 141 ofthe Austrian Federal Constitution Act:
(1) The Constitutional Court pronounces upon

a) challenges to elections of the Federal President and elections to the general representative bodies, the European Parliament and the constituent authorities (representative bodies) of statutory professional associations;

b) challenges to elections to aLand Government and to municipal authorities entrusted with executive power;

c) application bya popular representative body for a loss of seat by one of its members; application by at least eleven members of the European Parliament from the Republic of Austria for a loss of seat by a member from the Republic of Austria;

d) application by a constituent authority (representative body) of a statutory professional association for a loss of seat by one of the members of such an authority;

e) the challenge to rulings whereby the loss of a seat in a general representative body, in a municipal authority entrusted with executive power or in a constituent authority (representative body) of a statutory professional association has been enunciated, in so far as laws of the Federation or the Laender governing eleetions provide for declaration of a 1055 of seat by the ruling of an administrative authority, and after all stages of legal remedy have been exhausted.
The challenge (application) can be based on the alleged illegality of the electoral procedure or on a reason provided by law for the loss of membership in a general representative body, in the European Parliament, in a municipal authority entrusted with executive power, or in a constituent authority (representative body) of a statutory professional association. The Court shall allow an electoral challenge if the alleged illegality has been proved and was of influence on the eleetion result. In the proceedings before the administrative authorities the general representative body or statutory professional association has litigant status.

(2) If achallenge pursuant to para 1 subpara a above is allowed and it thereby becomes necessary to hold the election to a general representative body, to the European Parliament or to a constituent authority of a statutory professional association in whole or in part again, the representative body's members concerned lose their seat at the time when it is assumed by those elected at the ballot which has to be held within a hundred days after delivery of the Constitutional Court's decision.

(3) The preconditions for adecision by the Constitutional Court in challenges to the result of popular initiatives, consultations of the people or referenda will be prescribed by Federal law. How long, in view of the possibility of such a challenge, it is necessary to retard publication of the law about which a referendum has taken place, can also be laid down by Federal law.

1. The review of elections

1.1. General

The following elections may be challenged with the Constitutional Court: the election to the Federal President, elections to general representative bodies (National Council-Deputy Chamber of Parliament, Federal Council - second Parliamentary Chamber representing the interests of the Austrian *Laender* in the national legislative process), elections to the European Parliament, elections to the constituent authorities (representative bodies) or statutory professional associations, elections to the *Land* governments and elections to municipal authorities entrusted with executive power (mayor, municipal executive board).

1.2. The standard of review of the Constitutional Court

The electoral challenge may be based on any alleged illegality of the electoral procedure.

The constitutional court exercises its power to review elections only within the limits of the alleged illegality.[2] It follows strict line when answering the question whether a violation of electoral law has taken place.[3]

1.3. The entitlement to initiate electoral challenge

The entitlement to challenge elections is regulated by the constitutional court Act *(Verfassungsgerichtshofgesetz - VfGC).* These provisions clarify that pursuant to Art. 141 of the Austrian constitution Act, the right to stand for election *(passives Wahlrecht)* and the right of electoral groups to the observance of electoral law are considered to be enforceable subjective rights. Accordingly, the right to vote *(aktives Wahlrecht)* is only enforceable for electoral groups celectoral parties). In detail, the following individuals or groups are entitled to challenge elections:

- Candidates: Any candidate who claims to have been unlawfully declared ineligible in the course of the electoral procedure may lodge an electoral challenge with the (onstitutional Court.
- Electoral groups: Elections may be challenged by electoral groups celection parties) which have presented Iists of candidates for election in a way provided for by law. Entitled to electoral challenge are electoral groups who have presented election proposals to the legally defined electoral authority in time. According to the case law of the Austrian Constitutional Court, the admissibility of such proposals is not required.[4] The electoral challenge has to be filed by the representative of the electoral group authorized to accept service. If an Electoral Act does not provide for a presentation of election proposals as described, the entitlement to challenge has to be in accordance with the special provisions of the respective Eleetoral Acts.[5]
- Members of electoral bodies: Elections to a *Landgovernment* or elections to a municipal authority entrusted with executive power may be challenged by at least one tenth, in no case fewer than two, of the members of *a Land* parliament or a municipal council, respectively.

[2] VfSlg. 8700, 9011, 14.080; see also VfSfg. 9224.

[3] VfSlg. 8270, 8447, 11.022.

[4] VfSlg. 13.349.

[5] VfS/g. 9912.

1.4. The proceedings before the Constitutional Court:

Election review proceedings may only be initiated upon application. The application has to request the annulment of the entire electoral procedure or a certain part thereof, and has to give reasons in support of the annulment.

An electoral challenge has to be lodged with the Constitutional Court within four weeks after the completion of the electoral procedure. In cases, where the respective Electoral Act provides for administrative stages of appeal, it has to be lodged within four weeks after the delivery of the last instance administrative authority's decision. If such an administrative decision is not provided for, the Constitutional Court assumes that the electoral procedure is completed with the last legal act provided for by the respective Electoral Act, which is in general the last official publication of the election results.[6]

1.5. The decision of the Austrian Constitutional Court

- If the Constitutional Court allows an electoral challenge because a non eligible person had been declared eligible, it has to declare void the election of this particular person. Although the admission of a non eligible person constitutes an illegality, the Constitutional Court does not annul the respective part of the electoral procedure in this case. The election is considered to be legal and the declaration of the lack of eligibility is regarded as a retroactive loss of a seat, whereby provisions regulating the succession of mandataries apply.

- If the Constitutional Court allows an electoral challenge because an eligible person has been unlawfully declared ineligible, the Constitutional Court's judgment has to state whether thereby the election of other persons has become nil and void. If this is the case, the Constitutional Court has to annul the election of these persons.

- In the case of any other proved illegality during an election procedure, the decisive factor is whether this illegality was of influence on the election result. According to the case law of the Austrian Constitutional Court, legal provisions regulating elections have principally to be interpreted in a strict sense.[7] It is, therefore, sufficient for the annulment of an election that the proved illegality could possibly have influenced the outcome of the election.

In its judgment allowing the electoral challenge the Constitutional Court has to declare void either the entire electoral procedure or certain precisely identified parts thereof.

1.6. The legal effect of the Constitutional Court's judgment

The electoral authorities are bound to the facts and to the legal opinion of the Constitutional Court.

[6] VfSlg. 9342, 11.022.

[7] VfSlg. 7784, 8270 *et al.*

2. The declaration of the loss of a seat

2.1. General

Art. 141 para 1 lit c, d and e of the Austrian Constitution Act regulate the loss of a legally acquired seat. The loss of such a seat may either be pronounced by the Constitutional Court itself (direct proceedings) or by decree of an administrative authority (indirect proceedings). If the declaration of the loss of a seat by an administrative authority is provided by law, the respective decree may be challenged before the Constitutional Court pursuant to Art. 141 para 1 lit e.

The reasons for which a seat may be declared lost have to be laid down by law.

2.2. The subject-matter of the proceedings with regard to the loss of a seat

The proceedings before the Constitutional Court apply to seats in general representative bodies, to the Austrian seats in the European Parliament, to seats in a constituent authority (representative body) of statutory professional associations and to seats in municipal authorities entrusted with executive power.

2.3. The entitlement to initiate proceedings

With regard to direct proceedings, an application may be filed by the general representative body or the constituent authority (representative body) of a statutory professional association. The application must be based on a resolution of the respective representative body. When an Austrian seat to the European Parliament is the subject of the Constitutional Court proceedings, 11 Austrian Deputies are entitled to lodge an application.

The admissibility of an application is not bound to any further preconditions, not even to a time limit.

In indirect proceedings, the addressees of the administrative decree may file an application with the Constitutional Court. This is, first and foremost, the person whose seat has been declared lost, but also the general representative body or the constituent authority (representative body) of a statutory professional association. The exhaustion of all stages of appeal is a precondition for these proceedings. It is furthermore required to file the application within six weeks after the service of the last instance decree. The application has suspensive effect.

2.4. The judgment of the Constitutional Court

In direct proceedings, the Constitutional Court has to declare the loss of the seat provided the reasons required by law are met otherwise it has to dismiss the application.

In indirect proceedings, the Constitutional Court has to annul the decree when the alleged illegality has taken place otherwise it will dismiss the challenge.

3. Challenge of the results of popular initiatives, consultations of the people and referenda

Pursuant to Art. 141 para 3 of the Austrian Constitution Act, Federal Law has

to define the conditions under which the Constitutional Court decides challenges to the result of popular initiatives, consultations of the people or referenda. The Popular Initiatives Act, the Act on Consultations of the People and the Referenda Act contain such provisions.

3.1. Only the (alleged) illegality of the procedure may be claimed as reason for the challenge.

3.2. As regards popular initiatives, the representative of the application to initiate a popular initiative or four members of the National Council (Deputy Chamber of Parliament) or of a *Landtag* (Parliament of a *Land)* are entitled to file an application with the Constitutional Court. 100 to 500 voters of a constituency (the exact number depends on the size of the constituency) may initiate the challenge of the results of referenda and consultations of the people.

3.3. The challenge must be filed with the Constitutional Court after the publication of the respective results and has to be based on a well-founded application requesting the declaration of nullity of the results' determination by the Federal Election Board.

4.4. Certain provisions of the Constitutional Court Act have to be applied with regard to the proceedings before the Constitutional Court, such as, for instance, the entire or partly annulment and the binding effect of the Constitutional Court's judgment for the election authorities. If necessary, the Constitutional Court may also correct the numeric determination by the Federal Election Board.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT IUDGES

DEALING WITH ELECTION COMPLAINTS: AN INDONESIAN PERSPECTIVE[1]

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A. Democracy and General Elections

There is no democracy without general elections. It is not possible to realize democracy defined as government administration by the state based on recognition of the people's sovereignty without holding general elections. In the context of a democratic state, general elections have at least three strategic functions. First, general election is a form of recognition that the people hold the supreme power in state administration. Secondly, general elections are the most viable mechanism for establishing state governance which is in accordance with the people's aspiration. Thirdly, general elections are also a control mechanism to prevent the rise of an excessively dominant power leading to the abuse of power. It also serves as a peaceful mechanism for putting to an end power which is contradictory to the people's will.

Such close relationship between general elections and democracy is also quite evident in the democratization process in a country. A peaceful democratization process can only be achieved through general elections or at least, it must be immediately followed with the holding of democratic general elections. The 1998 reform movement in Indonesia was immediately followed by the holding of the 1999 general election. Such general election was necessary to end the political crisis by establishing a new government with a democratic legitimacy. Without the democratic general election in 1999, the political and constitutional crisis would have continue.

In the further course of the Indonesian nation's development, the general election reform became a part of democratization process. A fundamental reform was conducted not only in the political party system, the election system,

[1] Presented at the 7th Conference of Asian Constitutional Court Judges on July 12-15, 2010 in Jakarta, Indonesia.

institution for organizing general elections, but also in the representative and presidential institutions. These fundamental changes were also introduced through the Amendment to the 1945 Constitution in 1999 until 2002, which was subsequently followed by amendments made at the level of laws, particularly those related to the organization of the 2004 and 2009 General Elections. The Constitutional Court (CC) of the Republic of Indonesia was also established based on the amendment to the 1945 Constitution, with one of its authorities being to hear and decide upon cases of dispute concerning the results of general elections at the first and final instances.

In order for general elections to remain vested as the main character of democracy, they must be defined as a substantive issue, not only serve as a mechanism for establishing and giving the government legitimacy, but also to guarantee that the government meets the people's aspirations and will. Therefore, a legal framework for general elections is necessary in order to guarantee that general elections are held in an honest and fair manner throughout the process of general elections. A legal framework is required bearing in mind that from political point of view, general elections are an arena of competition among political forces aimed at securing or maintaining power. These political forces cannot be allowed to take control in setting the rule of the game as they are certain to use such position to obtain or maintain power. Law is also needed to solve any form of dispute in the process of general elections, as it is impossible for such political forces to resolve them by themselves. Any failure to solve any dispute in the process of general elections poses an extremely high risk as it most likely to cause political crisis which often leads to the disappearance of the democratic system, with anarchy and authoritarian regime replacing it.

B. Role of the Constitutional Court in the Development of General Election Law

For the purpose of materializing democratic general elections, Indonesia has developed general elections law in compliance with the principles of democracy and constitutional state. The general elections law covers various relevant legal aspects, among other things the Law regarding Political Parties, the Law regarding Legislative General Elections, the Law regarding Presidential and Vice Presidential Elections, the Law regarding Regional Government, as well as the Law regarding the Organizer of General Elections. The formulation of the general elections law is the main duty of law-making institutions, namely the House of Representatives and the President. Indonesia's general elections law has undergone several changes during the reform era in accordance with the general elections held, namely in 1999, 2004, and 2009, respectively.

In the course of its development, the general elections law has also been significantly affected by the demand made by the citizens through the decisions of the Constitutional Court, particularly those concerning the Judicial Review of Law (*Pengujian Undang-Undang/*PUU) and concerning Dispute Concerning the Results of General Elections (*Perselisihan Hasil Pemilu/*PHPU). The high level of citizens' participation and attention to the General Elections law are quite evident from the great number of petitions filed for judicial review of laws related to the General Elections law. Up to the present time, the Constitutional

Court has received and decided upon 2 petitions for judicial review of the Law regarding Political Parties, 24 petitions for judicial review of the Law regarding Legislative General Elections, 8 petitions for judicial review of the Law regarding Presidential Elections, 17 petitions for judicial review of the Law regarding Regional Government related to Regional Head and Deputy Regional Head Elections, and 1 petition for judicial review of the Law regarding the Organizer of General Elections. There have been several decisions of the Constitutional Court granting the petition filed, which has had a significant impact on the development of the general elections law in Indonesia. These decisions have been aimed at guaranteeing a democratic implementation of general elections in compliance with the direct, public, free, secret, honest and fair principles as provided for in the 1945 Constitution.

The following are some of the Constitutional Court's decisions affecting directly the development of general elections law, among other things:

1. Reinstatement of the Voting Rights of Former Members of Banned Organizations

In the history of general elections in Indonesia since the New Order era, a group of people in society were was denied their voting rights, namely former members of PKI (Communist Party of Indonesia), including members of its mass organizations and persons involved directly or indirectly in the G 30S/ PKI incident. In the reform era, the restriction of voting rights was reduced to the restriction of the right to be nominated as candidate. This is also set forth in Article 60 sub-article g of Law Number 12 Year 2003 regarding the General Elections of the Members of the House of Representatives, the Regional Representatives' Council and the Regional House of Representatives. One of the requirements sets forth in this provision for the candidate members of the House of Representatives, the Regional Representatives' Council, the Provincial House of Representatives and the Regency/Municipality House of Representatives is that former members of banned organization of the Communist Party of Indonesia (PKI), including its mass organizations or persons either involved directly or indirectly in G30S/PKI or other banned organizations, shall be prohibited from becoming candidate members of the House of Representatives, the Regional Representatives' Council, the Provincial House of Representatives and the Regency/Municipality House of Representatives.

With regard to the foregoing provisions, the Constitutional Court has referred to the provision of the 1945 Constitution prohibiting discrimination as stated in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) of the 1945 Constitution. The abovementioned Article 60 sub-article g of Law Number 12 Year 2003 clearly prohibits a group of Indonesian citizens (WNI) to be nominated and to use their right to be candidate based on their political beliefs.

The Constitutional Court has held that the restriction of the right to be nominated as candidate is only based on political consideration. Normally, the restriction of voting right in general elections can only be applied based on the considerations of incompetence and impossibility. Prohibiting a certain

group of citizens from nominating themselves as members of the House of Representatives, the Regional Representatives' Council and the Regional House of Representatives as set forth in Article 60 sub-article g contains an undertone of political punishment of a specific group. As a constitutional state, every prohibition directly related to the rights and freedoms of a citizen must be based on court decision which has obtained permanent legal force. Accordingly, the Constitutional Court through Decision Number 011-017/PUU-I/2003 has held that the provision of Article 60 sub-article g of the General Elections Law which reads as follows "shall not be the former members of banned organization of the Communist Party of Indonesia, including its mass organizations nor persons either involved directly or indirectly in the September 30 movement/Communist Party of Indonesia or other banned organizations" constitutes a negation of citizens' human rights or discrimination based on political belief and accordingly, it is contradictory to the protection of human rights guaranteed by the 1945 Constitution, as intended in Articles 27 and 28D paragraphs (1), (3), and Article 28I paragraph (2).

2. Independence of the Organizer of Local General Elections

Case Decision Number 072-073/PUU-II/2004 states that Article 57 paragraph (1) of Law Number 32 of 2004 regarding Regional Government (Regional Government Law), to the extent of the phrase *"... responsible to the Regional House of Representatives*"; Article 66 paragraph (3) sub-paragraph e "*requiring the accountability for the performance of duties of the Regional General Elections Commission*"; Article 67 paragraph (1) sub-paragraph e to the extent of the phrase *"... to the Regional House of Representatives*"; and Article 82 paragraph (2) to the extent of the phrase "... *by the Regional House of Representatives*" of the Regional Government Law are contradictory to the 1945 Constitution and therefore have no binding legal force.

Article 57 paragraph (1) of the Regional Government Law states that Regional Head and Deputy Regional Head Elections are held by the Regional General Elections Commission who is responsible to the Regional House of Representatives. On the other hand, Article 66 paragraph (3) sub-paragraph e sets forth the duties and authorities of the Regional House of Representatives in holding regional head and deputy regional head elections, including among other things requiring the accountability for the performance of duties of the Regional General Elections Commission. Article 67 paragraph (1) sub-paragraph e sets forth one of the obligations of the Regional General Elections Commission, namely to account for budget appropriation to the Regional House of Representatives.

The Constitutional Court has been of the opinion that direct Regional Head Elections must be held based on the basic principles of General Elections, namely being direct, public, free, secret, honest and fair and being organized by an independent (autonomous) organizer. It is impossible to achieve the abovementioned purpose of the 1945 Constitution without requiring the Regional General Elections Commission as the organizer of direct Regional Head elections to be accountable to the Regional House of Representatives. The Regional House of Representatives, as the people's representative body

at the regional level, consists of elements of political parties as the actors competing in the direct Regional Head elections. Therefore, the Regional General Elections Commission must be accountable to the public rather than to the Regional House of Representatives, and it should only submit a report to the Regional House of Representatives on the performance of its duties as specified in Article 57 paragraph (2) of the Regional Government Law. In order to guarantee the quality of the implementation of democracy at the regional level, the provision of Article 57 paragraph (1) of Regional Government Law has been declared as being contradictory to the 1945 Constitution and as having no binding legal force.

3. Individual Candidates in the Local General Elections

The Constitutional Court through its Decision Number 5/PUU-V/2007 has granted the petition for the judicial review of Article 56 paragraph (2), Article 59 paragraphs (1), (2), and (3) of Law Number 32 Year 2004 regarding Regional Government. The aforementioned Articles set forth that candidate pairs of regional heads and deputy regional heads can only be nominated by political parties and the coalition of political parties. Therefore, individual persons cannot nominate him/herself as a candidate.

Article 18 paragraph (4) of the 1945 Constitution which reads as follows, "*Governors, Regents and Mayors respectively serving as heads of the regional government at the provincial, regency and municipal levels shall be elected democratically".* The Constitutional Court in its decision Number 072-073/PUU-II/2004 has held that legislators have the policy option to regulate procedures for regional head elections. The Regional Government Law has elaborated the command of Article 18 paragraph (4) of the 1945 Constitution by stipulating that regional heads and deputy regional heads are to be elected through direct general elections in which the candidates are to be nominated by political parties or the coalition of political parties. This constitutes the policy of legislators.

However, under Law Number 11 Year 2006 regarding Aceh Government, the existence of individual candidates are recognized along with candidates from political parties or the coalition of political parties. The Constitutional Court has been of the opinion that in order to provide citizens with equal rights as guaranteed by Article 28D paragraphs (1) and (3) of the 1945 Constitution, we cannot merely declare that the nomination of individual candidate set out in Article 67 paragraph (2) of Aceh Government Law is contradictory to the 1945 Constitution and that accordingly, it is inapplicable, because as a matter of fact individual nomination is not contradictory to the 1945 Constitution.

The equality of right can be achieved by requiring the adjustment of the Regional Government Law to the most recent developments implemented by legislators, namely by granting individuals the right to nominate themselves as regional heads and deputy regional heads without joining a political party or a coalition of political parties as provided for in Article 67 paragraph (2) of the Aceh Government Law. The Court has been of the view that the opportunity for the individual nomination of regional heads and deputy

regional heads outside Nanggroe Aceh Darusalam Province has had to be provided in order to prevent dualism in the implementation of the provision of Article 18 paragraph (4) of the 1945 Constitution which can potentially result in the violation of citizen rights guaranteed by Article 28D paragraphs (1) and (3) of the 1945 Constitution.

4. Requirement of Domicile for Candidate Members of the Regional Representatives' Council (DPD)

Decision Number 10/PUU-VI/2008 is concerned about the judicial review of the provisions of Article 12 of the General Elections Law which does not specify the requirement of domicile and non-political party affiliation for candidate members of DPD, as well as Article 67 does not provide for the requirement for a candidate member of DPD to hold a Identity Card in the province represented by him/her and the evidence on non-political party affiliation. The Petitioners argued that the requirement of domicile represented the constitutional norm implicitly vested in Article 22C paragraph (1) of the 1945 Constitution. On the other hand, the requirement of non-political party affiliation represented the constitutional norm implicitly stated in Article 22E paragraph (4).

It is stated in the decision of the Constitutional Court that the requirement for a candidate member of DPD to be domiciled in the province he/she represents constitutes an implicit constitutional norm vested in the provision of Article 22C paragraph (1) which reads as follows, "*Member of the Regional Representatives' Council shall be elected from each province through general elections*" and Article 22C paragraph (2) which reads as follows, "*The Regional Representatives' Council shall have equal number of members and the total number of members of the Regional Representatives' Council shall not exceed one third of the total members of the House of Representatives.*" The implicit constitutional norm should be included as an explicit norm in Articles 12 and 67 of the General Elections Law as a requirement for a candidate member of DPD. However, in actual fact, Articles 12 and 67 of the General Elections Law fail to explicitly include such provision and therefore, they must be deemed unconstitutional.

5. Equal Treatment for Political Parties

Article 316 sub-article d of the General Elections Law states that political parties participating in the 2004 general election which do not comply with the provisions of Article 315 may participate in the 2009 General Election provided that they gain seats in the House of Representatives of the Republic of Indonesia as a result of the 2004 General Election. Several political parties viewed this provision as having impaired their constitutional rights and/or authority to participate in the 2009 General Election as guaranteed by Article 22E paragraph (3) of the 1945 Constitution.

The petitioner, as a party which had gained votes below electoral threshold in the previous general election and had failed to gain seats in the House of Representatives, felt that its right was impaired. Such impairment was due to the fact that other parties which had similarly not fulfilled the

electoral threshold in the previous general elections, but had gained seats in the House of Representatives, were allowed to participate in the subsequent general elections (2009) without verification by the General Elections Commission (KPU), while the parties of the Petitioners had to complete a verification phase by KPU.

In Decision Number 12/PUU-VI/2008, the Constitutional Court has held that through the General Elections Law, the legislators had altered the principle of electoral threshold adopted under Law No. 12 Year 2003 concerning the General Elections of the Members of the House of Representatives, the Regional Representatives' Council and the Regional House of Representatives into the principle of parliamentary threshold.

Based on the principle of parliamentary threshold as adopted in Article 202 paragraph (1) of the General Elections Law, the provision of Article 8 paragraph (2) of the General Elections Law is applicable, namely that "*Political Parties Participating in the previous General Election may participate in the subsequent General Election".* However, in order for their representatives to gain seats in the House of Representatives, the Political Parties Participating in General Elections must meet the minimum electoral threshold of 2.5% (two point five percent) of the total valid votes at the national level as intended in Article 202 paragraph (1) of the General Elections Law. In order to regulate the transition period as a result of transition from the electoral threshold to parliamentary threshold, based on Transitional Provisions (Chapter XXIII), Articles 315 and 316 of the General Elections Law stipulate that the Political Parties Participating in the 2004 General Election which were qualified to participate in General Elections after the 2004 General Election were those (among others) that had gained seats in the House of Representatives of the Republic of Indonesia as a result of the 2004 General Election, despite of their failing to meet the electoral threshold.

With regard to the foregoing, the Court has been of the opinion that the *ratio legis* and the consistency of Article 316 sub-article d of the General Elections Law in regulating the period of transition from the principle of electoral threshold to the principle of parliamentary threshold intending to be materialized through Article 202 of the General Elections Law were unclear. Political Parties Participating in the 2004 General Election, regardless of whether or not they complied with the provisions of Article 316 sub-article d of the General Elections Law, should have an equal position, namely as Political Parties Participating in the 2004 General Election not meeting the electoral threshold, as intended both by Article 9 paragraph (1) of Law No.12/2003 and Article 315 of the General Elections Law.

The Court has affirmed that Article 316 sub-article d of the General Elections Law constitutes a provision which provides for unequal treatment and leads to legal uncertainty and injustice for fellow Political Parties Participating in the 2004 failing to comply with the provisions of Article 315 of the General Elections Law. Therefore, the Court declared that the petition filed by the Petitioners was granted.

6. Use of Identity Card in General Elections

An issue arose in the course of implementation of the 2009 General Elections as a number of citizens had not been included in the Permanent Voters List (DPT) prepared by KPU. Consequently, in accordance with Articles 28 and 111 of Law Number 42 Year 2008, these citizens were not going to be able to exercise their voting rights due to the provision that citizens qualified to exercise their voting rights are those registered in the DPT.

Through Decision Number 102/PUU-VII/2009, the Constitutional Court has declared that the constitutional rights of citizens to vote and to be nominated as candidate are guaranteed under the constitution, laws and international convention so that any restriction, deviation, elimination and abolition of such rights constitute a violation of the citizens' human rights. These constitutional rights must not be impeded or impaired by any provision and administrative procedure which would prevent citizens from exercising their voting rights. The provision requiring a citizen to be registered as a voter in DPT is more of an administrative procedure and it must not negate substantial matters, namely the citizens' right to vote in general elections. Therefore, the Court was of the opinion that there was a need for solution to complete the existing DPT in order to remove the obstacle in the exercising of the citizens' rights. In its Decision, the Constitutional Court has stated that citizens not registered in DPT may continue exercising their voting rights by using Identity Card and Family Card or Passport.

7. Designation of Candidates-Elect Based on Majority Votes

Through Decision Number 22-24/PUU-VI/2008, the Constitutional Court has stipulated that the candidates-elect from a political party are designated based on majority votes acquired by the candidate members of the House of Representatives or the Regional House of Representatives. This has amended the provision of Article 214 sub-articles a, b, c, d, and e of Law Number 10 Year 2008 regarding Legislative General Elections providing that the candidates-elect are those gaining more than 30% (thirty percent) of the Denominator of Voters (BPP), or assuming a lower position. If no candidate reaches 30% (thirty percent) of BPP, nor assumes a lower position, those achieving 30% (thirty percent) of BPP are higher than the total proportional seats acquired by a political party participating in the General Elections, are unconstitutional.

The procedure for designating candidates-elect set forth in Article 214 sub-articles a, b, c, d, and e of Law Number 10 Year 2008 is declared unconstitutional as it is contradictory to the substantive meaning of the people's sovereignty and the principle of equity as provided for in Article 28D paragraph (1) of the 1945 Constitution. This constitutes a violation of the people's sovereignty if the people's will as reflected in the votes they cast for designating legislative members is ignored, because if there are two candidates acquiring substantially different votes, whereas the candidate acquiring a greater number of votes has to yield to the candidate acquiring fewer votes due to the fact that the candidate acquiring fewer votes has the

smaller consecutive number, this actually violates the people's sovereignty and equity.

If the philosophical basis for every vote for a person in determining the winner is based on majority votes, the candidate-elect must also be designated based on the acquisition of the majority votes by every candidate legislative member in sequence, rather than the smallest consecutive number given to them. In other words, elections should no longer apply double standards, namely the use of consecutive numbers and the number of votes obtained by the respective Legislative Candidates. The application of the provision granting the candidate-elect a right based on the consecutive number means impeding the people's voting right to elect based on their choice and disregarding the level of political legitimacy of candidate-elect based on the total majority votes.

With the recognition of equality and opportunity before the law as adopted in Article 27 paragraph (1) and Article 28 D paragraph (3) of the 1945 Constitution, every candidate legislative member has an equal position and opportunity before the law. The application of different provisions of law in two similar circumstances **is equally unfair** as the application of the same provision of law in two different circumstances. The Court has been of the opinion that the provisions of Article 214 of Law No.10/2008 apply double standard. Therefore, it may be regarded as applying different laws in similar circumstances and thus it is regarded to reflect an injustice.

8. Re-Voting and Re-Calculation of Votes

In the case of Regional Head Elections of East Java Province which was the first case of Regional Head Election decided upon after the authority to decide upon a regional head election case had been granted to the Constitutional Court, the Constitutional Court decided to order a re-voting in 2 (two) regencies and re-calculation in 1 (one) regency as set forth in Decision Number 41/PHPU.D-VI/2008.

This decision was based on the consideration that there had been a systematic, structured, massive as well as legally and convincingly proven violation in the electoral districts of Sampang, Bangkalan, and Pamekasan Regencies which was constitutionally contradictory to the implementation of democratic regional head elections in particular. Therefore, the Candidate Pair proven to have committed this violation was not to be allowed to benefit from the violation they had committed and on the other hand, the other Candidate Pair was not to be impaired.

In hearing this case, the Court had to be free from being impeded by the provisions of the laws within its narrow interpretation, namely that the Court could only examine the results of Regional Head elections and conduct a re-calculation of votes based on the minutes or recapitulation officially drawn up by the KPU of East Java Province because if it had only used the results of formal vote calculation conducted by the Respondent as a guideline, no material truth would have revealed and thus, it would have been difficult to achieve equity.

In order to uphold substantive equity and to benefit the enforcement of democracy and constitution which must be guarded by the Constitution, the Court may order a re-voting and/or re-calculation of votes in regencies and/or other specific regions in a voting district by taking into account all evidence presented in the hearing. The benefit of such decision will be that in the future, general elections in general and Regional Head Elections in particular may be held by adopting the direct, public, free, secret, honest and fair principles without being impeded by any serious violations, especially those of systematic, structured and massive nature. The choice made by the Court is still within the corridor of resolving dispute over the results of Regional Head Elections. However, it does not constitute a resolution for the process of violation so that the violation of such process alone may be further resolved through the available legal action.

C. Types of Dispute Related to General Elections

Law Number 10 Year 2008 provides for three types of dispute related to general elections, namely administrative violations, criminal violations related to General Elections and disputes over the results of general elections. Administrative violation is the violation of the provisions of the General Elections Law which does not constitute the penal provisions on General Elections and other provisions set forth by KPU. In order to address this type of violations, the General Election Supervisory Board (Bawaslu) and the General Election Supervisory Committee (Panwaslu) at each level play a central role in exercising supervision and receiving reports from the public. If any administrative violation is identified, Bawaslu or Panwaslu must inform KPU, provincial KPU, and regency/municipal KPU of the foregoing violation. KPU, provincial KPU, and regency/municipal KPU must decide upon such violation within 7 days as of the receipt of report from Bawaslu or Panwaslu.

Criminal violations of the General Elections are violations against the penal provisions on General Election set forth in the General Elections Law. If Bawaslu or Panwaslu identifies an alleged violation of General Election based on the supervision conducted or reports received, such alleged violation is to be submitted to the Police investigators for the purpose of investigation process and to be transferred to the public prosecutors.

Cases of criminal violations of General Elections are heard at the district court and are handled by special judges. There are only two levels of criminal court for cases related to General Elections, namely at the first level the district court and at the appeal level the appellate court, the decisions of which are final and binding. It is stipulated that the court handling violation cases against General Elections which potentially affect vote acquisition must decide the cases by no later than 5 days prior to the stipulation of the results of General Elections at the national level by KPU.

General Election Law has set the deadline for any competent institution to handle violations related to General Elections. The fulfillment of this deadline is crucial because the decision on such violation will affect the subsequent phase as well as the success of entire General Elections.

D. Dispute Over the Results of General Elections

In addition to administrative and criminal violations, another type of disputes includes disputes over the result of general elections. These occur in the event of discrepancy between the results of General Elections in the form of final stipulation of the results of vote calculation and the distribution of seats officially announced by the institution holding general elections on the other hand, and the calculation of general election participants on the other, or in the event of dissatisfaction of general election participants related to general elections results. If this difference incurs loss to the general election participants, the affected general election participants may take legal action by filling a petition with the Constitutional Court for a case of dispute over the results of general elections. The Constitutional Court has the authority to decide dispute over the results of general elections based on Article 24C paragraph (1) of the 1945 Constitution.

PHPU judicature is one of the phases in general elections. This mechanism has been created to ensure that General Elections are actually held in an honest and fair manner by providing an opportunity to General Election participants to take legal action by filling their complaints about the results of General Elections stipulated by KPU. With this judicial mechanism, any dispute has to be resolved through legal action, rather than by using force, much less by violence which can jeopardize the entire process of democracy.

In the course of its development, disputes over the results of General Elections filed with the Constitutional Court have not been limited to the determination of numbers of the results of General Elections acquired by General Election participants, but rather to the quality of the General Elections. The Constitutional Court also assesses the substance of the implementation of General Elections as to whether or not there has been any violation against the constitutional principles of general elections. The constitutionality of direct, public, free and secret principles as well as honest and fair principles is provided for in Article 22E paragraph (1) of the 1945 Constitution. In principle, the Constitutional Court is determined to uphold substantive equity. Therefore, if a problem arises in the implementation of General Elections, the Constitutional Court may also order the organizer of General Elections to conduct re-calculation or hold another General Election.

The development of decisions made at the hearings, from reviewing only cases related to the quantitative aspect (total results of General Election) to cases related to the qualitative aspect (the compliance with the principles of constitutionality) of the implementation of General Election, became evident for the first time in case Number 062/PHPU-B-II/2004. The case filed by Candidate pair of President in President and Vice President Election during the 2004 General Elections clarifies the protection of the principles of constitutionality adopted in the implementation of General Election as articulated in the legal consideration of the Constitutional Court, as follows;

> *Considering whereas the Court, as the guardian of the constitution is obligated to maintain, qualitatively, the compliance of the implementation of General Election with the principles set forth in Article 22E par-*

agraphs (1) and (5) of the 1945 Constitution which in principal stipulates that General Elections shall be held in a direct, public, free, secret, honest and fair manner as well as organized by a general election commission at the national level, having a permanent and independent nature… Considering whereas the Presidential Election Law has provided for a mechanism for settling various qualitative issues argued by the Petitioner, both in the phase of the organization of General Elections as from the registration of voters until the stipulation of the results of General Elections and within the hierarchy of the organizers of General Elections as from Voting Administrator Group (KPPS), Polling Committee (PPS), District Election Committee (PPK), Regency/Municipal KPU, Provincial KPU up to KPU. The intended mechanism will be applied if the General Election participants file an objection which must be responded to and handled by General Election Supervisory Committee (Panwaslu), KPU, and investigators apparatuses…considering whereas in the disputes related to General Elections the Constitutional Court does not serve as a judicial institution at the appeal or cassation level for handling various disputes related to General Elections. The mechanism for resolving such disputes has been provided for in the form of sectoral and local legal remedies. Rather than that, the Constitutional Court serves as a judicial institution at the first and final instance with regard to disputes over the results of Presidential and Vice Presidential Elections stipulated and announced by [vide Articles 85 and 68 of President Election Law, as well as Article 74 paragraph (2) sub-paragraph b and Article 75 of Constitutional Court Law). Therefore, the mechanism is indeed related to quantitative matters, namely the significant numbers of the final results of General Elections, while qualitative issues will be of the Court's concern in the event of violation of the principles of General Elections provided for in the 1945 Constitution as presented above.

E. Constitutional Court and Dispute Over the Results of General Elections

Up to the present time, the Constitutional Court has handled PHPU cases in the 2004 Legislative Election, the 2004 President Election, the 2009 Legislative Election, and the 2009 President Election, respectively. In addition to the above, since 2008, the Constitutional Court has also handled cases of disputes over the results of regional head and deputy regional head elections. This has been the consequence of the incorporation of Regional Head and Deputy Regional Head Elections into the general elections regime based on Law Number 22 Year 2007 concerning the Organizer of General Elections and the order to delegate the authority to decide upon dispute related to Regional Head and Deputy Regional Head Election from the Supreme Court to the Constitutional Court under Law Number 12 Year 2008.

In the 2004 General Election, the Constitutional Court received and decided upon PHPU cases with regard to both legislative and presidential elections. The total PHPU cases for Legislative elections reached 274 cases which were filed by 23 political parties, out of 24 political parties participating in the general elections, 21 cases were filed by the candidate members of DPD, and 1 case of presidential and vice presidential elections. Out of these total cases, 41 cases

were granted, 135 cases were rejected, 89 cases were unacceptable and 9 cases were withdrawn. As a result of the decisions of the Constitutional Court on the PHPU in the 2004 legislative election, the acquisition of seats by several political parties decreased, while several other political parties acquired additional seats.

With regard to the cases of general election of the members of DPD, 3 cases were granted, 3 cases were rejected, and 15 cases were unacceptable. Hence, there was a change in the designation of candidates-elect in South Sumatra and Central Java Provinces.

One of PHPU cases in 2004 which also attracted public attention was the PHPU case filed by President and Vice President Candidate Pair Wiranto-Salahuddin Wahid. After conducting a thorough and detailed study of the vote acquisition in 26 provinces in question, the Constitutional Court was of the opinion that the Petitioners were unable to prove their argument concerning the mistake in the results of vote calculation resulting in the loss of 5,434,660 of their votes. Therefore, the petition filed by candidate President Wiranto and candidate Vice President Salahuddin Wahid was rejected.

In the 2009 Legislative Election, the Constitutional Court received petitions from 42 political parties participating in DPR and DPRD elections, which comprised 627 cases. Out of these total cases, 68 cases were granted, 398 cases were rejected, 107 cases were unacceptable and 27 cases were withdrawn. In the 2009 Legislative Election, the Constitutional Court also decided to order re-voting in 2 cases, and re-calculation of votes in 6 cases. With regard to the General Election of DPD members, the Court received 27 petitions consisting of 28 cases. The Constitutional Court decided to grant 2 petitions, rejected 16 petitions, and declared 7 petitions as unacceptable. On the other hand, with regard to the 2009 Presidential Election, the Constitutional Court received 2 petitions filed by candidate pair Megawati – Prabowo and candidate pair Jusuf Kalla – Wiranto. However, both petitions were rejected as they were not proven.

With regard to disputes over the results of regional head and deputy regional head election, as of the mid 2008 when the authority of the Constitutional Court to hear and decide upon cases of disputes over the results of regional head and deputy regional head elections commenced, up to June 20, 2010, the Constitutional Court has received 81 petitions, 57 cases of which have been decided. Out of these cases, 8 cases were granted, 36 cases were rejected, 10 cases were unacceptable, 1 case was withdrawn and 2 cases were declared as not meeting the requirements as they had exceeded the determined timeframe.

In deciding the cases of disputes over the results of general elections, the law has imposed a time limitation to the Constitutional Court. With regard to the cases of dispute over the results of DPR, DPD, and DPRD general elections, the Constitutional Court must decide upon the cases within 30 business days as of their registration. Furthermore, the cases of dispute over the results of President and Vice President election must be decided upon within 14 business days as of the time of registration. Similarly, the cases of disputes over the results of regional head and deputy regional head must also be decided upon within 14 business days as of the time of registration.

The handling of cases of disputes over the results of general election requires particular attention and concentration by both the panel of justices as well as the apparatuses of the Secretariat General and Registrar's Office of the Constitutional Court. Marathon hearings used to be held until late at night time in order that the Court could examine and decide upon cases in a fair manner within the deadline imposed by the law. Hearings of cases of disputes over the results of general elections were presided over by a panel of justices consisting of minimum 3 (three) justices. However, the decision was made by 9 constitutional justices at the plenary session.

In accordance with the judicial development of disputes over the results of general elections at the Constitutional Court, cases examined are not limited to the discrepancy in the calculation of the results of general election between the organizer of general election and general election participants. Hearings of the cases of dispute over the results of general election also examine violations related to general elections affecting the results of the general election itself. In fact, in several cases, examination was also conducted on the illegality of regional head and deputy regional head candidates. Therefore, this judicature does not only determine the correct calculation of general election results, but it also ensures that the general election undergoes a direct, public, free, secret, honest and fair process as the constitutional principles of the implementation of general elections. As a result of the above, the decisions of the Constitutional Court include an order to conduct a re-voting either due to one of the candidates' being declared as not meeting the requirement or to the fact that a systematic, massive and structured violation has been proven to have occured; or oder to conduct a re-calculation in the event of violation during the process of vote calculation. Therefore, implementing adjudication in disputes over the results of general elections has become part of the functions of the Constitutional Court in maintaining constitutional supremacy in the implementation of general elections.

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THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

THE CONSTITUTION, THE CONSTITUTIONAL COURT AND THE ELECTION SYSTEM IN TURKEY

Alparslan Altan
Justice of the Constitutional Court of the Republic of Turkey

Dear Presidents,

Ladies and Gentlemen,

I feel very happy to participate in the 7th Conference of the Judges of the Asian Constitutional Courts on behalf of the Constitutional Court of the Republic of Turkey and to address to a distinguished group. I greet all of you with respect and I wish success in the Conference.

Election, as a term of political science and Constitutional law, implies that people and institutions that will rule the country should be determined by voters amongst a number of candidates. In other words, election can be defined[1] as "the operation in which governed people are specified/ authorized by the governed".

One of the most important criteria to be taken into account whether a certain country is democratic or not is its election system. Any democratic election system should include some characteristics. General suffrage, one vote right for each individual, existence of more than one political party, presentation of their programs to voters, honest elections conducted in acceptable periods are some features of any democratic election system.

The right to vote has been restricted to certain sections of the community in the ancient Greek and Roman democracies as well as in some primitive societies. It was accepted that only the noble people, land owners and clergymen had the right to vote. The principles adopted by modern and democratic election systems which reflect the will of voters onto results of elections in a healthy way are quite different from the elections applied in the past.

Throughout history, being an elector has involved some measures, such as citizenship, age, gender, education, place of residence, race, owning of land and socio-economic status.

[1] Hikmet Sami türk: "Election, Election systems and Constitutional Preference", **Constitutional Justice,** volume 23, 2006, pg. 76.

Previously, women due to discrimination based on gender; the ones who had no real estate due to discrimination based on property; villagers and laborers; the ones who did not pay tax at a specific rate and in a direct way to the state due to discrimination based on wealth and finally, the ones who did not reach a certain age due to discrimination based on age did not have any voting right. However, general suffrage and equal voting right (electing and being able to be elected/ eligibility), being prevalent as a result of the struggles throughout the 19th century, have found[2] their places within the Constitutions, as distinctive features of the modern countries in the 20th century.

In this presentation, I am going to give some short information with regard to the basic principles of the electoral law in Turkey and the improvements experienced in this field. In addition, I am going to mention some judgments of the Turkish Constitutional Court, which have brought hard discussions in the country.

In our country, some principles of election system have been adopted by the Constitutions of 1961 and 1982. But, the details on determination of the electoral system have been left to the discretion of the legislative body.

According to the provision of the 6th paragraph of Article 67 of the Constitution (amended in 1995):

"The electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation and consistency in administration."

This provision is a summary of the experiences Turkey has faces through the electoral laws based on different systems within the multi party system. Due to the political problems experienced in different periods, either the principle of "stability in the government" or the principle of "justice in the representation" has been taken alone. A balance between these two principles has been desired to be set with this regulation.

According to the Constitutional Court which interpreted this provision in one of its judgments:

"The amended 6th paragraph of Article 67 of the Constitution specifies that the electoral laws shall be regulated in a way that they will reconcile the principles of stability in the government and justice in the representation. The purpose is that the will of the voters should be reflected onto the legislative body as properly as possible. Despite the fact that an ideal system in elections has not been found, the most harmonious one with the Constitution should be held according to the conditions of the country. The system which brings many representatives with a small number of votes and causes the condition of overrepresentation through providing too many representatives is not compatible with the "principle of justice in the representation" of the Constitution. The fact that the unjust systems, having been assumed to provide stability, have conclusions which block the social improvements significantly is expounded through scientific investigations. The

[2] Mehmet Ö. ALKAN: "The Dimension of Mission of the Preference of the Electoral System in Turkey and Its Impacts on the Democratic Development" **Constitutional Justice** volume 23, 2006, pg. 133.

domination of justice in the representation is the basic condition of stability in the government. Justice provides stability. The thought of stability alone creates instability if there is no justice. The "principle of justice in the representation" which the Constitution requires to be observed should be realized with the number of representatives, proportionate with votes. As for the "principle of stability in the government", it is perceived as the methods which will reflect the votes onto the legislative body in a way that they will enable the executive branch to be powerful. The togetherness of these two principles, which seem as if they are opponents of one another under some circumstances, should be attached importance in the way that they will balance and integrate one another in the elections regarded as the natural means of democracy. For this reason, the electoral system which is complained the least should be applied. To reconcile these two principles in general, despite not at all points, is a state which is natural to change according to countries.[3]

The European Convention on Human Rights regulates the "free right to elect" in the 3rd Article of the Protocol 1. According to this, the parties undertake to hold free elections by secret ballot, in reasonable periods of time under the conditions which enable the public opinion on the election to be expounded freely. The relation of this right with the state is taken into account and this article guarantees the right to elect in both the active sense and the passive sense and moreover, there is[4] an obligation of the regulation of the election by the law. Although states have a large discretion, arbitrary restrictions are excluded.

Perhaps one of the most important obligatory conditions of a democratic government country is election, more correctly free election. The legitimate ruling power, according to the democratic theory, is the power which obtains its source from public and which depends on the support and approval of the public. A political ruling power which is not based on the consent and approval of the public is not a deserved power and perhaps the most important of the means of bringing up the consent and approval of the public is election. In representative democracies, this support and approval is put forth with the free elections held at regular intervals. Thus, election gives the electors the opportunity to approve of the representatives to govern them, to renew their previous consent or to withdraw it as well.

In this respect, among the first of the means of the restriction of the ruling power is the elections.

THE LOWEST GRADE TO SUCCEED IN THE GENERAL ELECTION

In the Turkish law, a lowest grade of %10 in the country has been applied since 1987. The existence of a grade at this rate has been discussed and criticized in the fields of law and politics.

[3] The decision of the Constitutional Court, dated 18.11.1995, Registry Number 195/ 54, numbered 1995/ 59.

[4] Tezcan-Erdem Sancakdar, **The Problem of the Human Rights of Turkey in the light of European Convention of Human Rights,** Seçkin, Ankara, 2004, pg. 537.

The subject has been brought to the Constitutional Court and it has found this provision compatible with the Constitution. The Court has concluded that the lowest grades which are set as percentages and which stems from the nature of the system can be applicable as long as they do not reach any measures which are extraordinary, restrictive of the right to elect and to be elected. According to the Court,

"To intervene in the restriction which the legislative body has appraised, abiding to the Constitutional provisions and to intervene in the lowest grade is not compatible with the judicial review. Moreover, the lowest grade of %10 is is in accordance with the principle of stability in the government and compatible with the principle of justice in the representation."[5]

Another important subject in terms of the electoral system in Turkey is related to whether the lowest grade of %10 is compatible with the system of European Convention on Human Rights or not. Two candidates have not been elected as members of parliament due to the fact that their parties, in spite of having reached high vote rates in the electoral districts, have not been able to go beyond the lowest grade of %10. They applied to European Court.

The court has determined in its decision dated 30.01.2007 that the lowest grade of an election in the country is not contrary to İHAS. In the Court's decision with reasons, it has been stated that there are various applications with regard to the way of regulation of elections throughout Europe and that the rules on this matter change within the framework of the peculiar history of each state and the political factors and that for this reason, the states have a large discretion while determining the electoral laws. It has been explained that the discretionary power with regard to drawing down the lowest grade or dealing with regulations ensuring the most proper representation of various trends in order to constitute a steady majority in parliament belongs to the judiciary, legislative and political world in the national plan.

Moreover, in the decision in which the instability in Turkey, especially in the 1970s was taken into consideration, it has been stated that the lowest grade aims at preventing the parliament splitting terribly from being nonfunctional and strengthening the stability of the government. In the decision, it has been set down that The European Court of Human Rights is not in a state to propose a proper solution on this matter even though it has also been stated that the lowest grade in Turkey is the highest grade applied in the countries of European Commission, which is why %43 (14,5 million) of the votes in the latest election could not be reflected into the Parliament.

The ECHR has stated in its decision that the lowest grade of %10 is reviewed in terms of the principle of "justice in the representation" considered in the 67th Article of the Constitution by the Constitutional Court as well, has concluded that the lowest grade is in accordance with this principle, has expressed that it cannot put forward that this decision of the Constitutional Court is "obviously

[5] The decision of the Constitutional Court, dated 18.11.1995, Registry Number. 1995/ 54, the decision numbered 1995/ 59.

arbitrary" and has also stated that the interference of the ECHR in the decisions of the national court, which are not "obviously arbitrary" and through replacing the national court, the assessment of the ECHR will not be in accordance with the case law of ECHR.

DEPUTYSHIP OF THE ELECTORAL DISTRICT

Article 3 of the Law on Parliamentary Elections has been amended and provided that 100 representatives out of 550 shall be elected " the deputy of electoral district of the country". This provision has been brought to the Constitutional Court.

The Court in its judgment said that "… It is clear that in Article 80 of the Constitution, the members of the Turkish Grand National Assembly will not represent the district where they have been elected or the ones who have elected them, but the whole nation. In the Article, it is stated that the representatives will be elected from districts, they will admitted to membership of the legislative organ as the representative of the electoral district, however, they will represent the whole nation without being dependent on the place and the elector.

The measure of elector and district sought with election turns into the national dimension after the election. This expansion is a formation which is in accordance with the principle of "representation". To have a limitless work in the legislative organ, to exercise the national sovereignty in the scope of legislation, and to act on behalf of the nation is only possible with representing the nation. However, this situation does not affect and block the regional tie to be elected and the representative's being called as the representative of the district where he/ she is elected.

With the decision of the competent commissions of his/ her party, to associate one person who has not been elected from an electoral district with a city, relying upon the votes of his/ her party is to establish a relation outside the Constitution. As there is no rule giving such a possibility in the Constitution, the representative is related to his/ her district and is elected only with the votes he/ she gets from his/ her district. Neither Article 80 is open to another relation nor the Article 75 is suitable to categorize the representatives and call them in a different way. To elect one or a few representatives with another name and to set them apart cannot be valid at the stage of the Constitution. In another Article of the Constitution as well, there is no explicitness as to the separation of the 550 representatives within themselves.

It cannot be thinkable that the elector is deemed as if he/ she has elected a representative from a district that the elector does not know. The association of these representatives with a city, outside the will of the elector by the competent commissions of the party cannot be compatible with the democratic principles.

The case of the representative who has no election tie with the elector requires to be assessed separately. Yet, it is a subject matter of the judicial review due to its disagreement with the nature of the fact of election. A regulation contrasting

with the concept of democratic state governed by the rule of law as well is contrary[6] to Articles 75 and 80 of the Constitution."

According to the Constitutional Court, while a lowest grade around the country in the parliamentary elections has been considered for the "principle of stability in the government" at which the Constitution aims, to introduce a new grade for also each electoral district is not compatible with the principle of "justice in the representation."

STATE CONTRIBUTION TO THE POLITICAL PARTIES

The State contribution to the political parties in realization of the election race fairly is of great importance. For this reason, the Law on Political Parties specifies that the political parties which were conceded the right to participate in the last general parliamentary elections and the ones which went beyond %10 lowest grade in the country and the political parties which have a group in the Turkish Grand National Assembly – that is, which have at least 20 representatives- are provided state contribution. It is also considered that the political parties which get more than %7 of the total eligible votes in the general parliamentary elections are provided the same amount of aid as the party which gets the least aid, commensurate with the total eligible votes in the general elections.

The specified amount of contribution is paid every year provided that it is distributed, commensurate with the number of total eligible votes of the political parties, declared by the High Electoral Commission. Contribution should be used only for the needs and activities of the party.

The regulations specifying that state contribution will be provided to the political parties have been brought before the Constitutional Court. The Constitutional Court has found provisions on state contribution to the political parties is in accordance with the Constitution, since there is no prohibitory provision in the Constitution.

According to the Constitutional Court, "It cannot be thinkable that a political party which cannot meet the requirements to be able to participate in the elections and despite its participation in the elections, which is understood to have been unable to achieve the confidence of the electoral body at a sufficient rate with the votes it has taken, will contribute to the formation of the national will in the same way as the strong parties having achieved the confidence of a greater electoral body do. With the disputed regulation, no discrimination has been made among parties; they have been treated differently, taking the public benefit which they provide according to their power and size into consideration. This situation is not contrary to the principle of equality of the Constitution.

[6] The decision of the Constitutional Court dated 18.11.1995, Registry Number. 1995/ 54, the deciison numbered 1995/ 59.

CONCLUSION

Election systems imply the methods to be taken into account in the determination of rulers. The purpose of election systems that we examine in its narrow sense, as the methods benefited to convert the votes taken by the electors to chairs is to provide the political participation in the way that it can involve the principles of benefit (stability) and justice. There are proportional representation system which highlights the principle of justice and majority electoral system which highlights the principle of benefit (stability). Moreover, mixed election systems constituted through the extraction of some elements of these two election systems are also applied.

Other than the electoral system, that the historical, cultural, ethnical, ideological and social splits also influence the political stability and political parties has been seen. That is, the applied election systems and methods change from country to country due to the reasons that we have stated above.

The determination of the right electoral system in a democratic political system is of high importance both because of the right possession of national sovereignty and because of the processing of the system. The adoption of an inappropriate electoral system not only blocks the healthy process of democracy but also turns the problems of representation into a jigsaw puzzle.

Thank you very much for your attention.



THE 7th CONFERENCE OF ASIAN
CONSTITUTIONAL COURT JUDGES

Elections Complaints

by
Chief Justice
Farouk Ahmed Sultan
President of the Supreme Constitutional Court of Egypt

The Egyptian Constitution has granted the right to vote, stating in Article 62 thereof that: "Citizen shall have the right to vote, nominate and express their opinions in referendum according to the provisions of the law ...." and no constrains shall be imposed on exercising such right in a way that would impound its content and prevent exercising this right in an effective and serious way, and this is to ensure the right of the citizens in choosing their representatives in the Parliament Councils based on the fact that the legitimate authority is only imposed by the voters.

And accordingly, guarantying the freedom of voters in casting their votes, and ensuring their free will to choose from among candidates of the elections campaign is of the fundamental terms for the validity of the elections, so that its impartiality is not hindered by money flowing into the electoral process with no guidance, or measures of the Police force that may burden the gathered voters and divert them away from balloting or may frighten them to cast their votes and thus, there shall be real opportunities for them to decide the consequences of the election campaign and for the candidates also to present their platforms and so the dialogue between the two parties will be the essence of the campaign and an evidence of the reliability and integrity of its consequences. Consequently, the electioneering shall not be affected by external influences that make the contribution of the citizens is of no sense. The candidates shall particularly have equal rights and opportunities to access the media and that money shall not be their way to the polls.

Exercising Political Rights Law issued by law no. 73 of 1956 and amendments thereof has considered such fundamentals, through organizing the balloting which passes through several stages, where it is not confined to

the stage of balloting but it shall also prevail and extend to the following two stages:

First: the registration of voters, such stage is to grant the voter, whether men or women, the right to exercise political rights through registering his name pursuant to the provisions of such law and to register the name of anyone who unduly neglect or omit a name from registration, provided that -as per Article 16 of that law- a committee assembled of the President of Court of First Instance in the governorate (as a chairman) and the membership of a security director of the same governorate and a District Attorney assigned by the Attorney General. The Administrative Court shall expeditiously decide in the complaints of such stage is of unchallengeable decision.

Second: the stage of carrying out the electioneering -which is the most significant- as it is may be affected by any incident that may encumber its effectiveness or validation such as the measures undertaken against voters to hinder them from going to the polls, or to influence their point of views or pushing them to cast in a particular manner or even threatening them to prevent them from accomplishing their duty to advocate to a candidate, and depriving the representatives of the candidates of monitoring the voters while casting their votes, they may even tire the chairmen of the sub-committees through compelling them to work in inappropriate work conditions and intending not to meet their demands ,by which they can control the electioneering and ensure its impartiality. The high committee of elections which is distinguished by its impartiality, integrity and independence, as prescribed in Article 88 of the Constitution, shall monitor this phase. It is assembled of the President of Cairo Court of Appeal; a chairman and the membership of judiciary organs and a number of public figures, pursuant to law no.18 of year 2007 amended by certain provisions of law no. 73 of 1956 on the regulation of exercising political right.

This committee according to the acts of this law is seeking to accomplish the following:

- Set the rules of preparing the schedules of elections and their contents and developing the means of how to review and update them.
- Develop the general rules for the organization of the electioneering.
- Contribute to the outreach and educational efforts related to elections and draw up guidelines for the conduct of the election process.
- Monitoring the compliance with codes of ethics of elections.
- Propose rules for determining the constituencies.
- Develop the measures governing the electioneering in accordance with the provisions of Article (5) of the Constitution and Article XI of law no. 38 for the year 1972 concerning the People's Assembly, these regulations should include prohibiting the use of slogans, symbols or practicing activities of electioneering that have a religious nature or discrimination on the basis of sex or origin.
- Develop and implement a system for electoral symbols used by candidates of political parties or independent candidates in any election.

- Receive reports and complaints of violations of the provisions governing the process of election, to verify its validity and undertake the necessary actions towards whichever proves to be out of order.
- Declaration of the result of elections and referendums.
- Give opinion regarding draft of laws concerning elections.
- Develop rules and procedures for the participation of the Egyptian civil society organizations in monitoring the ballot and counting of votes.

The Administrative Jurisdiction Authority is entitled to monitor the decisions of the Committee on running the process of election - before the completion of the ballot - The Administrative Jurisdiction Court established many principles in this regard, of which we recall, for example:

The decision of the Administrative Court in Cairo issued on the 6th of November, 2005 in case no. 2726 of the Administrative judicial year 60, which has granted the civil society organizations the right to monitor all stages of electioneering under the supervision of the higher committee of the elections.

Such decision stated that: "Since the parliamentary elections are the cornerstone of the democratic construction long for by the Egyptians, as it represents the most important peaceful way to reveal the people's will to choose their representatives in the legislative authority, thus the Constitution has endowed such elections with a special organization entrusting in it the judicial authority to supervise the elections so that it can protect the rights of candidates and the absolute right to choose the best and optimal candidate from among them.

There is no doubt that the Egyptian judiciary in exercising this constitutional duty does not only show its immunity and independence, but it also enhances the confidence and trust that all ranks of Egyptians give to such system, in a way that firmly establishes a general feeling among the public and also among special ranks that the judiciary supervision over the elections is a major guarantee to the transparency and integrity of the electoral process.

Such court jurisprudence has settled on that there is no contradiction between the judiciary authority practicing its constitutional role in supervising the elections and what is entrusted to the associations and the organizations of the civil society in monitoring the elections, so that all steps of the process is observed and documented whether negatively or positively to be under the scope of the competent authorities, working together to reach the transparency and fairness of the election process.

" The ruling of the Administrative Court in Cairo issued on the 3rd of December, 2005 in case no. 4416 of the judicial year no.60 which gives the civil society organizations the right to monitor the electioneering through the suspension of television cameras enabling them to follow the counting of votes.

Since such ruling is stating that: "The role played by the civil society organizations in the light of the political transition -that the country is witnessing- is a tool for peaceful expression of opinion and participation in founding the community politically, socially and economically. This role further places upon the Higher committee for elections a genuine commitment to go along with this

political transition and this new culture, as this dictates creating pace for political malleability and freedom of movement for all parties and individuals, as well as associations and organizations from the civil society and opening the doors in front of civil and public work, so that all members of the community whether in public or private sectors should work and assume their responsibilities towards achieving the political renaissance of this country.

This cannot and will not be achieved unless the Committee keeps up with each development going in this direction and supporting it, as well as opening the legitimate channels in front of whatever that might lead to building and not demolition, advancement and not freezing.

Hence ensuring the right of the civil society organizations in monitoring the electioneering in all its stages which is now stable and non-controversial can only be achieved through guarantying the methods and mechanisms that facilitate the ways to exercise this right, so that it can be practically put into effectiveness. "

As ensuring the credibility of the electoral process, assumes the impartiality of the legal rules which govern it whether it relates to its timing , place or procedures, and in the same time it was not permissible for the Legislative authority - which is a non judicial one – to be the sole determent of the fate of the elections, which have different pressures affecting its outcome, as well as different laws interfering with its organization, and different methods of registration in the voters tables that will eventually define the electorate. And at the same time the jurisdiction of the legislative authority to arbitrate the validity of the terms of membership of its own members represents a deviation from the norm of its functions.

However, the Constitution of the Arab Republic of Egypt fully sided in favor of the Legislative authority by making its decision indisputable regarding whether the terms of membership of its members are valid or not according to Article 93 of the Constitution which states that membership shall not be dropped (dismissed) except by a decision of the legislative authority itself and by a two-thirds majority of its members.

The aforementioned Article states that: "The People's Assembly shall be competent to decide upon the validity of the membership of its members. The Court of Cassation shall be competent to investigate the validity of contestations on membership presented to the Assembly after referring them to the Court by the Speaker of the Assembly. The contestation shall be referred to the Court of Cassation within fifteen days as from the date on which the Assembly has been informed thereof while the investigation shall be completed within ninety days from the date on which the contestation is referred to the Court of Cassation. The result of the investigation and the decision reached by the Court shall be presented before the Council to decide on the validity of the complaints within 60 days from the date the result of the investigation was presented to the Council where the membership shall not be dropped unless a majority of two-thirds of the members of the council vote in favor of that".

However, this provision aroused a dilemma regarding its judiciary applications on the extent of the competence of the courts of the State Council's on taking cognizance of the complaints on the electioneering. The Administrative Court - in its early rulings – decided on its jurisdiction to do so based on that "the

administrative decisions regarding the electioneering shall not be considered a legislative act or an act of the parliament, as they are regarded one of the administrative work undertaken by the administrative authority at a stage prior to the admissibility of the Parliamentary membership. And in assuming its responsibility in exercising this process or judicial supervision over the integrity of decisions made by the Parliament in this regard, the administrative authority does not encroach on the jurisdiction of Parliament or lessen its powers.

As The Council of Deputies does not attend to the affairs of its members except after the proper proof of their membership, and accordingly the judiciary of the State Council is originally concerned with the decide on all administrative decisions regarding the electioneering throughout its stages, whether voting, counting or declaration the consequences of election and these decisions may not be subject to the judicial supervision only after the correct proof of membership of the candidate as determined by the law."

Nevertheless and on the contrary, the Administrative Court settled on the non- jurisdiction of the courts of the State Council's in considering the complaints on the electioneering in the precise sense. Also the Supreme Constitutional Court in Egypt firmly confirmed that: "The jurisdiction of the Court of Cassation concerning electoral complaints shall not exceed –pursuant to the context of Article (93) of the Constitution - to investigate such complaints if referred to it by the People's Assembly, and that such jurisdiction is not judicial, and whatever reports it prepares are merely advisory and it is not required to settle the dispute in question to ensure the minimum account of litigation procedures, or its basic guarantees".

THE 7th CONFERENCE OF ASIAN CONSTITUTIONAL COURT JUDGES

ROLE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN IN THE PROTECTION OF SUFFRAGE OF CITIZENS

Mahmudov Mahkam Azamovich
Chairman of the Constitutional Court of the Republic of Tajikistan

Dear Ladies and Gentlemen!

First of all let me express my gratitude and appreciation from Constitutional court of the Republic of Tajikistan and from myself personally with respect to the Constitutional court of Republic Indonesia and its chairman to Mr. Muhammad Mahfud and other organizers for hospitality and the successful organization of the given international forum.

After independence acquisition in 1991 the Republic of Tajikistan has planned a course for development of democracy and civil society. Acceptance of the Constitution and division of the power on legislative, executive and judicial were the first steps on a development way.

Legislature in the Republic of Tajikistan is the Parliament (Majlisi Oli, Supreme Assembly) of the Republic of Tajikistan. Executive power in the Republic of Tajikistan is the Government (Hukumat) of Republic Tajikistan. The chief executive is the President of the Republic of Tajikistan. Judicial authority is carried out by courts of the Republic of Tajikistan which are the Constitutional court, the Supreme court and the Higher economic court. The constitutional court of the Republic of Tajikistan as a branch and independent instance of judicial system stars in maintenance of protection of the rights and freedom of the person and the citizen.

1. A general characteristic of the legislation of the Republic of Tajikistan about elections.

The legal regulation of process of elections first of all is fixed in the Constitution of the Republic of Tajikistan and a number of the constitutional laws which regulate relations in the course of elections. Number of the given laws concern:

1. The constitutional Law of the Republic of Tajikistan «About elections of Majlisi Oli (Supreme Assembly) of Republic Tajikistan»;
2. The constitutional Law of the Republic of Tajikistan «About Presidential elections in Tajikistan »;

In the Constitution of Tajikistan it is specified that:« The citizen on reaching 18-year-old age has the right to participate in a referendum, to select, and also to be the selected works on reaching the age established by the Constitution, the constitutional laws and laws ». Legislature in Tajikistan is the parliament (Majlisi Oli, Supreme Assembly). The parliament consists of two chambers (Majlises): Majlisi milli (Assembly of representatives) and Majlisi Namoyandagon (National Assembly). The parliament term of appointment is defined for 5 years. The legal regulation of process of parliamentary elections (Majlisi Oli) is carried out on the basis of Law of the Republic of Tajikistan\ «About elections of Majlisi Oli». The given law makes accurate definition about elections and appointments of representatives of Majlisi Namoyandagon (National of Representatives) and members of Majlisi Milli (National Assembly) of the Republic of Tajikistan. In the Republic of Tajikistan elections of Majlisi Namoyandagon (Assembly of Representatives) are appointed by the President of the Republic of Tajikistan not later than 75 days before the termination of powers of members and representatives of Majlisi Oli (Supreme Assembly) of the previous convocation. Elections in Majlisi milli (National Assembly) are spent in 25 days after elections of Majlisi Namoyandagon (Assembly of Representatives). The Majlisi Namoyandagon (Assembly of Representatives) is selected on the basis of general, equal and a direct suffrage at ballot. The Majlisi Namoyandagon (Assembly of Representatives) operates on a constant and professional basis.

By the representative in the Majlisi Namoyandagon (Assembly of Representatives) can be selected the person who has reached of 25-year-old age, being not less the citizen than five last years of Republic Tajikistan and has higher education. The Majlisi Namoyandagon (Assembly of Representatives) consists of 63 representatives from which 65 % of representatives of the Majlisi Namoyandagon (Assembly of Representatives) 41 people are selected on one-mandatory districts and 35 % of representatives of the Majlisi Namoyandagon (Assembly of Representatives) 22 people are selected on uniform to district. The member of the Majlisi milli (National Assembly) is selected and appointed for a period of 5 years. The Majlisi milli (National Assembly) consists of 25 members who are selected on the basis of representation of territorial interests, from the former presidents if they have not refused the right, and other 8 members who are appointed by the President of the Republic of Tajikistan to a term of appointment

of Majlisi milli (National Assembly). Three quarters from total number of Majlisi milli (National Assembly) 25 people are selected on the basis of representation of territorial interest's local representative bodies. The one fourth parts of members of Majlisi milli (National Assembly) 8 people. The President of the Republic of Tajikistan appoints. As the member of Majlisi milli (National Assembly) can be selected and the assignee who has reached of 35 years, has higher education and not less than last 7 years being the citizen of the Republic of Tajikistan.

In Republic Tajikistan mandates are distributed on the basis of the law «About election of Majlisi Oli (Supreme Assembly)». Central commission on elections and carrying out of referenda counts up the sum of the votes submitted on uniform to election district for political parties received five and more percent of votes of the voters who have taken part in voting. This sum of votes shares on 22 - number of the representative mandates distributed on uniform of election in districts. The received result defines quantity of the voices necessary for one representative mandate. Then the quantity of voices which was received by each political party, shares on quantity of the voices necessary for one representatives mandate. The received result is number of representative mandates.

Also practice has shown that in some cases there are repeated elections of members of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of Representatives) instead of the left members and representatives. The law also provides certain procedure of repeated elections. In case of the prescheduled termination of powers of a member of Majlisi milli (National Assembly) and representative of Majlisi Namoyandagon (Assembly of Representatives) in one-mandatory election district in three-monthly term from the moment of the termination of their powers a new election is held. Elections are appointed by the Central commission on elections and carrying out of referenda not earlier than before two months before elections according to law requirements. In cases of the prescheduled termination of powers of the representative which is selected as a result of distribution of deputy mandates by political parties, its mandate under the decision of the Central commission on elections and carrying out of referenda is transferred to that candidate who is registered in corresponding lists after the left deputy. In case of leaving of a member of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of Representatives) less than one year prior to the expiry of the term of powers of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of Representatives) elections of a new member of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of Representatives) instead of the left are not spent.

In the Republic of Tajikistan presidential elections are carried out, first of all, on the basis of the Constitution of the Republic of Tajikistan and the Constitutional Law of Republic Tajikistan «About Presidential elections».

In the Republic Tajikistan presidential elections are carried out by citizens of the Republic of Tajikistan on the basis of general, equal and a direct suffrage

at ballot.

The president of Republic Tajikistan can be any citizen not younger than 35 years, owning a state language, living in Tajikistan not less than last 10 years and possessing the suffrage. In the Republic of Tajikistan presidential elections are appointed in joint session of Majlisi milli (National Assembly) and Majlisi Namoyandagon (Assembly of Representatives) of the Republic of Tajikistan not later than two months before the expiry of the term of powers of the President of the Republic of Tajikistan. The citizens of the Republic of Tajikistan who has reached of 18 years have the right to participate in presidential elections of republic. In presidential elections of the Republic of Tajikistan have no right to participate the persons recognized as court incapacitated or vessels deprived of freedom on a sentence. Any restriction of the suffrage of citizens of the Republic of Tajikistan, except the cases provided by the Law is forbidden.

Promotion of candidates on a post of the President of the Republic of Tajikistan is carried out according to requirements of the Constitutional Law of the Republic of Tajikistan «About Presidential elections». Candidates on a post of the President of the Republic of Tajikistan are put forward registered in the order established by the law republican political parties, Federation of independent trade unions of Tajikistan, the Union of youth of Tajikistan. Majlises (Assemblies) of People's representatives of areas and cities of republican submission can put forward each political party, Federation of independent trade unions of Tajikistan, the Union of youth of Tajikistan, Majlises (Assemblies) of People's representatives of Mountain-Badakhshan Autonomous region, regional Majlises (Assemblies) of People's representatives, Dushanbe city Majlis (Assembly) of People's representatives, meeting of representatives only one candidate be elected on a post of the President. Promotion of candidates on a post of the President is spent for 50 days and comes to an end not later than 30 days to elections. Total number of candidates on a post of the President is not limited. The decision on promotion of the candidate on a post of the President of the Republic of Tajikistan, goes to the Central commission on elections and carrying out of referenda not later than in three-day term after its acceptance. The decision informed to the candidate not later than in two-day term.

There cannot be proposed candidates on a post of the President of the Republic of Tajikistan the citizens having a previous conviction which is not extinguished or is not removed in the order established by the law, professional attendants of the religious organizations and associations. In case any candidate on a post of the President of the Republic of Tajikistan has not been put forward or all proposed candidates have removed the nominees, candidates for Presidents of the Republic of Tajikistan are put forward by joint session of Majlisi milli (National Assembly) and Majlisi Namoyandagon (Assembly of Representatives) of the Republic of Tajikistan. Put forward the candidates who have got in result of ballot support of the majority from total number of members of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of Representatives) of the Republic of Tajikistan in this case are considered.

Registration of proposed candidates on a post of the President and their authorized representatives is carried out by the Central commission on elections and carrying out of referenda within three days from the moment of receipt of necessary documents, not later than 25 days prior to elections.

2. Judicial protection of the suffrage of the citizen in Republic Tajikistan.

The reasons of occurrence of selective disputes are rather various, however basic of them – infringement of suffrages of citizens.

Each citizen has the right to address in court if considers that wrongful actions (decisions) of state structures, establishments, the enterprises and their associations, local governments, public organizations, officials or civil servants break its rights and freedom or obstacles to their realization are created, or any duty has illegally been assigned to it, or it illegally has been made answerable. The statement can be submitted by the citizen which rights are broken, and also its representative. Limits and the mechanism of judicial consideration of selective disputes are regulated by selective laws and regulatory legal acts. Business is considered by court according to the Republic Tajikistan legislation. The party which actions (decision) will be appealed against, bears a remedial duty documentary to prove legality of challenged actions (decisions). The citizen is released from a duty to prove illegality challenged, but is obliged to prove the fact of infringement of the rights and freedom.

Protection and the rights and freedom of the person and the citizen always and was at all times and remains to one of essential problems of the state as the history of development of mankind is a history of struggle of the person for the rights and freedom. In process of achievement of higher levels of development of the state and a society and introduction of the civilized and conventional standards. Receptions and ways of protection, the rights and freedom of people these questions get the increasing importance, and overcoming on this way of considerable problems of their realization is natural. Is not an exception and Republic Tajikistan which, having accepted the Declaration on the state sovereignty and the new Constitution, became the full subject of the international community and consequently, has incurred obligations of observance of all democratic institutes, showing a fundamental principle in business not only recognitions, but also guarantees of protection of the rights and freedom of the person and the citizen.

One of characteristic features of the right state is the recognition it of the rights and freedom of the person and the citizen, leaning against strong fastening in the Constitution and laws of their indestructibility, and also the duty to observe and protect these rights and freedom. Not the person is created for the state, and the state for the person - such is a principle of their relations. In it humanistic essence of the Constitution of the Republic Tajikistan accepted in 1994.

Conceptual positions of reform of judicial system of Republic Tajikistan are defined according to modern representations about the principles of fair or due justice actively functioning at the international judicial institutes: everyone has an easy approach to the independent and fair justice, everyone on consideration of the business in reasonable terms independent, competent and fair court. Sharply there are problems of the further formation of the legal base providing to the full departure of justice according to the Constitution of the Republic of Tajikistan both conventional principles and norms of international law (D.A Gersamiya "Theoretical and practical problems of constitutional law of citizens on judicial protection in Republic Tajikistan" - Dushanbe, 2010 p.6).

Judicial consideration of selective disputes is regulated by a civil procedural right, however, the operating order does not provide the account of specificity selective relations.

In the cases provided by the legislation the court has the right to cancel the decision of corresponding election committee, the referendum commission on results of voting or about results of elections (referendum), and also other decision. Judgments are obligatory for execution by the corresponding commissions.

The court of law can consider selective dispute and make the decision not later than in a month from the date of a filing of application. The constitutional court can consider selective dispute and make the decision not later than in six-monthly term from the date of a filing of application. However decisions under the complaints which have arrived during the selective company (referendum preparation), are accepted in three-day term, but not later than the day previous day of voting, and this day or in the day following it, - immediately. However the court can to cancel, for example, the decision of the commission on registration of the candidate and to turn the decision to immediate execution. If appeal of the facts demand additional check, the decision should be accepted not later than in 10-day term. Under the complaint to the commission decision, on results of voting or about results Elections (referendum) the court is obliged to announce the decision not later than in two-month term from the date of statement reception.

The constitutional Court does not resolve selective disputes literally this word. Its problem is much more important, for the constitutional justice is represented by the sample of the relation to the right and the legislative technics. The constitutional Court of Republic Tajikistan accepts the decisions, definitions and the conclusions at the initiative of representatives on that of public authorities, and also under complaints of citizens and their associations to infringement of their constitutional laws and freedom the law applied or subject to application in a concrete case, in other words, excludes from the operating selective legislation the norms promoting occurrence of selective disputes.

Many selective disputes generate also insufficient level of legal culture of voters and organizers of elections. Many disputes simply would not arise, if some candidates understood the selective legislation is better. The low legal

culture of participants of selective process in certain degree is caused by that selective relations are in the Republic of Tajikistan at a formation stage.

In practice of the Constitutional court of the Republic of Tajikistan there is a case when one of political parties of Republic Tajikistan Party of the Islamic Renaissance has addressed with the petition for definition of conformity of a part of 4 articles 57 of the Constitutional Law of Republic Tajikistan «About elections of Majlisi Oli (Supreme Assembly)» and decisions of the Central commission on elections and referenda of the Republic of Tajikistan from May, 25th, 2009 □ 122 parts of 7 articles 49 of the Constitution of the Republic of Tajikistan. The fact of the reference of political party to Constitutional court with the petition for definition of conformity of the law of the Constitution of the Republic of Tajikistan says once again that the Constitutional court does not resolve selective disputes literally but considers questions at issue connected with realization of suffrages of citizens and other subjects of references in the Constitutional court.

After all-round studying of the petition of political party of the Islamic Renaissance, the Constitutional court of the Republic of Tajikistan according to point 7 of article 37 of the Constitutional Law of Republic Tajikistan «About Constitutional court» has made decision on business acceptance to manufacture.

According to a political party management which, has addressed with the petition in the Constitutional court of the Republic of Tajikistan, questions on the prescheduled termination of powers of the representatives selected as a result of distribution of representative mandates among political parties, and also transfer of their mandates to the candidate following them in corresponding lists of parties, are regulated regarding the second article 57 of the Constitutional law of Republic Tajikistan «About elections of Majlisi Oli», and positions of a part of fourth article 57 of the named Constitutional law concern not representative from uniform election in districts, the elite from political parties, and to the deputies selected on one-mandatory districts.

The constitutional court of the Republic of Tajikistan considering this case ascertained that positions of the Constitution of the Republic of Tajikistan start with requirements of the international legal certificates recognized as the Republic of Tajikistan, including from article 21 of the General declaration of human rights according to which:

«1. Each person has the right, to take part in management of the country directly or via freely selected representatives.

… 3. The will of the people should be a basis of the power of the government; this will should find to itself expression in the periodic and not forged elections which should be spent at the general and equal suffrage, by ballot or by means of other equivalent forms providing freedom of voting ».

The constitutional court, having studied a part of fourth article 57 of the named Constitutional law which is a dispute subject between the parties and

regulates a question about not elections of new members Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of representatives) instead of the left member or the representative of the stopped power less than one year prior to the expiry of the term of powers of Majlisi milli (National Assembly) and Majlisi Namoyandagon (Assembly of representatives), in comparison to corresponding norms of the Constitution, and also the full text of article 57 which regulates questions of elections of members of Majlisi milli (National Assembly) and representatives of Majlisi Namoyandagon (Assembly of representatives) instead of the left members and deputies, notices that it does not contradict a part of the first and a part of seventh article 49 of the Constitution of the Republic of Tajikistan.

In summary it is necessary to notice that the dominant role in maintenance of restoration of the broken suffrages is played by the election committees resolving a considerable quantity of electoral conflicts in the operative form that is very important in the conditions of limited time of election campaign. Moreover, the status of election committees grants it the right to operate with a view of protection of suffrages of subjects proceeding from own, given on a joint basis, estimations of presence of the fact of infringement and its character while the remedial legislation does not allow judicial bodies to operate under own initiative.

At the same time, the citizen whose rights are broken has possibility of the appeal of decisions and actions of other subjects in a judicial order. Moreover, at realization of protection of suffrages the legislator specifies in a priority of the given form that is caused by great volume of powers of judicial bodies in this sphere. The court possesses compulsory mechanisms of execution of own decisions, and the reference of the applicant with similar requirements in court and in election committee stops their consideration in the commission to the permission of a matter of substance in a judicial order.

Thank you for attention.

ANNEX II
LIST OF DELEGATES

LIST OF DELEGATES

No	Country	Name	Position	Institution
1.	Republic of Austria	Brigitte Bierlein	Vice President	Constitutional Court
2	Republic of Azerbaijan	Raouf Guliyev	Secretary General	Constitutional Court
3.	Brunei Darussalam	Dato Seri paduka HJ Kifrawi bin Dato Paduka Hj. Kifli	Chief Justice	Supreme Court
		Muhammed Faisal bin Pehin Dato Juragan Laila Diraja DSP HJ Kefli	Senior Magistrate	
4	Kingdom of Cambodia	Penn Thol	Member	Constitutional Council
		Kuy Kimheang	Deputy Director of IT and Languages Translation Department	
5.	Republic of Chile	Jose Antonio Viera-Gallo Quesney	Justice	Tribunal Constitutional
6.	Republic of Colombia	Mauricio Gonzalez Cuervo	President	Constitutional Court
7	Arab Republic of Egypt	Farouk Ahmed Sultan	President	Supreme Constitutional Court
		Maher Sami	Deputy Chief Justice	
		Adel Omar Sherif	Deputy of Chief Justice	
8.	Federal Republic of Germany	Rudolf Mellinghoff	Justice	Constitutional Court
9.	Republic of Indonesia	Moh. Mahfud MD	Chief of Justice	Constitutional Court
		Achmad Sodiki	Vice of Chief Justice	
		M. Arsyad Sanusi	Justice	

		Muhammad Alim	Justice	
		Harjono	Justice	
		Maria Farida Indrati	Justice	
		M. Akil Mochtar	Justice	
		Ahmad Fadlil Sumadi	Justice	
		Hamdan Zoelva	Justice	
		Janedjri M.Gaffar	Secretary General	
		Zainal Arifin Hoesein	Registrar	
10.	Republic of Kazakhstan	Rogov Igor Ivanovich	Chairman	Constitutional Council
		Kanat Sarsembayev	Head of Legal Expertise	
		Kuanysh Aldongarov	Head of the Department on Organizational Issues	
11.	Lao People's Democratic Republics	Khammy Xayavong	President	Supreme People's Court
		Bounkhouang Thavisack	Judge	
12.	Malaysia	Tun Zaki Tun Azmi	Chief Justice	Federal Court Malaysia
		Tan Sri Arifin bin Zakaria	Chief Judge	High Court of Malaysia
		Y. A. Tan Sri Dato' Zulkefli Ahmad Makinudin	Judge	Federal Court Malaysia
		Tansri James Cheng Yuen Foong	Judge	Federal Court Malaysia
13.	United Mexican States	Constancio Carrasco Daza	Electoral Justice	The Federal Electoral Court
		Héctor Dávalos Martínez	Coordinator of Relations with Electoral Bodies	
14.	Mongolia	Jamsran Byambadorj	Chairman	Constitutional Court
		Gankhuyag Agar-Erdene	Assistant	

15.	Kingdom of Morocco	Mohamed Achargui	President	Constitutional Council
16.	Federal Democratic Republic of Nepal	Khil Raj Regmi	Justice	Supreme Court
		Krishna Prasad Subedi	Secretary	
17.	Philippines	Mariano C. Del Castillo	Judge	Supreme Court
		Jose P. Perez	Judge	
18.	Republic of Korea	Dong Heub Lee	Justice	Constitutional Court
		Seungyeon Ye	Researcher	
19.	Republic of Singapore	Chao Hick Tin	Vice President	Supreme Court
		Leong Kwang Ian	Asistant Registrar	
20.	Democratic Socialist Republic of Sri Lanka	Pemamiththa Abrahama Ratnayake	President's Counsel and Senior Judge	Supreme Court
21.	Republic of Tajikistan	Makhmudov Mahkam	Chairman	Constitutional Court
		Ismoil Gaybulloev	Assistant	
22.	Kingdom of Thailand	Chut Chonlavorn	President	Constitutional Court
		Chalermpon Ake-Uru	Justice	
		Jaran Pukditanakul	Justice	
		Vekin Rattanapant	Staff Officer	
23.	Democratic Republic of Timor Leste	Claudio Ximenes	President	Tribunal de Recurso
24	Republic of Turkey	Alparslan Altan	Judge	Constitutional Court
		Mehmet Oğuz Kaya	Secretary General	
		Bekir Sözen	Judge Raporteur	
25.	Republic of Uzbekistan	Bakhtiyar Mirbabaev	Deputy Chairman	Constitutional Court
		Sayyora Khakimova	Justice	
26	Bolivarian Republic of Venezuela	Arcadio Delgado Rosales	Justice	Supreme Tribunal of Justice
		Gilberto Guerrero	Assistant Lawyer	

27.	Venice Commission of the Council of Europe	Serguei Kouznetsov	Head of the unit of Regional Cooperation Programme	International Organization
		Clauspeter Hill	Director	
28.	Konrad Adenaur Stiftung (KAS)	Jenny Chan	Assistant	Foundation
		Susan Chan	Assistant	

Jakarta Declaration

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the Association of Asian Constitutional Courts
and Equivalent Institutions

Jakarta, 12 July 2010





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