MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

Proceeding

INTERNATIONAL SYSMPOSIUM
CONSTITUTIONAL COURT
AS THE GUARDIAN OF IDEOLOGY
AND DEMOCRACY IN PLURALISTIC SOCIETY

Solo, Indonesia , 9th - 10th August 2017

PROCEEDING

INTERNATIONAL SYMPOSIUM

Constitutional Court as the Guardian of Ideology and Democracy in Pluralistic Society

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Prepared By
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IN CELEBRATION OF 14th ANNIVERSARY OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
9th - 10th AUGUST 2017, SOLO, CENTRAL JAVA, INDONESIA

OPENING CEREMONY: 09.25 WIB

1. MASTER OF CEREMONY:

The National Anthem of The Republic Indonesia "Indonesia Raya". Accompanied by the choir of Sebelas Maret University student, Voca Erudita.

(Singing National Anthem)

Ladies and Gentlemen, please be seated. A choir of the students of Sebelas Maret University, Voca Erudita, who have received award and recognition at the international level.

In the name of God, Most Gracious, Most benevolent, Excellency President of Republic Indonesia, Mr. Ir. H. Joko Widodo. His Excellency the Chair of Constitutional Court of Republic Indonesia, Mr. Arief Hidayat. The Heads of State Institutions, the Heads of Delegations, Central Java Governor Mr. Prof. Ravik Karsidi, M.S.

Ladies and Gentlemen. Assalamualaikum wr. wb. *May peace and prosperity be upon you all. Good greetings to all of us, good morning and welcome to the opening ceremony of the International Symposium the Constitutional Court as the Guardian of the Ideology and Democracy in a Pluralistic Sociality which is held today, Wednesday the 9th of August 2017, having held in the auditorium of Sebelas Maret University, Central Java.*

Distinguished Ladies and Gentlemen, The Constitutional Court is an important part of governance system to provide justice to the society. There are lot of aspects that need to be taken into consideration in making decision for taking, handling cases including the state ideology. Especialy in countries with pluralistic society and based on that consideration this international symposium is held today entitled the Constitutional Court as the Guardian of the Ideology and Democracy in a Pluralistic Sociality, this forum is hoped to establish coorporation and to serve as exchange of experience among constitutional courts, supreme courts, and other independent institutions that are mandated to protect and guard constitution and to provide the benefit for the people in general in international level and Indonesia in specifically.

I would like to present you with the Kongkorongo Dance from Sanggar Seni Kembang Lawu that will combine Tarian Ayam and Tarian Tapen or The Chicken Dance and Tapen Dance. This is part of Mondosiyo ritual in a village in Indonesia. Please welcome Kongkorongo dance.

(Dance Performance)

Distinguished Ladies and Gentlemen to begin the opening ceremony is the opening remark to be delivered by The Governor of Central Java, Mr. Ganjar Pranowo.

2. THE GOVERNOR OF CENTRAL JAVA: GANJAR PRANOWO

Assalamualaikum wr. wb. May peace and prosperity be upon you all. Good morning. Good greetings to all of us.

Our most honored Excellency and whom we are most proud of, Mr. President; the President of Republic of Indonesia, Mr. Jokowi, the Ministers, Heads of State Institutions, the Chair of the Constitutional Courts of The Republic of Indonesia, and Justices of the Constitutional Courts, the Delegations from fellow countries, Rectors, Academic Invitees from the National Police, from The National Armed Forces.

Praise be to God that we are able to gather here this morning. In my opinion, this is a very important event. There are two matters that I would like to convey. The first one is the important need to protect the constitutional rights of the people, but also most importantly and specifically on how this Symposium can provide feedback for the constitutional courts to protect the state ideology as the guardian of constitutions among different countries, different states that are present here today, hopefully we can establish a way to respect and protect each ideology in each respective country. And I hope that this symposium can deliver the important decisions, so that there is a better cooperation, better relationships among the states, and also better communication among the member states. And throughout the International Symposium, Solo, as the host, is the correct choice to choose Solo as the host, because this is a place where you can eat well, delicious food. This is also the

place where art and culture develop. This is also the place with the most activities registered in our calendar in Indonesia. So, for our colleagues, delegations, who would like to enjoy culture and places in Solo, there are a lot of places that you can enjoy.

And I do would like to remind you that you should take something small to go back home. And you should take a lot of souvenirs to your home countries, to bring to your family. So you need to take a lot of souvenirs and tokens and also take some produce from Solo, handicrafts from Solo. And I do recommend you a lot to enjoy the beauty of Solo. Please welcome the hometown of our President. This is where our President is raised and grew up and he is now leading our beautiful state for the interest of all of the people.

Thank you. Wassalamualaikum wr. wb. May peace and prosperity be upon you.

3. MASTER OF CEREMONY:

Ladies and Gentlemen, We would like to play you a video of Wonderful Indonesia. Please enjoy.

Ladies and gentlemen, that was the visualization of the beauty of Indonesia, the diversity of Indonesia and the role of the Constitutional Court of the Republic of Indonesia. Distinguished ladies and gentlemen, the next item is the report from The Chief Justice of the Constitutional Court of the Republic of Indonesia, Mr. Arief Hidayat.

4. CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA: ARIEF HIDAYAT

In the name of God Most Gracious, Most Benevolent. Assalamualaikum, may peace and prosperity be upon you. Good greetings to all of us. Om swastiastu. Namo Buddhaya.

Your Excellency Mr. President of the Republic of Indonesia, Mr. Joko Widodo. Excellencies, the president of the Association of Asian Constitutional Courts and Equivalent Institutions, Tan Sri Datuk Mohammad Raus Sharif, honorable chiefs and justices of the constitutional courts from friendly countries, distinguished heads of state institutions, honorable justices of the Constitutional Court of the Republic of Indonesia.

For the first, second and third periods, the ministers of Kabinet Kerja (Working Cabinet), the Governor of Central Java, Mr. Ganjar Pranowo, honorable Rector Professor Dr. Ravik Karsidi, academics from campuses throughout Indonesia who are present here today, participants of the Symposium. Ladies and gentlemen, let us praise God Almighty, Most Gracious, Most Benevolent, because of His grace we

are able to gather here today to attend the opening ceremony of the International Symposium in good condition.

I would like to bid welcome to all participants of the symposium, both member countries of the AACC as well as other fellow countries from the Association of the Constitutional Court of Africa, from Franca Lingua Association, Latin Association, The President of Venice Commission, welcome to Solo.

Excellency, Mr. President, distinguished Ladies and Gentlemen, I would like to report to your Excellency that this symposium is conducted in a series of activities, which included the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) on Tuesday, August 8, 2017. This is a follow-up after the third congress of AACC which was conducted in Bali, which was also officiated by the President of the Republic of Indonesia.

At the third congress in Bali, the Constitutional Court of the Republic of Indonesia was mandated to continue the presidency or leading the AACC for the next one year, and based on that, the Board of Members Meeting was conducted this month in August 2017.

At yesterday's Board of Members Meeting, through a very humble process, based on consensus and based on the fourth principle of the Indonesian Pancasila, The President of AACC was elected, which is the Malaysian Federation Court to act as President of the AACC for the 2017 – 2019 period. I am confident that the existence of the AACC will be even stronger to develop cooperation at the regional and global level, and to actualize a state that upholds democracy, human rights, constitutionalism, togetherness and peace.

Excellency President, Ladies and Gentlemen, the International Symposium will discuss about constitutional court, ideology and democracy in a pluralistic society.

This a very relevant topic to be discussed, specifically for Indonesia and also other countries with diversity and pluralism. Indonesia consists of, as you have seen from the video that we have played, consists of 1.128 ethnicities and there are more than 1.700 islands and no less than 546 languages or dialects.

Moreover, the religious beliefs, culture and customs that are also highly diverse. But, until today this form of diversity is well protected and well maintained within the frame of the unity of the Republic of Indonesia. From the history perspective, Indonesia, the diversity is a fundamental point for the birth of Indonesia, an independent Indonesia. The diversity was adopted by our founding fathers when we formalized the Constitution of 1945 with the principle of unity in diversity. Our Constitution, which contains five main principles, is an actualization of our founding father and former president Mr. Sukarno in his speech and is also strengthened to pin our law Pancasila. Our ideology contains the best principles for the people of

Indonesia that upholds the diversity and is based on Pancasila - the five principles of Indonesia - and our 1945 Constitution that are the pillars for protecting diversity in Indonesia.

Excellency, President, distinguished Ladies and Gentlemen. In protecting the five principles of Pancasila, our Constitutional Court has proven it in various decisions including an interpretation of Article No. 33 of our 1945 Constitution on the control of state where the people of Indonesia as constructed in our Constitution give the mandate to the State to develop policies, to take decision, to manage, to arrange, and to control the resources for the best interest and well-being of the people of Indonesia. And, therefore any law that is contrary to Article 33 and also the preamble of our Constitution will be considered unconstitutional. In other decision, the Constitutional Court has also provided interpretation regarding the relationship between the State and religion.

The State may provide provision to arrange, manage, and limit freedom to act but it should not intervene with the freedom to hold religions and beliefs within the definition of freedom to be. The arrangement made or the provision made by the State is to protect the citizens in observing their religion and belief, not to intervene the freedom to act. In principle, I would like to reiterate that in performing its mandate, the Constitutional Court would like to ensure that all laws and regulations have to be in concordance with the five principles of Pancasila.

The laws must be aimed to protect the integrity of nation both at the territorial level and ideological perspective. Second, the law should be aimed to build democracy and nomocracy. Third, it shall develop social justice and fourth, the law needs to develop tolerance among religions and civilizations.

From the symposium, we hope that there will be follow up at the academic level and at the practical level both from the domestic level and global level. For the domestic level we hope that there'll be a strengthening of our five principles of Pancasila in Indonesia and these principles can serve as reference for other states in the country to actualize a dignified justice and peace for the interest of global society.

For participants of the symposium, I would like to congratulate you and wish you good luck in participating in this symposium. I would like to thank also Mr. Joko Widodo and kindly ask and welcome His Excellency the President to officiate this international symposium. Thank you. Wassalamualaikum wr. wb. May peace and prosperity be upon you all.

5. MASTER OF CEREMONY:

Ladies and Gentlemen. The next, let us listen together the remarks from the President of The Republic of Indonesia, continued with the hitting of the gong as the official

mark on the opening of the International Symposium of the Constitutional Court as The Guardian of Ideology and Democracy in a Pluralistic Society.

6. THE PRESIDENT OF THE REPUBLIC OF INDONESIA: JOKO WIDODO

May peace be upon us all and greetings to everybody. Good morning and good tidings to everybody. *Om Swastiastu*, *Namo Buddhaya* and all the good greetings from the world.

To the honorable, His Excellency the Chief Justice of The Constitutional Courts and Equivalent Institutions all over Asia who are present this morning.

To the honorable, His Excellency Chief Justice of Constitutional Court of The Republic of Indonesia as well as the other Justice of the Indonesian Constitutional Court.

To the honorable Minister of Political Law and Human Rights. The Governor of Central Java. As well as all of the Chief of the State and Government Institutions. To His Honorable Rector of the Sebelas Maret University. Together with all of the academicians, the students who are here. The guest and everybody in the symposium.

First of all, I would like to welcome all of the participants for the Association of Asian Constitutional Courts and Equivalent Institutions, Symposium that is held in Solo, Central Java. We were reminded, by the Governor of Central Java that I was the major of the Solo City.

It a city, that I believe a good reflection on the livelihood of Indonesian people who are very pluralistic. I still remember how every day, I have to handle the aspiration, the demands, and the protests from the citizens of Solo, who are not only diverse, but also dynamic.

The experience in managing this city taught me that democracy through dialogs and constitutional principles are the best way in managing the diversity.

Solo is one of the diverse mosaic that Indonesia has. Indonesia has seventeen thousand islands spreading from Sabang to Merauke, from Miangas to Rote Island. Indonesia has thirty four provinces, 516 cities and districts, with 714 tribes, with more than 1.100 local dialects and different cultural expressions.

This plurality, is not a problem for us to be united. We are being united with the same goals to achieve a Pancasila state within the framework of constitution of the 1945 Basic Constitution.

To the honorable Chief Justice of the Constitutional Court, Ladies and Gentlemen, as a plural country Indonesia has gotten a long history in managing the diversity and

plurality. And this history, has shown us the importance of Pancasila as the glue of the unity and ideology of the nation.

To understand the importance of the 1945 basic constitution as a mutual consensus of all nation elements, all of the citizens. We hold dear the constitution to ensure respect, protection, and fulfillment of human rights, and rights of the citizens for all of the people of Indonesia, and with respect, with protection, with fulfillment of the rights of the citizen, every citizen of Indonesia has the same position, has equality in the constitutional life. In a constitutional state, there is no first class citizen or second class citizen. What we have is the citizen of the Republic of Indonesia. This experience strengthens my belief that constitution is the protector of plurality and diversity be it diversity of opinions which is the characteristic of democracy as well as diversity of ethnicities, cultures, and religions. It is the constitution that maintains that there should be no group that can force what they want without respecting the rights of other citizens, and in addition to that, as a democratic country, Indonesia uses the constitution as the main reference in building a healthy and institutionalized democratic practices. And referring to our constitution, there is no institution that has an absolute power and it is not a dictatorship. The Constitution ensures a balance of power among state institutions and also that they can control each other, supervise each other, and the Constitution also prevents mobocracy by which they push what they want because they have a big mass and with that corridor we will have a healthy democracy – an institutionalized democracy.

Ladies and Gentlemen, our challenge in doing the Constitution is not entirely easy. The world is changing quite fast. There are many new things emerging and compared to the past when our State Constitution was formulated, the new challenges keep coming up. For example, radicalism, terrorism, globalization, narcotics trafficking, human trafficking, smuggling of arms, cybercrimes, and other things. The generation is also changing, now we are meeting young people who have become part of the millennial generation - the Y generation who has a different way of thinking compared to the past generation and this is another challenge on how to make the values and the spirit of the Constitution well understood by the new generation. Among the new wave of challenges, the role and the position of the Constitutional Court in each democratic country becomes more important because it is the Constitutional Court that has to become the anchor - to become the beacon that shows the understanding of a country - the anchor in understanding the preliminary views of the state founders - the constitutional founders - to see the spirit and the nobility of our forefathers. It is the Constitutional Court that interprets the Constitution so that it can be used as a reference and also as a part of inspiration of the state in answering all of these new challenges. And therefore, I really appreciate the implementation of the international symposium with the theme of "Constitutional Court as The Guardian of Ideology and Democracy in a Pluralistic Society". We hope that everybody here can learn from the experience from other states and that the results of this symposium can strengthen the quality of our own constitutional courts and also strengthen the democratic practices of all of us.

And by saying, "With the grace of God," I officially open this symposium – the Board of Members Meeting of AACC and the International Symposium that is being held this morning. Thank you very much. May God's blessings be with us all.

7. MASTER OF CEREMONY:

We would like to ask the Governor of Central Java, The Chief Justice of the Constitutional Court, and The Rector of Sebelas Maret University.

Ladies and Gentlemen, all of the guests and participants, the official opening of the international symposium has been conducted. May this event be able to create a better justice and a fruitful result for all of the people related.

And next the President of the Republic of Indonesia is leaving the room, please stand up.

INTERNATIONAL SYMPOSIUM SPECIAL SESSION: 13.15 WIB

8. MASTER OF CEREMONY:

You will discover inspiring presentations and breakthroughs in the practices of constitutional across Asia.

Commencing our program this afternoon, we honored to invite honoraries speech from the new President of the Association of Asian Constitutional Courts.

Ladies and Gentlement, please welcome His Excellency Mohammad Raus Sharif.

9. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Bismillahirrahmaanirrahiim. Assalamualaikum wr. wb. His Excellency the Chief Justice of Constitutional Court of The Republic of Indonesia, Professor Doctor Arief Hidayat, His Excellency, the President of the Venice Commission Mr. Gianni Buquicchio, His Excellency the President of The Conference Constitutional Jurisdiction of Africa, Mr. Mogoeng Mogoeng, Chief Justices, Distinguished Delegates, Ladies and Gentlemen.

Shortly, we'll be witnessing the signing of the Memorandum of Understanding, MoU, between The Association of Asian Constitutional Courts and Equivalent Institutions AACC and Conference Constitutional Jurisdiction of Africa (CCJA). Before that, let me say a few words. First and foremost, on behalf of AACC and on behalf the Malaysian judiciary, I would like to congratulate the Constitutional Court of the Republic of Indonesia for organizing this international symposium.

To Professor Doctor Arief Hidayat, The President of Constitutional Court of Republic of Indonesia and his constitutional judges, may I extend my deepest appreciation for the warm welcome and your hospitality in this historic royal city of Surakarta, famously known as Solo.

Malaysia is indeed humble to be given the trust and mandate to lead the AACC. I hope and pray that Malaysia will live up to the success of my immediate predecessor, Chief Justice Professor Doctor Arief Hidayat, who has taken AACC to a greater height under his skilled leadership.

Today's international symposium is the testament to his accompaniment shown by Chief Justice Professor Doctor Arief Hidayat and his team of Constitutional Court of the Republic of Indonesia to advance the legal cooperation within members and non-members of the AACC. Further, the organization of the symposium is in line with the AACC objectives in exchanging views and experiences among members and non-members.

Distinguished guests, as I said earlier, shortly we'll be witnessing the historic event the signing of the MoU between AACC and CCJA. The board members of the AACC had mandated Professor Arief Hidayat to sign the MoU on behalf of the AACC. This MoU represents a significant step forward in the cooperation between and exchange of views between AACC and CCJA. We as members of constitutional courts and equivalent institutions must be conscious of our extremely pivotal role as the guardian of supreme law of our nations that is the Constitution.

Distinguished delegates, AACC has come a long way since its establishment in 2010. And I am pleased to know that three Permanent Secretariats in Korea, Turkey, and Indonesia have been established. These permanent Secretariats will indeed be tremendous benefit to all members of the AACC especially in the planning and organizing of future Secretariat General Meetings, Board of Members Meeting, and of course bi-annual congress. As the new president, Malaysia look forward to working closely with these Permanent Secretaries. I hope all guests and participants would benefit from the symposium and I wish a successful symposium ahead. Thank you very much.

10. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much, His Excellency Muhammad Rauf Sharif.

Excellency delegates, Ladies and Gentlemen, privilege to invite the honorary speech of The President of The Conference Constitutional Jurisdiction of Arica. Let us welcome His Excellency Mogoeng Mogoeng.

11. CCJA: MOGOENG MOGOENG (PRESIDENT OF THE CCJA)

His Excellency Mohammad Raus Sharif, Chief Justice of the Constitutional Court of the Republic of Malaysia and The President of Association of Asian Constitutional Courts and Equivalent Institutions, His excellency Professor Dr. Arief, Chief Justice of The Constitutional Court of The Republic of Indonesia, and outgoing President of AACC, His Excellency The President of the Venice Commission, Mr. Buquicchio, esteemed speakers, esteemed Board members, colleagues, distinguished guests, Ladies and Gentlemen, I greet you.

Just to express my appreciation for the invitation, I'd come and say a word or two on behalf of the CCJA at this historic conference, historic for a number of reasons I need not go into, but just to mention what crucial importance of signing the Memorandum of Understanding between the AACC and the CCJA. I believe that history will celebrate the significance of that exercise in the years to come. The theme for this conference was Constitutional Courts as Guardian of Ideology and Democracy in a Pluralistic Society would not have come at the right time, and then the right place.

Listening to speeches this morning about the plurality that Indonesia epitomizes, in the maze of a number of tribes, I've never heard of a nation with so many tribes put together and yet coexisting peacefully, and the number of languages that are spoken in this nation tells us that it is indeed possible for people however diverse, languages, and religions however diverse, could live together in peace and harmony. This is of crucial importance to Africa because whether it is Nigeria you look at, you'll find that there are serious misunderstandings that often culminate in wars resulting in that's of many because of religion but also because of the number of tribal groupings in that area, one fighting for dominance over the other. It may even be of South Africa that you have in mind black and whites at each other's throats because the one grouping believed that it is endowed with some strength superiority over the others. Whether it is African people and Indian people within the South African city, we still have the same problem. It may even be Rwanda you wonder why there is so many killings I think close to a million people losing their lives just because one tribal grouping or cultural grouping believes that it ought to dominate the other. It may even be Kenya I'm sure you're well aware of what happened during the 2007 election in Kenya. Tribalism, cultural diversity, and the inability to appreciate that there is strength in that diversity rather than weakness. And the lack of capacity to harness the diversity and make the most of it, explains why so many people lost their lives at the time when and that time that has been made to strengthen the democratic setting in that country.

But there is something very similar with Indonesia and South Africa, one where at one stage or the other, both colonized by the Netherlands, I've come to learn. When I got to Jakarta, I said, "But why do they have the word bagasi," Because bagasi in African, in South Africa which stems from the Dutch language is 'luggage',

does that might also mean 'luggage' here, because we were once colonized by the Netherlands. I see *kantor*. Kantor is 'office' in African, in South Africa. So, I've never been to this beautiful country before, but I feel like I'm home, away from home.

There is something else, the national motto of South Africa, it's in Kwai language it says, "Ekahake," in the Kwaisian language means 'unity in diversity'. But our constitution as well as in the preamble talks about South Africa belonging to all people who live in it united in diversity. .

I was struck by this reality, that here in Indonesia, that the official national motto is Bhineka Tunggal Ika, and I was told that in Javanese ... in Javanese, the translation is also Unity in Diversity. I have no doubt, that concerned that we all are about the intent of our strife was and all misunderstanding was all over.

Nations and regions, we will use the opportunity whenever we have, to identify the best practices stemming from the jurisprudential challenge that we have unable to unearth over the years. To strengthen our individual countries and to strengthen our regions. Let me just make a point. One of the challenges that we had, a historic challenge that we have had in South Africa, is this, but the only religion that was recognized during the apartheid era was Christianity.

All others were relegated to the level of near nothingness. And it required the constitutional court, in fact, it took the Constitutional Court of South Africa based on the constitution we have to interpret the constitution in particularly, a clause relating to freedom of religion in a manner that is many to govern people of all religions together to focus on the constitutional vision, the constitutional project, and the national agenda, rather than the differences they seem to lay emphasis on a face purely on their religion.

I mean, let face it, why is it that they seem to be some tension or misunderstanding between America and other jurisdictions, look at what is made of religion there. So, I believe as individual countries, as regions, particularly as the think tank of whatever best practices we can share, documents would help us, not only to strengthen or guarantee ideologies, fundamental rights, and constitutional democracy in our respective countries, but also in our region, with the result that the next time we interact with your America, your Europe or any other jurisdiction.

It is from the position of strength we are able to say to them, you know, this was a problem is not a problem after all. This is how we have been able to find strength of our diversity. Language, religion, race, should rather allow us to harness whatever good is to be found from each so that the collective good that comes from the diversity, then find expression to the good of the broader nation or the broader collective. I had meant, to read from the quotations from the Constitutional Court of

South Africa, which deal with how diversity, could best be harvested and harnessed for the greater good of all but time does not allow.

I just want to wish you, well and very grateful for our host for the amazing and breathtaking hospitality, that met us right at the Jakarta Airport all the way down to the airport here and to the hotel. We're most humble to say the brilliant presentations which are time conscious that took place this morning are something to take back home to Africa with. I look forward to the signing of the MoU, that will seem to mend the relationship between the CCJA and the Association of Asian Constitutional Courts. Thank you very much for the opportunity given.

12. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much indeed, His Excellency Mogoeng Mogoeng.

Excellency, Delegates, and Ladies and Gentlemen, allow us now to invite the Honorary Speech from the President of the Venice Commission. Let us welcome His Excellency Gianni Buquicchio.

13. VENICE COMMISSION: GIANNI BUQUICCHIO (PRESIDENT OF THE VENICE COMMISSION)

Chief of Justice of the Constitutional Court of the Republic of Indonesia then, Arief Hidayat, Chief Justice Mohammad Raus Sharif, the new President of the AACC, Presidents and Judges.

Dear friends, Ladies and Gentlemen, I am very pleased to be in Solo today and to welcome you on behalf of the Venice Commission to this International Symposium in celebration of the 14th anniversary of the Constitutional Court of Indonesia. I would like to thank Chief Justice of Indonesia, the judges and the staff of the Constitutional Court for the excellent organization of this symposium and for the generous hospitality we have been receiving here.

Today's event gathers together the members of the association of Asian Constitutional Courts and the equivalent institutions but also the courts of other continent.

Before we embark on today's topic, I would like to briefly to speak to you about the Venice Commission and its relationship with constitutional courts and courts with the equivalent association. The Venice Commission whose real name is Commission of Court Democracy Through Law who was established in 1990. The commission is an advisory body of the counselor of Europe in the field of constitutional law, while its main activity is centered on advising state on draft constitutions, constitutional amendments and what we refer to as para-constitutional legislation such as laws on constitutional courts or electoral legislation.

The Venice commission was always aware that this text must be implemented in practice to be useful. It was therefore natural for the Venice Commission to turn his attention to the constitutional courts, constitutional councils or supreme courts as these institutions are where the implementation of constitutions and para constitutions legislation can be best accompanied.

And therefore, we are delighted to see the AACC is striving for and continued its dynamic trajectory, with 3 permanent secretariats. One in Indonesia dealing with coordination in planning, one in the Republic of Korea dealing with research, and the training center for education human resources development in Turkey.

The Venice Commission has always been in favor of and supported the creation of the regional constitutional court networks. And this has been supporting for this structure for the past 25 years. Cooperation between the Asian Constitutional Courts and the Venice Commission is back to 2005. And once the AACC was established this was officially organized with the signature of our cooperation agreement in Seoul May 2012.

Through this agreement, the AACC members have access to our data base called courtesies which contains more than 9000 constitutional judgments from all around the world, freely accessible on the Internet. In addition, this agreement also gives the liaison officers, appointed by your respected courts, access to this site on line and in this forum which allows them to quickly exchange information between one another on current issues relating to the constitutional justice.

And I would like to call upon all of you here today to actively contribute for this joint and review though your liaison officers. Courtesies is not only showcase of your judgment that can be seen by other courts and the public at large, but more importantly it offers a much spectrum of constitutional arguments which provide you with the available comparative law bases that could assist you in complicated cases before your respected courts. The Venice Forum is there where your courts maintain a permanent exchange also in between the congresses of the AACC and the world conference.

Dear Justices, the topic you have chosen for this symposium is a challenging one and you have options to take on an interesting angle on what we consider to be the role of the constitutional courts. The role of constitutional courts is often described as being one guardianship of the constitution. We all know that constitutions guarantee the separation of powers the role of law and the protection of the fundamental rights. But it is the constitutional court that ensures the respect for the role of law and fundamental rights. And this court has offered time acquired a distinctive roles in strengthening development of democracy and the role of law as well as providing for the continuity using the constitution as a pillar. This basic principal and constitutional values must be respected in practice as they provide the

foundation for peace and stability in any given country. Its respect is the essence of a constitution.

The implementation of the constitution however which means turning the abstract profession into rules that govern everyday life is a difficult task and should not be the sole responsibility of the legislature. Thus, therefore also entrusted to other programs in particular to judges, and first and foremost to the official judges.

And this is where constitutional justice and constitutional control also referred to as constitutional review comes into play. We might ask why this is so, and the answer is that constitutional control tend to play a role in ensuring that constitution, once adopted, remains relevant on its daily basis. It is this type of control that is needed to defend the constitution against unconstitutional lawyer ranking ordinary law.

Ladies and Gentlemen, the interesting angle taken by the subject of today's symposium, I was referring to, is seeing the constitutional court as the guardian of ideology, and they are of course referring to the founding principles of the state not party ideology. Some states express such principles in their official motto. Franc, for instance refers to Liberte, Egalite, and Fraternite. Freedom, Equality, and Fraternity. I learned that in Indonesia it is the Pancasila, which is said to be the foundation and philosophical theory of the Indonesian state. Its five interrelated principles which are divinity and ultimate unity, a just and civil life humanity, national unity, democracy and social justice, all have important an impact on Constitutional Law. The principle of humanity, democracy, and social justice, for instance, have a direct impact on Constitutional law and its interpretation.

Ladies and Gentlemen, in pursuing the cooperation established with various groups of constitutional court in Asia in other continents, the Venice Commission decided to organize the first congress of the world conference on the Constitutional Justice in 2009 in Cape Town, hosted by the Constitutional Court of South Africa. This event gathered 9 regional or linguistic groups and around 90 boards, it was agreed that the world conference should promote constitutional justice understood as constitutional review that includes human right as key element for the democracy, the protection of human rights, and rule of law.

The success of this event led to the drafting of the statute for the world congress on constitutional justice which adopted at the second congress in Rio de Janeiro in 2011. The statute entering to force on the 24th of September 2011 with accession of other constitutional courts, constitutional councils, supreme courts exercising justice.

I would like to underline that the AACC immediately became one of its founding of regional courts. The 3rd congress of the world conference was a very successful event hosted by the Constitutional Court of Korea in Seoul in September, 2014. And today, the world conference, I'm saying today, not yesterday but today the world

conference counts 110 member courts because yesterday, Kenya, the Supreme Court of Kenya acceded to the world congress.

Chief Justice, Judges, and friends, I would like to conclude by saying that I hope I win the pleasure of greeting all of you at the 4th congress of world conference in Venice, which will also be hosted by the world conference of Lithuania from 10 to 13 September, 2017. Thanks for your attention.

14. MASTER OF CEREMONY: RAHMAT IDRIS

Much obliged, thank you, His Excellency Gianni Buquicchio.

Ladies and Gentlemen, we now move with the signing of Memorandum of Understanding between Association of Asian Constitutional Courts and Equivalent Institutions or AACC and Conference of Constitutional Jurisdictions of Africa or CCJA. May we invite on to the stage to sign, President of CCJA, His Excellency, Mogoeng Mogoeng, also inviting secretary general of CCJA, Mr. Mousa Laraba. We also invite Chief Justice of Constitutional Court of the Republic of Indonesia, His Excellency Professor. Dr. Arief Hidayat, S.H., M.S. We also invite President of AACC, His Excellency, Muhamad Raus Syarief, and the Secretary General of Constitutional Court of the Republic of Indonesia, Mr. Muhammad Guntur Hamzah.

Delegates, Ladies and Gentlemen, the signing of the Memorandum of Understanding between the AACC and the CCJA will now begin.

Ladies and gentlemen, as we witness the proceedings of the signing of the Memorandum of Understanding between the Association of Asian Constitutional Courts and Equivalent Institutions, the AACC and the Conference of Constitutional Jurisdictions of Africa, or the CCJA. Let us give a big round of applause for the cooperation.

Thank you very much, Excellency. May we invite you to return to your seat? Thank you very much indeed.

INTERNATIONAL SYMPOSIUM SESSION ONE

Excellency, Distinguished Delegates, Ladies and Gentlemen, and now with the utmost delight, we will proceed with the first session of the International Symposium. May we invite our distinguished array of speakers for the first session?

The first speaker from Armenia on behalf of the CCCOCND, we invite the Chief Advisor to the President, Ms. Anahit Manasyan. The next speaker from Indonesia, Justice I Dewa Palguna. Speaker from Mongolia, the Chairman of the Constitutional Court, Mr. Dorj Odbayar. Our speaker from Turkey, President, Mr. Zuhtu Arslan. Also requesting our speaker from Uzbekistan, ex-Chairman of the Constitutional

Court, Mr. Bakhtiyar Mirbabayev. And the final speaker of the session from Russia, the Head of The Secretariat, may we invite His Excellency, Vladimir Sivitskiy.

The first session of the International Symposium will be chaired by the Chief Justice of the Federal Court of Malaysia, the President of the AACC, His Excellency Muhammad Raus Sharif. Let's give a big round of applause for all of the speakers and our Chair.

Ladies and Gentlemen, the first session of the International Symposium will now commence with the opening remarks from our Chair, please.

15. MALAYSIAN DELEGATION: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Chief Justices, Distinguished Delegates, Participants, Ladies and Gentlemen. I am privileged and indeed honored to open the floor in today's theme, the Constitutional Court and State Ideology.

As an introduction, Malaysia's state ideology, already a national philosophy, is embodied and prescribed in the national principles, known locally as Rukun Negara. The Rukun Negara was instated by the Royal Proclamation with the aims to incorporate and promote among others the principles of unity, rule of law and the supremacy of the constitution. These five principles are:

1. Belief in god,

2. Loyalty to King and Country,

3. Upholding the constitution,

4. Rule of Law, and

5. Good Behavior and Morality.

These principles are very much alive in Malaysia. The Malaysian Court recognized these principles under the Rukun Negara as being intrinsic to the social structure or the Malaysian society and take conscious to promote and protect this philosophy. And, I am sure all of us are keen and indeed keen to learn the approach adopted by other countries in this regard.

Hence, I now open the floor to our distinguished presenters to share the experience in today's theme, The Constitutional Court and State Ideology. Thank you.

16. MASTER OF CEREMONY: RAHMAT IDRIS

Inviting the first speaker for this session, Chief Advisor to the President from Armenia, Ms. Anahit Manasyan.

17. CCCOCND: ANAHIT MANASYAN (CHIEF ADVISOR TO THE PRESIDENT OF THE REPUBLIC OF ARMENIA CONSTITUTIONAL COURT)

Honorable chairperson, honorable colleagues, dear friends, on behalf of The Constitutional Court of The Republic of Armenia and the conference of constitutional control or consult, countries of yielding democracy, at first I'd like to thank the organizers for the excellent organization of this beautiful event and at most important, of course, is the invitation to participating. It's an honor and pleasure for me to speak today at this high-level conference and auditorium regarding constitutional stability as an important prerequisite for stable democracy.

A topic which is at most importance bought from the view point of ensuring and strengthening stable democracy in modern countries in general, and also from the view point of the proper activities of the constitutional court in particular.

Actually, as a rule, constitutional stability is presented as unchangeability of constitutional regulation in legal literature. I have another viewpoint regarding the mentioned issue which I'm going to analyze regarding, during my presentation. At first I'd like to mention that in modern science, stability doesn't exclude changes. It expresses the possibility of the system to preserve dynamic balance during the long period of time just in previously defined.

I'm highlighting previously defined and reasonably expected conditions. Hence from the point of constitution too, stability does not exclude the possibility of changes and development. Of course, reasons of constitutional stability is not based on the idea of preserving the system from the changes, but all the idea of taking the mentioned changes into consideration.

At the same time, we should take into account that in this context we do not think about changing thoroughly the core, the essence of the system, and in this case, the constitution. Because each social system has an integrity quality which defines and composes the whole mentioned system and the initial condition from which the transition to new position takes place. Hence, in case we change the court, thoroughly change the court the essence of the system we cannot think about stability and development of the system in general at all.

From the view point of the constitution, I believe that these provisions, the core the essence of constitution are the constitutional legal characteristics of the state which

are defined almost in allc constitution of modern societies that are for example for The Republic of Armenia that our country is a democratic, social independent country based on the rule of law.

Hence, the main position in this case is the fact that constitutional stability presupposes its unchangeability just in case of unchangeable social relations. But, at the same time we should take into consideration that in this case we speak not about static but dynamic stability when the court, the essence of the constitution, is not subject to changes, but the basic law itself ia able to adapt to changing social relation thing there and it should regulate.

In this context, I'd like to speak about the inter-relations that bring constitutional stability and politics because this topic is really very important for the proper activities for The Constitutional Court. According to most of the scholars both legal and also political scientists, constitutional stability is thorough based on political stability and the constitution state enforce just during such a time frame within the frame of which is convenient from the political point of view, and no more. Of course, various research showed that constitutional stability, the stability of modern constitution depend also on the political stability and the interruption of the political power, for example in the result of political upheaval, civil wars, revolution, et cetera, has greatest impant on decreasing the viability of the constitution.

For example, 66% of the constitution of Latin American state, a state which most the effect starting from 1946 until 1999 were replaced just during disband. Of course we shouldn't be naive to think that politics has no impact in constitution stability.

At the same time, we should take into consideration that this impact is not the only literal as the constitution itself defines the rule according to which and based on which the political hence also states, I am sorry, the political power should act. Hence, constitutional stability is not conditioned by this or that change of correlation of the political power itself, but on the corresponding level of constitutional and political culture of the society in general.

Therefore, Constitution can not be a tool for the politics and also it can not be a tool for various judicial bodies. It should be a bound framework for them. Moreover, the constitutional developments should express not just this or that political interests and preferences of this or that political groups and events, but be superior to them and define fundamental legal framework for the political actors and events.

The next important issue which I would like to discuss in this auditorium is the interrelations between the constitutional stability and time, because according to many scholars and also practitioners, constitutional stability is thorough conditions on the fact how long it is in force or the durability of its force in time. Of course, the

action of the constitutions bring along a period of time, when it is also the initial regulator of social regulations, this is the most acceptable and effective education.

At the same time, this does not theoretically true such a situation when things enforce or having the most important features for the stability. Constitutions will be based for example in the results of the changes of that political power. Of course, the constitution is stable when it stays in force for a long period of time.

But, at the same time the stability of constitutions depends on various other factors, for example: political, social, economics, etc. For example, The Constitutions of Colombia of 1886 was replaced just in 1991 being in force, as far as I remember, for about 100 years. But the main reason for this was not the authorithy of constitutional regulations, but the unsuccessful attempts to convene constituent assembly. Hence, the constitutions is stable, not because it is in force for a long period of time, but it is in force for a long period of time and it becomes viable just in case it defines the main fundamental principles and values which are typical for a concrete social society and the aim to reach the society should (inaudible).

Of course, a question rises here, whether there is a concrete period of time during which the constitutions should stay in force in order to be considered stable. According to Thomas Jefferson, Laws, including the Constitutions, mechanically lose their force, taking to considerations the fact that today's majority can restrict just today's majority and minority, but it can not restrict the future of majority and minority. That is why he considered 19 years as a normal period of time during which the laws and the constitutions should act and they considered that after this period, they should mechaniclly lose their force, taking into account the average period of active life that timing (inaudible).

Taking into account, my ideas, and position regarding the interrelations between constitutional stability and its time, I believe that there is no concrete time frame within frame of which the constitutions sustain in force in order to be considered stable. Of course, as I mentioned, the most acceptable situations are the ones when the constitutions which is also the initial regulator of social relations which defines fundamental values and principles which are typical for the given social society and the aim to which this society should seek.

In this case, the stability of the constitutions and its action during a long period of time, of course takes about this stability. But at the same time, I would like to highlight that the stability of a constitutions is unchangeable, just in case the social relations unchangeable. That is why, in this case, we should speak about not static, but dynamic stability, when the constitutions itself is able to adapt to concrete social relations.

I would like to touch upon also one issure regarding the constituional amandment and constitutional development in the Republic of Armenia to finalize my today's

presentation. I am not going to deepen into political issue, because I do not consider myself (…)

18. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Excuse me, I would like to inform that your presentation is only 10 minutes.

19. CCCOCND: ANAHIT MANASYAN (CHIEF ADVISER TO THE PRESIDENT OF THE REPUBLIC OF ARMENIA CONSTITUTIONAL COURT)

Sorry? I am finalizing.

20. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Thank you, three more minutes.

21. CCCOCND: ANAHIT MANASYAN (CHIEF ADVISER TO THE PRESIDENT OF THE REPUBLIC OF ARMENIA CONSTITUTIONAL COURT)

I am finalizing. I'll finalize in a minute. Actually, as a result of the constitutional amendment process in the Republic of Armenia, the Constitutional Court will have a new authority which will be solving constitutional conflicts between the constitutional bodies regarding their constitutional authorities. This is a very important authority for the Constitutional Court because in case there is no legal body, which can solve political conflicts which are related to the implementations of the Constitution, these conflicts will be resolved like behind the scenes, on the political level which is not considered to be a civilized way of resolving such conflicts.

Actually, I can speak endlessly regarding the mentioned issue. That's why I will finalize here. I'll stop here in order not to misuse your patience. And thank you for your attention. I'll be glad to answer your questions if you have such. Thank you so much.

22. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much, Miss Anahit Manasyan, Chief Advisor to the President of Armenia.

Our next speaker, Ladies and Gentlemen, is from Indonesia. Please, give a warm welcome for Justice I Dewa Gede Palguna.

23. INDONESIAN DELEGATION: I DEWA GEDE PALGUNA (JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Thank you very much. It is a great honor and also a great opportunity for me to be here to present my short paper, announcing Pancasila as the state ideology and its relation with the Constitutional Court. So, the one and only issue that I would like to describe and to discuss in my paper, is is there any relation between Pancasila and the Constitutional Court? And the answer is already apparent, though I describe it maybe quite succinct or short in my paper. Yes, it does, there is.

As we know, when we are talking about ideology, there are so many definitions about the terminology. So, I don't want to add more confusion to the already complex and confusing about the terminology as I stated at the beginning of my presentation.

So, by ideology in my paper, I mean Pancasila as the state fundamental, Pancasila as the philosophical foundation of the state. As we know and as history goes, Pancasila was first introduced by our late first president, one of the founding figures of the Republic of Indonesia, President Soekarno, when he was a member of board ... what is call BPUPKI, im not sure with my translation. Board inquiry for independent preparation sourche. Ya, ini Bahasa Indonesia, is called Badan Usaha ... Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia.

The Investigating Committee for Preparatory Work for Indonesian Independence, at the time. In his historic speech on June 1, 1945, Soekarno introduced the five basic principles that he proposed as the state fundamental, during the great meeting or the plenary session of BPUPKI, chaired by Mr. Radjiman Wedyodiningrat.

And he said, and he emphasized during the speech that only with the five basic principles the unity of Indonesia, could be secured and maintained. And that's why, he said, only with the five an basic principles should Indonesia's eternal independence be established. And then the plenary session of BPUPKI accepted, the proposal made by Soekarno, but on condition that it needed a reformulation.

Now, we can see the five basic principles, consisting of, ya, as we can read in our the Preamble of the Constitution. The Oneness of God the Almighty or Ketuhanan Yang Maha Esa, (in Bahasa Indonesia). And a Civilized Society or Kemanusiaan Yang Adil dan Beradab. The Unity of Indonesia or Persatuan Indonesia. Democracy With the Guidance of Wisdom in Assembly/Representation or Kerakyatan Yang Dipimpin oleh Hikmah Kebijaksanaan Dalam Permusyawaratan/Perwakilan, and the last one, Social Justice for All the People of Indonesia or Keadilan Sosial Bagi Seluruh Rakyat Indonesia.

It is strongly believed after this very day that only by upholding Pancasila, the five basic principles, the unity of the nation be maintained and secured. That's why, the Pancasila is included in the Preamble of the 1945 Constitution, our constitution, ya.

So the question shall be: what is the relation between the so-called state ideology Pancasila and the Constitutional Court? As we know, according to Article 2 of our additional provision in our Constitution says that the Constitution consists of the preamble and the articles of the Constitution. So Constitution as a whole includes the preamble and the Constitution of 1945. It means that Pancasila is part of the Constitution according to Article 2, our additional provision in our Constitution.

While, academically speaking, when we are talking of the Constitution, according to prominent Professor Hans Kelsen, he says that a preamble is a solid introduction consisting of political as well as legal principles, moral and political, religious and legal principles of the Constitution. So it said a solemn introduction of the Constitution. While according to other scholars, Henc van Maarseveen and Ger van der Tang, according to their studies conducted in late 1970's, they say that there two types of preambles of a Constitution. The first one is the preamble with the character of declaratory. The second one is preamble with character of programmatic or the programmatic preamble.

There is no doubt to me that the preamble of the Constitution of 1945 falls within the second category. So, what is the difference between the first character of preamble of the Constitution and the second one? Actually there is no very distinct character but it is more emphasized in a preamble with a programmatic character that is not only declared what kind of principles, whether it is political, religious or moral, that shall be maintained by the Constitution but it also guides some important measures to be taken by the Constitution. It also enshrines the ideal of the state to be established by the Constitution.

Now, when we are talking about the Constitution Court of Republic of Indonesia, according to Article 24 paragraph, 1c of our Constitution, there are two authorities or powers of the Constitutional Court of Republic of Indonesia that relate to the existence of Pancasila as a state ideology.

There is the authority to declare the unconstitutionality of law and the authority to dissolve political party. So, when the Court considers that a law, whether the procedures of the establishment of the law or part of the material of the law, it could be one article or a paragraph or a part or any of the law by the Constitutional Court of Republic of Indonesia is considered unconstitutional, then the Court shall expressly declare the law no longer has its legally binding power.

Now, because the Constitution itself covers not only the Articles of Constitution of 1945 but also includes the preamble of the Constitution; hence, it goes without saying that when a law is considered inconsistent with Pancasila, it could be declared unconstitutional; even it must be declared unconstitutional. So is a political party. When a political party, either its principles, its objectives, its activities or its programs, is considered inconsistent with the Constitution especially with Pancasila, it could be declared unconstitutional by the Constitutional Court.

Of course, there are questions about what the description the court should made, when it says that a law or a political party is contradictory or inconsistent with Pancasila. I think that's another homework for the Constitutional Court of the Republic of Indonesia because actually, personally speaking, I don't want to do the job during my ten year in the Constitutional Court.

Because I think in a democratic society we all believe that everyone should be free to have opinion or to make assembly according to his opinion. And that is certainly guaranteed by the constitution, but at the same time when we are talking about the constitutional democratic state, we also believe that there is no freedom without constitutional restriction, that the very basic what the Constitutional Court means in my understanding.

Thank you very much, Mr. Chairman.

24. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much, Justice I Dewa Gede Palguna.

May we next invite our speaker from Mongolia, Chairman of the Constitutional Court of Mongolia? Let us welcome Mr. Dorj Odbayar.

25. MONGOLIAN DELEGATION: DORJ ODBAYAR (CHAIRMAN OF THE CONSTITUTIONAL COURT OF MONGOLIA)

Honorable Chairman, Honorable President Chairman, Chief Justice of Constitutional Courts and Equivalent Institutions, Ladies and Gentlemen. Let me begin by extending a warm welcome, on behalf of the Constitutional Court of Mongolia, to the Constitutional Court of the Republic of Indonesia, the Chief Justice Professor Arief Hidayat for hosting this International Symposium and inviting us to this important event. It gives me immense pleasure, in it to be participating in this symposium. The support of making this symposium fruitful and accessible like the previous ones.

I would like to briefly present this topic on, the concept of ideology in addition to the Constitution of Mongolia and how it is applied in the Constitutional Court of Mongolia. Constitution is not only the fundamental law of the state, but it is also the document of consensus of the entire nation determining the process and development of law instead. If we take into consideration the process and development of the state, the constitution has many aspects and among them, of course, the ideology of the state. There has been various terminology of ideology today. It is acceptable that ideology is a set of doctrines or beliefs that have been shared by the members of several groups, or that from the basis of political and economic or other system.

It's the body of the ideas that is reflected in beliefs and interests for a nation, political system, and underlies political actions. It also a body of forming a political and social program along with the devices for putting it into operation.

Ladies and Gentlemen, it is important too to note that Mongolia is a unitary country. Mongolia in its history has enacted four constitutions. The present democratic constitution was passed in 1992. The previous constitution were passed in 1921, 1940, and 1960 respectively. Mongolia is also a country which dedicated seventy years of history with a strong ideological period for a single party system. The ideological foundation was socialism.

Why this ideology was engaging such a long period of history of our country? Of course, there are many reasons. One of them main reasons was that this ideology was constitutionalized in Mongolia. Our guardian of this ideology was so little in the political party. It's the past world happening in our history.

But, with the enactment of the new constitution in 1992, the ideology of the nation and state has shifted to democracy, constitutionalism, secularism, rule of law, separation of power, independence of constitutional court and judiciary of course multi-party system and so on and so forth. With the introduction of open market economy various expressions of ideologies were introduced into the Mongolian society, like different forms of ownership of property, human rights, supremacy of law, freedom and equality, etc.

Mentioning these aspects, I would like to note that any doctrine or belief when they are situated in the fundamental politico-legal documents, namely constitution, seems to become ideology of a nation or state in any social economic formation.

If we read the Constitution of Mongolia that ends with the words *learn and abide*, calling the nation to learn and abide by the constitution - it proves the ideology is a body of formulated doctrines, thoughts or principles that guides individuals, social movement, institution groups. Therefore, the constitution is meant to determine the ideology of the state and the constitution court is the guardian of the ideology in a pluralistic society while in a non-pluralistic, a single political party … the … speak about as to how to guard the ideology is going on in Mongolian context.

To represent our opinion that it is the notion in legal size called basic structure. This structure of the constitution should be stable, it should not be easy to be amended or even damaged. Recently in 2010 the parliament of Mongolia passed a new law, the law on the procedure of amendments into the Constitution of Mongolia.

The Mongolian Parliament has determined in this law the notion of basic structure, first time in its legal history in the above mentioned law through the same notion itself is formulated through the judicial precedent mainly in common law countries,

while in the law are bare acts, or the Constitution itself in civil law countries as unamendable an (inaudible) provisions of constitution.

Mongolia parliament has declared 22 provisions and sub provisions of the constitution as unamendable provisions having named after as basic structure of the Constitution of Mongolia.

All these 22 provisions may be considered provisions which contain main ideological principles of the state and the nation.

The Constitutional Court of Mongolia while protecting basic structure of Mongolian Constitutional at the same time it improves duties of being constitutional guardian of ideology. But the principle of being a subject to the Constitution, the Constitutional Court will only need to be kept – to be strictly observed and followed as the Constitutional Court of Mongolia - the only competent organ that has the power to exercise in judicial reviews and the enforcement of the constitution and the guarantee for strict observance of the constitution. The constitution of Mongolia examines and decides disputes regarding breach of the constitution with its own initiative, answers to the petition of all information from the citizens or requests the parliament of Mongolia, the President, the Prime Minister, the Supreme Court, the Prosecutor General and the Election Commission of Mongolia in accordance with the constitution.

While citing this, it is important to note and inform that the decided disputes used on the citizens petitions occupy more than 95% in our practice. Most of them, more or less, touch the national ideological issues.

All cases are decided grounding the reasoning related with ideology, public interest, social policy under the general reasoning of the Constitution violation.

And thank you for all my friends for listening and paying attention to our presentation. And then, I would like to express my deepest gratitude to our friends from Indonesia for successfully fulfilling and taking the presidency last year, especially His Excellency Dr. Arief Hidayat, Chief Justice of Indonesia. And I would like to wish good achievement and big success to the our new President Chief Justice of Malaysia Doctor Muhammad Rauf Sharif. And thank you, all of you. Good luck with success.

26. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much His Excellency Dorj Obdayar.

And now inviting the presentation from the President of the Constitutional Court of the Republic of Turkey, His Excellency Zühtü Arslan, Please.

27. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Colleagues, Ladies and Gentlemen. It's a great pleasure for me and God bless you. Before I start, I would like to thank Chief Justice Arief Hidayat and all the judges and staff of Indonesian Constitutional Court for their warm and generous hospitality. As the term president of AACC you have done excellent job for the last three years. Terima kasih. Thank you. I would like to congratulate the Chief Justice of Malaysian Constitutional court my dear friend Rauf Sharif on assuming the presidency of the AACC. I wish you success and luck.

Ladies and Gentlemen. In my presentation, I argue that Constitutional Courts determine the contents and essential features of state ideology and enshrine in the constitution. You know, there is a very famous saying that you are under the constitution but the constitution is what the judges say it is. Therefore, the court's interpretation and application of state ideology as well as constitutional identity may change over time.

I'll explain this argument by examining the case of law of the Turkish Constitutional Court on the principle of secularism, which has been the essential part of state ideology and constitutional identity ever since 1937.

According to article 20 the Constitution of the Republic of Turkey is the secular democratic and social state governed by the rule of law and based on human rights. The main task of the Constitutional Court is to interpret, the principles of secularism in a way it is in harmony and complying with democracy, rules of law, and human rights. That may be concrete by asking two simple questions. First, "Is the ban on wearing headscarves at a university or public (inaudible) compatible with the principles of secularism?" And the second question is, "Is it legally possible to remove a female lawyer, advocate, from a court room in a secular society?"

The responses to these questions maybe *yes* or *not*, depending on which interpretation of secularism is adopted by constitutional court. If you adopt a militant or monolithic secularism or Laïcité as French people call it, this answer would be yes. On the contrary, if you adopt a more flexible and pluralistic interpretation of secularism, your answer would probably be no.

For the first of fifty years of its establishment, the Turkish Constitutional Court has strictly interpreted secularism and adopted a militant concept of Laïcité.

The court's interpretation of the principles of secularism was at the same time complemented with this practice of militant or combatant democracy.

In 1972, a number of political parties were dissolved by the Turk Constitutional Court on the ground that their programs or activities were against secularism.

In 2008, even the ruling party The Justice and Development party was likely escaped from being dissolved, nonetheless the court declared that party, the ruling party, was to be granted from receiving State 8. Because it became the center of activities against the principle of secularism.

One of the reasons for this judgment of the court was the fact that the parliament which was dominated by the ruling party at that time, this is also the case now, amended the constitution in order to lift the ban in the west on wearing head scarves in universities.

Previously, the court eradicated a law permitting head scarf in universities in 1989. For the court, wearing head scarf was not even a matter of freedom of religion or conscience, because it was a political symbol which was contradictory to secularism. The court declared that secularism wasn't an ultra-constitutional principle that couldn't be sacrificed for the sake of rights and liberty of individuals.

In 2008, the Turkish Constitutional Court also declared unconstitutional the amendment to the constitution on the basis that no amendment could be proposed, if it was contradictory to eternal principle of secularism. The principle of secularism according to Turkish Constitutional Court cannot be amended. This is one of the eternal clauses of Turkish Constitution. The court started to abandon this militant approach to secularism with the introduction of individual constitutional complaint system in Turkish Law by 2010 Constitutional Amendment. In a judgment of 2012, even three days before the individual complaint system came into course, the court adopted a pluralistic interpretation of secularism. Constitutional Court examined the Law which introduced elected courses of Quran Al Kareem and siyer, the life of Prophet and declared it constitutional on the basis that it was compatible with the principle of secularism.

The Court emphasized that secularism as a quality of the State not of individuals, imposes negative and positive obligations to protect the freedom of religion and conscience. In terms of positive obligation, the state must take necessary measures for individuals to learn and practice their religions. According to the Court, since we live in a diverse society, this main task is to provide a suitable framework for the coexistence of individuals with their different religious beliefs or disbeliefs. Coming back to the caution of head scarf, the Turkish Constitutional Court has delivered a significant judgment in 2014, in the case of individual constitutional complaint. The case concerned the expansion of a female lawyer from a court room for the reason that wearing Islamic head scarf was contradictory to the judgment of the Board of Turkish Constitutional Court and the European Court of Human Rights. By referring to the above mentioned interpretational of secularism, the Court declared that there was a violation of the right of the freedom of religion and to protection against discrimination.

After examining this judgments of 1989 and 1991, as well as the Leyla Sahin judgment of Strasbourg Court, Turkish Constitutional Court reached the conclusion that the intervention in the the applicant's freedom of religion didn't meet the constitutional the requirement of lawfulness. It was so because there was no law preventing any lawyer from wearing head scarf at courtrooms. The Court also held that no reasonable and objective basis was presented for preventing the applicants form taking part at the courtroom by wearing head scarf for her religious conviction. Therefore, since the applicant was put in a disadvantage situation when compared to those female lawyers who don't wear head scarves, the prohibition of discrimination guaranteed by Article 10 of the Constitution was violated.

Ladies and Gentlemen, the head scarf problem or the head scarf issue poses a formidable challenge for the European democracy as well. The European Court of Human Rights has left contracting states an extremely wide margin of appreciation in regulating the head scarf at the public institutions as well as the public space. The Strasbourg Court found no violations of Article 9 of the European conventional Human rights in cases of Dahlab versus Switzerland and Leyla Sahin versus Turkey which concerned the ban on wearing the headscarf where primary school teachers and university students respectively, or recently the Strafford Court had that blanket ban on full-face veiling was justifiable on the basis that it aims to guarantee that the condition of living together as an element of protection of rights and freedom of others.

Likewise, a couple of months ago the Constitutional Court of Justice of European Union rejected discrimination claim of a Muslim worker who was fighting for her head scarf. The European Court of Justice stated that employers may impose a general ban on employees as wearing religious symbols. There is no doubt that we live in a pluralistic society with different and often conflicting ideologies, beliefs, and Conceptual Goods.

As the Turkish Constitutional Court has emphasized this lacks of judgment Pluralism requires the co-existent of individuals with their identities. I think this is very difficult, if not impossible to sustain such thing and maintain the interpretation of militant secularism in pluralistic society. They even encourage Islamophobic attitude throughout of all.

In conclusion, I would say that the best and perhaps on the way of accommodating religion differences and securing the condition of living together is to adopt a rise-based approached to the constitutional principle like secularism. Thank you very much for your attention.

28. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you very much, Your Excellency Zuhtu Arslan. May we now invite the 4th presentation from the Ex-Chairman of the Constitutional court of Uzbekistan, Mr.

Bakhtiyar Mirbabaev. Let us give a warm welcome with a round of applause. Ladies and Gentlemen, thank you very much, please.

29. UZBEKISTAN DELEGATION: BAKHTIYAR MIRBABAEV (EX-CHAIRMAN OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN)

Assalamualaikum. Thank you for giving me this opportunity to speak in this International Symposium.

The Constitution of the Republic of Uzbekistan proclaims that Uzbekistan based on article 12 of the Constitution in Uzbekistan that governs the social life on the basis of diversity of political institutions, ideologies, and opinions. No ideology can be established as a state ideology. This norm establishes ideological pluralism as the basis for the development of society as reiterated in the speech addressed by the president of the Republic of Uzbekistan, Shavkat Mirziyoyev.

He said that the basic law has created ample opportunities for the formation and free activities in the country of various non-governmental, non-profit, and activities of political parties that are integral to the civil society, which is also strengthened by the principles and provisions of our electoral system.

This diversity are constitution in full concordance with the requirement of the universal declaration of human rights and other major international document that guarantee personal rights and freedom, political, economics, and social rights as stated by Plato ... Plato stated that it is important to tolerate others' view as well as to recognize the freedom of speech in all elements in society that support the diversity of ideology.

The diversity of ideology is guaranteed through the consolidation of corresponding rights and freedom of man citizen such as the establishment of political party and other groups or associations because there is no single ideology that is taken as the state ideology. The diversity of the ideology is the principle of the constitution in the society and in democracy, and the establishment of a theory that supports and expresses that the society can live in the context of a state and this is what differs my country to other countries.

Having one ideology such as in the Marxist-Leninist ideology, Uzbekistan like other republics of the post-Soviet space was faced with a phenomenon where social life developed only on the basis of the only Marxist-Leninist ideology as the official state ideology. However, with the attainment of independence, Uzbekistan then refused to adhere to one party system and there is no modernization without ideology. People have to have a set of options, of ideologies, and religions, and to view different views, and different opinions. They have to be able to differentiate between what's good and what's bad. In Uzbekistan, the idea of national independence which lead to the consolidation of the people in achieving the progress of society is being

implemented and the national idea should not rise to the level of the dominant state ideology. The national idea should become a unifying banner for people, parties, and public organizations with different views to ensure peace, prosperity of the country and the well-being of the people.

The idea of national independence being a social phenomenon, a national phenomenon becomes leading with respect to the ideologies of various political parties and social groups, it does not become a political weapon in order to strengthen the existing power. It is necessary to work constantly to improve the national ideology that meets the interests of the nation. In accordance with the Constitution of the Republic of Uzbekistan, the state ensures observance of the rights and legitimate interests of political parties and other public associations, creates equal lawful opportunities for them to participate in public life.

Intervention of state bodies and officials in the activities of public association, as well as and interference of public associations in the activities of state bodies and officials, is not allowed. It is prohibited to create and operate political parties as well as other public associations that have the aims of violently changing the constitutional system, opposing the sovereignty, jeopardizing the integrity and the security of the republic, the constitutional rights and freedoms of its citizens, propagandizing war, social, national, racial and religious enmity, encroaching on health and morality of the people are also prohibited as well as prohibition on para military association, political parties on national religious grounds, this solution prohibitions are restriction of the activities of public association can take place only on the basis of a court decision. In many countries, the adoption of such decision is atributed to the competence of their Constitutional Court.

In The Republic of Uzbekistan, such decision is lawful to adopt courts of general juridiction and not the Constitutional Court, and we are currently undergoing a reform, which we are confident that we are able to face all challenges.

30. RUSSIAN DELEGATION: VLADIMIR SIVITSKIY (HEAD OF SECRETARIAT OF THE CONSTITUTIONAL COURT OF RUSSIA)

Allow me to congratulate, The Indonesian Constitutional Court and also to congratulate, and also to express my thanks to this extraordinary symposium that's been organized really well. Thank you very much.

And I want in this ocassion to talk about the role of Constitutional Court in the objectification of the constitution of The Russian Federation.

Article 13 of the Constituion of The Russian Federation explicitly stipulates that the political diversity, shall be recognized in The Russian Federation, no ideology shall be proclaimed as the state or the obligatory one. And the genesis of this norm is understandable.

Similarly with Uzbekistan, it is the same thing with our history in which the comunist ideology was established as the state ideology for many years, and of course, as you may know, it has a negative impact, so that based on that, the freedom of opinion and speech in our society is affected negatively. And therefore, the constituional legislator of Russia has taken measures to ensure supremacy of any ideology will not happen which serves as the basis for the prohibition of other opinions and the suppression of dissent will not procure. This norm, however, must be perceived dialectically.

Of course, it means that no one can impose a system of moral, religious, aesthetic, and philosophical views, as well as ideas on society on each of the member in which the ones that are being valued is the people's attitude to the reality. So, it doesn't mean that there is no system of value, that is used in the society. Such value exists and it is enshrined in the constitution of the Russian Federation, namely in a special chapter which is the fundamental constitutional order. And this, has a priority interpreting any other provisions of the constitution.

And this, also interprets several provisions on the human rights, especially for the freedom of expressions. These principles are put in a concentrated form, and moreover these principles are not allowed to be revised within the framework of the current constitution. To change provisions of the first and the second chapters, a new constitution must be adopted. And this of course, imposes The Constitutional Court, a high responsibility for interpretation that is for the correct objectification of the constitutional ideology.

So what is the difference between constitutional ideology and the state or obligatory ideology? First, it should not interfere in someone's personal sphere, so they can have any ideological view, but at the same time all actions to create incitement of hatred and enmity is prohibited in Russia, as well as humiliating the dignity of a person or a group based on gender, race, nationality, language, origin, attitude to religion as well as social groups. These are forbidden.

But, more importantly is that these are public actions that we're talking about, including those that are used in the media. And The Constitutional Court has activity to confirm the constitutionality of prohibition of such action and constitutionality of responsibility for committing them. And this, is actually something that would change the foundation of the constitutional system of a liaison of the integrity of The Russian Federation, and remaining the security of the state, creation of arms formation and incitement of social racial national religious discord are prohibited.

Secondly, the constitutional ideology is addressed primarily to the State itself and directly imposes imperative obligations thereon.

The third, the constitutional ideology is expressed in the constitutional and legal categories, and this is the higher level and universal of rules that are guaranteed by the state, previously by the judiciary.

And fourth, the Constitutional Ideology of Russia corresponds to the modern standards of a democratic law-governed social secular state. And it also assumes that the State must follow these standards. And it is not a question of blindly following all those interpretations of these standards, for example, by an Interstate Body on Human Rights.

And the fifth, what becomes the important element of the Constitutional Ideology in Russia and is as previously stated, which is the diversity of ideological politics, and also the role of the secularity of the state which is directly inherent within the costitution. So, it means that if something is being imposed on the society, as the obligatory world perception, then, it would not be corresponding to the constitutional ideology itself.

So, the important question that arise is that whether the Constitutional Principles in conjuction are synonymous with the Constitutional Ideology, or whether there are some Principles lying beyond its limits. And it seems that the criteria to classify Constitutional Principles in this sphere of Constitutional ideology is their defenition of relationship within the lines of State Society, State Human, and to some extend is Human-Society and Human-Human.

However, there are Principles that reflect the Organization of the State Power itself. For example, the Principles of separation of Power or the Principles of Federalism, or the Hierarchy of Source of Law. For example, some pre legal force of the Constitutions. So it is unlikely that they can be attributed to the sphere of Constitutional Ideology. But, the line here is very subtle. For example, the principles according to which the better of sovereignity and the only source of power in the Russian Federation is its multinational people, which is in accordance to Article 3 of the Russian Constituions and by virtue of its rich content goes beyond the organizational one and is one of the fundamental ideological foundations for the functioning of the Russian State.

So, in what way does the Constitutional Court can realize the Constitutional Ideology in Russia? First, the Constitutional Court in Russia applies the Constitutional Principles expressed directly in the Constitutions. So, this is a natural part of the Constitutional Court Activities. Secondly, the constitutional Courts identify the Constitutional Principles we are not explicitly stipulated in the Constitutions but whether exist there implicitly. And some of them are within the sphere of the Constitutional Ideology.

These principles must include things in particular: Humanism, Justice, Security, of mutual trust in the relationship between an individual and public authorithy,

legal certainty, and the balance of the Constitutional Values. These are the most important and universal principles identified by the Constitutional Courts. They are also the basis for the Constitutional Court Evaluation on any contested provision.

So, it is an important principle that the Constitutional Court does not invent new Constitutional Principles, but identify them. So, what I mean is that it does not claim that they are the ones who create the Constitutional Ideology because Constitutional ideology in its narrative both explicitly and implicitly contains within the Constitution itself.

And sometimes, the implicit principles being part of the latter, can be identified by using the means of interpreting the text that is being discussed. However, it is always necessary to understand that the line from the practice of the Constitutional Courts are the words that are contained within the Preambule of the Russian Constitutions, in which it is stated that Russian people who are multi-ethnic is adopting the Constitution to refer to the memory of the ancestors who have passed on to us the love to the fatherland and to have faith in good and justice and striving to ensure the wellbeing and prosperity of Russia. So, it is bearing the responsibility of the homeland for the present generation and future generation.

And therefore, the Constitutional Court of Russian Federation uses that reason to refer to the preamble of the constitution in which the expression is explicitly stated. And as I said before, as the balance of the constitutional values. So, actually, this is a balance of the constitutional principles that have got different manifestation, and if you ask what the main activities are besides the constitutional court, then the question would be balancing the values of the constitution. And another question will arise, why not human rights, why is it the balance of the values? Nobody denies the importance of constitutional rights and their protection but sometimes in the right and interest of someone is contradictory to the right and interest of someone else. If someone had a relation with the public power, the balance of rights and obligation would not be balanced. So, what we have to do is ensure someone else's right. This is ambiguous. Now in the decision in the constitutional court is decision on tax issue.

So, we need to have a correction in the liberal approach and individualistic approach to understand the law that will explain the principle of solidarity. And Prof. Valerie Sorkins stresses particularly that the philosophy of Russia is trying to unite the idea of abstract in personal, formal legality, equality with the idea that it is about everyone's responsibility not only for themselves but also others. And, the aspiration is to harmonize within the concept of the law of mind and spirit, freedom of mercy, right and truth, individual and social principles. This is why it is natural that the approach, based on the balance of individual and social life is the foundation of Russian constitution and ideology.

31. MASTER OF CEREMONY: RAHMAT IDRIS

Delegates, Ladies and Gentlemen, all of the presentations have been delivered. It is now time to answer the burning questions from the audience as we hand over the question-and-answer session to our Chair, please.

32. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Do you have the microphone?

33. MASTER OF CEREMONY: RAHMAT IDRIS

The committee can pass the mike to the persons asking questions.

34. THE THIRD COMMISSION OF PEOPLE'S CONSULTATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA: ABOE BAKAR

Bismillahirrahmaanirrahiim. Assalamualaikum wr. wb. My name is Aboe Bakar from Commission 3 of the Indonesian Parliament. It is very interesting to listen to the presentation. There are some things that I would like to ask.

First is that, in Indonesia the State ideology is formulated in the Preamble of the 1945 Basic Constitution. And we also heard that Turkey also regulates its ideology in the Constitution, and similarly, with Kazakhstan. So I would like to ask Armenia and Mongolia. Is the State ideology also regulated in the constitution? Or, where do you regulate this? That's the first question.

The second question, it is interesting to read the constitution of Kazakhstan, Article 1, which admits the differences in ideologies and politics. My question is that what if there is a conflict of interests between the people and the groups that is related to ideology. Is it later used as a reference by the Constitutional Court to settle the problem? Thank you very much.

35. RUSSIAN DELEGATION: VLADIMIR SIVITSKIY (HEAD OF SECRETARIAT OF THE CONSTITUTIONAL COURT OF RUSSIA)

(Incomprehensible because it is delivered in Russian).

36. CCCOCND: ANAHIT MANASYAN (CHIEF ADVISER TO THE PRESIDENT OF THE REPUBLIC OF ARMENIA CONSTITUTIONAL COURT)

I apologize. According to Armenian Law, I'd like to mention that the trend is state ideology is not used in constitution. The main value on which the whole legal system of the Republic of Armenia is based is the fact that the human being is the highest value in our society, in our country. Hence, our whole legal system is based at first on the principle of the rule of law and the fact which I mentioned. But at the

same time the Constitution of the Republic of Armenia defines the main spheres and directions of the policy of our state both in social economic and also cultural spheres which cannot be considered as state ideology but just the aims and tasks which our state is functioning and implementing in the mentioned spheres.

Hence, summarizing the whole above-mentioned, I'll state that the whole system of the Republic of Armenia, not just the legal one, but the whole social system is based on the idea that the human being is the highest value in our state. Thank you.

37. MONGOLIAN DELEGATION: DORJ ODBAYAR (CHAIRMAN OF THE CONSTITUTIONAL COURT OF MONGOLIA)

Okay, thank you very much for the question.

And it was understood by me that if whether the Mongolian Constitution itself contrasts all these diversified parts for ideology exactly is it put on the constitution? I understood the question like that. As I mentioned before 1992 we followed only one party ideology which was constitutionalized. Now that is diversified, but the constitution does not say that these certain provisions are strict ideology, the constitution does not say that. But there are many aspects which are written or formulated in the constitution, like ideology, ideas, principles or some kind of directive principles.

And within the notion of this law of, the constitutional amendment of Mongolia in 2010, we formulated on our own, some way or some form of so-called basic structure. It's something slightly different from the general term of basic structures, of course. Maybe it is called in another way fundamental structures or whatever. In that all these directive principles and ideological issues which I've mentioned are included.

So basically, all aspects of state or national ideology are included in this notion of basic structure. It does its own protection for being not changed, not to be amended, not to be damaged. If such kind of attempt has been done then it is requested that a new addition to the constitution be made. Thank you very much.

38. RUSSIAN DELEGATION: VLADIMIR SIVITSKIY (HEAD OF SECRETARIAT OF THE CONSTITUTIONAL COURT OF RUSSIA)

I also would like to give some explanation. It is rare to have an ideological constitution formally. But what we have is that the basis on the form of the constitution, so that's the first form of constitution. But within the constitution in practical meaning is that it does contain parts about constitution. Thank you.

39. UZBEKISTAN DELEGATION: BAKHTIYAR MIRBABAEV (ACTING CHAIRMAN OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN

And I also want to ask shortly on the second question, that question for the parliament. I want to correct this. In the constitution of the Uzbekistan Republic, we have a condition that is based on various ideologies and I want to read the two parts of ideology. The first one, Article 19 of the Constitution in which states that in Uzbekistan, the life of the society is based on ideology and pluralism. There is no ideology that can be seen as the state ideology.

Secondly, in a separate article, it is forbidden for political parties to have the objective of changing the constitution, of being against freedom or in contradictory, who are anti-freedom.

And it should not be contradictory to the constitution. So, I have already explained about this and what we are talking about is not about the conflict between the state and the government. For example, it is not about conflict between the government and the political party. But, what is … what does the political party mean, if they are going to incite war. You should not do that.

If an NGO does that, that it is against the law. And if an NGO ... if, NGO is doing or who are not doing in accordance to the constitution like Uzbekistan, then this their activity can be stopped.

40. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

But the question, your question is very apt. Which court will see this issue in the Uzbekistan Republic? In accordance to the law, this kind of issue is not determined by constitutional court, but the high court or the supreme court.

Basically, these are not a problem of administrative and civilian issue but is all about constitutional issue. And in many countries, these kinds of things are being seen by the constitutional court, but in Uzbekistan it is let the live?? Is being led toward democratization. So, each party will work together including with constitutional court. In the future, the constitutional court hopefully. This is then later put into the constitutional court, so it can be seen by the constitutional court.

41. AUDIENCE: HESTI ARMIWULAN (SURABAYA UNIVERSITY)

Thank you very much and good afternoon.

First of all, I would like to my show appreciation to all of the speakers with very interesting materials. My name is Hesti Armiwulan from the Surabaya University and we have two things that I would like to ask. Number 1 is response from the speaker.

Number 1 is what are the efforts conducted by the state in order to give understanding or awareness to the citizens about the Constitution and ideology to all of the citizens. And then, there is the Constitutional Court also has the rule to give education about the understanding of ideology or understanding about Constitution of the said state. Like, for example, something that is done by the Constitutional Court of Indonesia, who also gives the education on the awareness of the Constitution and also told us about the constitutional rights education to the citizens. Now does you, does your constitutional court also have this kind of education program?

And secondly, it is interesting what the Russian delegate, has explained that we are not talking about constitution and ideology but you were telling is that about constitutional ideology. This is very interesting. What about the concept of balance between the public interest to the individual interest? Is there any efforts that is conducted to give understanding to the state, to the citizen that public interest needs should be put forward compared to individual interest? So, I think these are the things we need to explain to you first. So, thank you very much for your attention and cooperation.

42. RUSSIAN DELEGATION: VLADIMIR SIVITSKIY (HEAD OF SECRETARIAT OF THE CONSTITUTIONAL COURT OF RUSSIA)

I am going to answer the first question about a special program on constitution. We don't have that. It is only been explained in the website, what you can do if you want to ask something to the constitutional court.

But, specifically a specific project about education of the constitution, we have talked about this but we that these functions should be conducted by the ministry of law during the information on the rights of the citizens...so... those specific, we don't make a special one.

And then for the 2nd question about the balance of constitutional values, we have only several aspects that determine the constitutional court the balance of private values and public values and with the balance of the rights and legal interests, in which you should not violate the right, such as the aspects in constitution. And now the balance in the disposition of … the balance of the interest of the Russian Federation and the Russian region and etc.

So, there are many aspects that are used that are related to the rights of the human. I would like to give you a case that was seen in the constitutional court, which is the norms that was regulated about the payment of countries, of companies that are bankrupt to whom these companies must pay. First of all, whether it is to the people who are working for them or is it the taxes and the constitutional court see this issue and then they underline that yes, the rights of the citizens or the rights of the workers are important, but taxes are also important because these are the instruments to pay for all of the social obligations of the state. And in accordance to law about regulation of this issue you have to determine the balance so there should

not be any problems if it does not close the obligation of payment from one side to another.

So, the tax, in regard sto the tax on one hand, they are a person and the other side is there are the government, but the constitutional court understand that behind the government there many people who have direct interest on the social protection from the government. And this is obtained from taxes. So thank you very much for your attention.

43. UZBEKISTAN DELEGATION: BAKHTIYAR MIRBABAEV (EX-CHAIRMAN OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN)

And it seems that I also need to give addition in here that in the Republic of Uzbekistan, the situation is also the same thing like in Russia, in which concretely the constitutional court is not providing training to the state. But, all of the things that are being taken are being informed and it is being directed in accordance to the diversity of the people and their ideology. And of course, the state also participate as teachers, MK giving teaching and programs are not prohibited. So, they can provide education and information to the people.

In 2017, in Uzbekistan Republic, it is announced, we announced that 2017 is the year of dialog with the people and human, and those legal entities should meet the people. And they immediately come and visit these people, and they immediately give the information to the people and go directly and meet the people.

44. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Providing education concerning to constitutional principles. Well, it will be very brief simply because we do not have such program, but the minister of education, the ministry of national education provides certain programs, seminars, conferences, and also curriculum studies to teach students about constitutional the principles of The Republic of Turkey. But I can also say that the Constitutional Court has sometimes published some booklets and publications concerning the procedures of individual constitutional complaints and explaining the content of rise and liberty of individuals. The court also organizes some workshops, conferences, and symposiums to expand on the idea of lodging individual application before the constitutional court. Other than that, we have no special programs. In Turkey, the students of the law faculty as well as the students of secondary school may visit our court and to get some information about the procedures and activities of the Turkish Constitutional Court. Thank you.

45. MONGOLIAN DELEGATION: DORJ ODBAYAR (CHAIRMAN OF THE CONSTITUTIONAL COURT OF MONGOLIA)

Thank you very much. Of course, this is a question of public awareness and legal or constitution education among citizens. It is very important. But, in accordance with the Constitution of Mongolia the government is in charge of constitutional laws in Mongolia, and Parliaments was to control on the thinking and test (in audible) process and results. But, it doesn't mean the Constitution Court doesn't have any duty. Of course, through our decisions and court procedures, we do all the same work as servants mentioned. The Constitutional Court of Mongolia is, I think, a very open institution, very open.

Anyone, any citizen, even foreign citizens in Mongolia they can attend freely into our session, into our court procedures. Of course, we should send publications and all these activities in order to arise the constitution and education of the people who are almost empty. Just to save time. That's my reply. Thank you very much.

46. JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA: I DEWA GEDE PALGUNA

Thank you very much, Mr. Chairman. I think as far the Constitutional Court of Indonesia is concerned there are plenty of activities done by the Constitutional Court of Indonesia concerning developing the awareness of the Constitution among the citizens of Indonesia. Just to name a few examples we have the center of education on the Constitution and Pancasila which is located in Cisarua, Puncak.

We also organize some activities in cooperation with many campuses in activities like moot court concerning constitutional issues and debate competitions on constitutional issues. We also publish the constitution in many local languages in Indonesia. It is our effort to internalize and to build and develop awareness among the citizens on the importance of understanding the Constitution of the Republic.

And also we have a quite comprehensive ... what do you call it ... "museum" where in the museum there is also a historical sequence ... not only about the historical backgrounds of the constitutional court, but also about many historical aspects that finally come to the conclusion why a constitution court is needed in a democratic society and there is also a short documentary film which is open for public to observe our museum at any time. Of course this is not the main task of the justice of the constitutional court, but the constitutional court as an institution, I think also has to do a kind of indirect responsibility to disseminate information about the Constitution of the Republic and the constitutional court itself. Thank you very much.

47. CCCOCND: ANAHIT MANASYAN (CHIEF ADVISER TO THE PRESIDENT OF THE REPUBLIC OF ARMENIA CONSTITUTIONAL COURT)

Thank you. As it was mentioned by all my honorable colleagues that Constitutional Court of the Republic of Armenia also does not have any special authority according to the constitution in the sphere of legal education and in increasing legal awareness. But, at the same time in comparison with most of the examples presented here the Armenian Constitutional Court plays really very active roles in increasing the legal awareness regarding the constitutionalism in the state.

It implement this function on two levels. The first one is all the events are organized by the constitutional court because since its establishment the Constitutional Court of Republic of Armenia has continuously been organizing pupil and student moot courts which presupposed two stages. The first stage is to train the pupils and the students regarding the fundamental of the constitution and the constitutional order of the state. And the second stage is the moot court itself.

We also organize conferences and disseminating information via our websites et cetera, but as my colleague has already mentioned that I am not going to repeat … use your patient. I'd like to speak about the second level, too because on the second level which is the individual level I'd like to mention that most of the representatives of the constitutional court as the President, me, et cetera and we are also professors at various universities and we are disseminating information and giving lectures regarding constitutional law both at the university and also during various training programs in Armenia and Internationally. Thank you.

48. CHAIRPERSON: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Thank you very much. I think we are out of time. So before I close I just want to say that whatever ideology that we have, at the end of the day Constitutional Judges must support the best intention of our constitution. When we uphold the supremacy of the constitution, it means that any law or any act of executives which is inconsistent with the constitution must be struck out to the extent of inconsistences. Only by upholding the supremacy of the constitution that the rule of law and justice will prevail in any given society.

With that we come to the conclusion of session one and before I end, I would like to say thank you to the present speakers from Armenia, from Indonesia, from Mongolia, from Turkey, from Uzbekistan, and from Russia. Let us give them round applause by saying thank you.

49. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you, Chairperson, Chief Justice of the Federal Courts of Malaysia, also the president of AACC His Excellency Muhammad Rauf Sharif. And we are

also expressing our gratitude of the speakers of the first session of international symposium.

Ladies and Gentlemen. Now we come to the end of the first session of today's International Symposium. We now invite you to enjoy coffee and tea as well refreshments already served for you in the next door.

Ladies and Gentlemen. Thank you very much and have a good day.

INTERNATIONAL SYMPOSIUM SESSION TWO

50. MASTER OF CEREMONY: RAHMAT IDRIS

We have arrived at our last day of the series of the International Symposium on the Constitutional Court as the Guardian of Ideology and Democracy in a Pluralistic Society. Now we are going to commence Session 2, and we would like to invite to the podium, firstly, from Azerbaijan, the Secretary General of the Constitutional Court of the Republic of Azerbaijan, Mr. Rauf Guliyev. We would like also to invite the Delegations from Kazakhstan, the President of the Constitutional Court of Republic of Kazakstan, His Excellency Mr. Igor Rogov, may we also invite, from Korea, Justice Constitutional Court of the Republic of Korea, Mr. Jin Sung Lee, to join us please to the head table, from Romania, Judge of Constitutional Court, Mr. Morar Daniel Marius, we also invite, from Thailand, Justice Punya Udchachon, and our Final Speaker for the session from Timor Leste, President of the Constitutional Court, His Excellency Mr. Deolindo dos Santos.

Ladies and Gentlemen, Session 2 will be chaired by the President of the Constitutional Court of Turkey, let us welcome His Excellency, Mr. Zühtü Arslan as we give the biggest wonderful applause for our array of speakers.

Delegates, Ladies and Gentlemen, it is now time for us to get inspired by our speakers. As we open Session 2, I hand over the session to our Chair, please.

51. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Good Morning everybody, Ladies and Gentlemen, our distinguished colleagues, today we are going to discuss about the Role of Constitutional Courts as the Guardian of Democracy, as you may remember (inaudible) yesterday we talked about the role of Constitutional Court in upholding constitutional values and principles, and ideology.

You know, democracy is a matter of heated debate ever since it was invented. It is, generally defined as the government of the people, by the people, for the people.

This was the definition from Abraham Lincoln. And I think this definition is still valid today. But, the substantial meaning of democracy goes beyond this procedural definition.

When we impose some values on the term democracy, we talk about also the rule of law in arise plurality, tolerance, so on and so forth. So, the constitutional courts became very crucial instrument for protecting all these values. You may also remember that last year, we as the members of the AACC declared that Constitutional Court and equivalent bodies play a very important role in upholding the democratic principles.

In Bali Declaration, adopted after the third congress of AACC clearly emphasized this issue. We said at the third paragraph of this declaration that we uphold the principle that constitutional courts and equivalent institutions as one of the guardians of constitutional democracy, should be freed from interference by other branches of the state powers. We're also emphasizing this declaration that furthermore, we deplore any unconstitutional and undemocratic attempts aiming to abolish the rule of law and democracy in any country.

I think this introductory remarks, will be enough to initiate this important session of our international symposium. We have in this session six very distinguished speakers, I will give each of them only ten minutes because we have to finish this first session in two hour time, we have another session to complete the symposium.

So, our first speaker is Mr. Rauf Guliyev from Azerbaijan, He's the Secretary GeneraL Law The Constitutional Court of Azerbaijan. The floor is yours, Mr. Guliyev. You have 10 minutes, thank you.

52. AZERBAIJAN DELEGATION: RAUF GULIYEV (SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF AZERBAIJAN REPUBLIC)

Thank you, Mr. Chairman. First of all, let me please congratulate the Constitutional Court of Indonesia, personally to Justice Professor Doctor Arief Hidayat, the Judges and the Secretariat for the success in the completion of the presidency and hospitality I feel every time I visited Indonesia. I congratulate also the Constitutional Court of Malaysia for assuming the presidency and wish his court the success for work.

Dear ladies and gentlemen, my short presentation is not devoted to the topic because the Constitution complaint as the effective render to anxious of supremacy of constitution in Azerbaijan. The Constitution of Azerbaijan was adopted in 1985 by means of nation-wide board of referendum. It proclaimed Azerbaijan as a democratic secular and social state governed by the rule of law.

When joining the Council of Europe, Azerbaijan government undertook such commitments regarding constitutional reforms, and as a result of successful

implementation of those commitments, there was held the constitutional referendum in 2002, and thus every individual living in Azerbaijan obtained the right to apply directly to Constitutional Court against normative legal acts or judicial decisions violating the constitutional rights and freedom. This right or direct access was also granted to Ombudsman and all the courts. It should be noted that the Venice Commission of the Council of Europe rendered useful assistance to Azerbaijan as to drawing up of legal procedure of submission and examination of complaints in Constitutional Court. The constitutional complaints are very effective to restore the violated constitutional right and freedom.

Here I'd like to mention also the modification and amendments introducing the constitution by means of referendum of 2016 alongside with other legal aspects. There was adopted the new constitutional principle, the principle of proportionality. That is very often applied in the case law of European Court of Human Rights. This new constitutional principle was adopted on the basis of this new constitutional principle, the Constitutional Court of Azerbaijan, adopted in May 2017, an important decision on the complaint of the United Kingdom's citizen, Mr. Clank Gordon Morris. This gentleman applied to the Constitutional Court, challenging the constitutionality of normative legal act that encode ruling which imposed a ban for him to leave the territory of Azerbaijan.

It should be mentioned that Mr. Morris, working on the basis of labor contract with an oil company, married and then divorced in Azerbaijan. There this court ruled out that this man should pay alimonies to his former family and to the department responsible for execution of the court decision asked the court to ban his leaving the country unless the full amount of alimonies are paid out.

The applicant's situation was very complicated. His labor contract was abolished and his labor visa was expired. Besides, he had no means for living and the only property he had was in the territory of the United Kingdom. The Constitutional Court admitted the application even though the applicant didn't exhaust our … and he could face other possible damage. In this decision adopted by the plaint Constitutional Court, the court recognized the normative legal act as for response native consecution since it provided only general requirements to pay alimonies, but as drawn attention of all the courts which were or will be involved into such a case to be right to the principle of proportionality when restricting the constitutional right to freedom of movement. The applicant applied after this to district court, and the district court taking into account the decision of the Constitutional Court abolished the imposed ban.

Dear Ladies and Gentlemen, since 1998, I mean since the date of the setting up of the Constitutional Court, the plaint of our court adopted 361 decisions, 138 of which were adopted on the basis of individual complaints. The direct access of the people to Constitutional Court was proved to be very effective means of restoration

of constitutional rights and freedom and thus the ensuring of the supremacy of the basic law. Thank you for your attention.

53. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you very much Mr. Guliyev especially for being so brief. Our next speaker is Mr. Igor Rogov From Kazakhstan. He is the President of Constitutional Counsil of Kazakhstan.

54. KAZAKHSTAN DELEGATION: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Selamat pagi. (Incomprehensible because it is delivered in Kazak).

(Inaudible) the constitutional values.

The article of the Kazakhstan Constitution states that ideological and political diversities are recognized in the Republic of Kazakhstan.

The Recognition of ideological and political diversities presupposes freedom of choice and confession to citizens on certain values, but at the same time does not interfere with their voluntary association on the basis of common views and ideas. We can talk about a certain degree of conventionality, about the need for ideology or a national idea that reflects the interest of the overwhelming majority of the citizens. I believe that the central link that accumulates all these components of the national idea and ideology is the constitution because it determines the main directions of the society movement and the states that allow us to answer the questions: “Where are we going? What sort of goal and how can we achieve it? “.

So, the Basic Law determines the principles on which the nation is built. Given the universally recognized human values and the requirements of fundamental international documents, the constitution provides such fundamental principles as the supreme value of human is a person, equality of people, prohibition of discrimination against anyone for any motive, the inviolability of property, pluralism of opinions, and the inalienability of natural rights and freedoms, sovereignty of the citizens and others.

Second, the constitution clearly sets out the goals on which the nation is moving. Such as, in article 1, paragraph 1, of the Basic Law of Kazakhstan that stipulates that the Republic shall establish itself as a democratic, secular, legal and social state that promotes the values of person, life, rights and freedoms.

Third, it is the Constitution that determines how to achieve these high goals. In Kazakhstan, it is directly indicated by the fundamental principles of the Republic’s

activity, stipulated in paragraph 2 of Article 1 of the Constitution, according to which the state policy is being created and implemented, and the main directions of functioning of the sovereignty Kazakhstan are formed, for example: public consent and political stability, economic development for the benefit of people, the Kazakhstan's patriotism, solution of the most important issues of state by democratic methods, including voting during the republican Referendum or in Parliament. So we can actually say that the bodies of constitutional justice also plays an important role in protecting and realizing the democracy within the state. Through the constitutional control, they act as "custodians" and also as an effective guarantor of the function.

In the practice of the Constitutional Council of Kazakhstan, a number of appeals have been related to the subject of discussion of this symposium. In 2002, on the appeal of the Head of State, the Constitutional Council considered the Law on Political Parties adopted by the Parliament and in its decision, the constitutional council noted that the right to freedom of association in political parties is a collective right that is exercised by citizens of the Republic together and also at their own personal choice.

Thus, there should no political parties that violate the human rights and the freedom guaranteed by the constitution, and equally membership in any political parties does not relieve any citizen of the republic from performing his constitutional duties. The Constitutional Council has repeatedly considered the issues of legislative regulation on the status of religions and the right to freedom of religion. As noted in the decisions, the secular nature of the state says they have the same position in front of law. According to Article 14 of the Constitution, all are equal before the law, which is the subject of a research, which also implies the equality of all religions and religious associations before the law, and thus preventing any religions and religious associations from getting any advantages compared to others and this is also prohibiting discrimination based on religion, beliefs or any other reasons.

As the society develops further, and also in the implementation of international legal norms as well as the purification of the national legal system from the rudiments of the totalitarian by eliminating the inevitable inconsistencies and contradictions in the legislation, Kazakhstan pursues a policy for gradual liberalization and democratization. And to his end at the beginning of the year the next constitutional reform was carried out, and in essence of which is the redistribution of certain powers of the Head of State between the Parliament and the Government with the strengthening of the independence and responsibility before democratization of the political system as a whole, and also modernization of all things, including instruments to protect the foundations of the constitutional system.

Some new concerns in the activities of the Constitutional Council and affect the issues will be discussed again. Now the President of the Republic, is granted the rights to carry out the protection of human rights and freedoms, ensuring national security,

sovereignty and integrity of the state, sends appeals to the constitutional council on consideration of the law or other legal act. And this innovation is an effective mean to ensure the compliance with the current legal framework of the Kazakhstan Constitution. The competence of the Constitutional Council is supplemented by one more authority – namely, to issue a conclusion on the conformity of the proposed amendments and additions to the Constitution to the requirements specified in clause no. 2 of Article 91 of the Basic Law, before they are submitted to a republican referendum or to the parliament. This norm establishes a list of especially protected constitutional values that cannot be changed in any cases, even by revising the Basic Law. And these also strengthen the function of the Constitutional Council. And in this issue, they also try to uphold the highest values of the Constitution. And therefore, the independence of the state, the unitary and territorial integrity of the Republic, the form of its governance, as well as the aforementioned fundamental principles of the Republic's activities laid out by the Founder of Independent Kazakhstan, the First President of the Republic of Kazakhstan and his status.

And this actually related to the independence of the state itself and the integrity of the republic and the basic principles of the action of the republic that has been determined previously.

Based on the initiative of the President we have some articles being stricken out, Article 73 (4) of the Constitution, which provided the right of the President of the Republic to object to the decision of the Constitutional Council and regulated the procedure and consequences of their consideration. The adopted decision aimed at strengthening the Constitutional Council, increases the responsibility and tightens the requirements of the activity of the body of constitutional control. And I think that today's conference will help all of us to better understand the existing problems, exchange positive experiences, and outline ways of further work to ensure the inviolability of the fundamental constitutional values of our countries.

Thank you for attention.

55. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

To the Justice of the Constitutional Court of Korea. Mr. Lee, the floor is yours.

56. KOREAN DELEGATION: JIN SUNG LEE (JUSTICE OF THE CONSTITUTIONAL COURT OF KOREA)

Let express my deep appreciation to Chief Justice Arief Hidayat for giving me the opportunity to speak to honorable justices, and Ladies and Gentlemen. I also would like to say my gratitude to Mr. Chief Justice Mohammad Raus Sharif, in charge of the new President of the AACC and my anticipation to the new term presidency of Malaysia.

This year, the Koreans had a special experience of ousting the president by impeachment trial. The trial made an epoch in the history of the Korean democracy. I'd like to present the beginning, the process and the effect of the trial.

Modern democracy, faces a lot of challenges all over the world. Some of them are the repression and trampling of the basic human rights, the misuse of power by the very top of power, and the corruption of high-ranking officials. They are typical examples of the violations of constitutional obligations. In order to prevent high-level officials from violating constitutional duties and to force them out of their office when violated, most of the countries have designated their own impeachment systems suited to their needs, and the social and political situations.

In some bicameral parliamentary countries, once the house of representatives passes a motion for impeachment, the senate has the power to make a decision on impeachment. Other bicameral countries and some unicameral countries have a system where the Constitutional Court has to adjudicate via an impeachment trial after the Parliament's motion for impeachment. The former system has a tendency to concentrate on the political issues in the adjudication procedure. On the contrary, the latter system can afford to look into the constitutional or legal issues on impeachment trial rather than merely focusing on the political issues.

Korea adopted the latter system. The Korean Constitutional Court has an exclusive jurisdiction over the impeachment trial. According to the constitution, the court has focused on the constitutional or legal issues rather than the political issues.

A scandal surrounding former President Park erupted and was revealed by the media in July last year. Park allowed her long time shadowy confidante Choi to meddle in state affairs. Policy making and governmental personnel appointments. Also, they were at the center of the scandal over corruption and influence-peddling. Especially, Park abused her power to force some conglomerates to give away seventy million dollars in order to establish two foundations for pursuing Choi's personal gains.

As the suspicious scandal became rapidly widespread, more than ten million people took to the streets all over the country and continued to hold massive candlelit rallies for seventeen weeks in a row since last October. The National Assembly or NA voted in favor of the motion to impeach Park on 9th December last year. The motion was passed by an overwhelming number.

People's candlelit rallies resulted in the approval of the motion in NA and triggering the impeachment trial according to the constitutional system. That was an effective way to collect and integrate the people's opinions. It is hardly necessary to reiterate the importance of the freedom of holding rallies and demonstrations as one of the basic rights in the constitution.

After three-month long proceedings, on March 10 this year the Court upheld the parliamentary impeachment, making Park the first Korean leader to ever be removed from her office. This landmark decision was issued unanimously. The court said, that she neglected her presidential duty by leaking documents containing confidential information. She also infringed on the property rights and managerial freedom of private companies by forcing them to give away a vast amount of money for the her confidante profit-making activities. Her wrongdoings are an abuse of her power and constitute the crucial violations of the constitutional and legal duties of carrying out public interests as the president.

The Court also noted, she had no will to defend the constitution and her violation of the constitution and laws, means a betrayal of the people's trust and cannot be tolerated by the people. She impaired the spirit of democracy and the rule of law. Taking the negative impacts and seriousness of her wrongdoings into consideration, the benefits of ousting her, greatly outweigh the benefits her keeping the presidential terms. She has been put in detention after the judgment and trial in 18 criminal charges at the criminal court.

So, thus far, there have been two presidential impeachment trials, the first was against the late president Roh Moo-hyun in 2004. The first was rejected while the second was upheld. The ruling of the first decision was that Roh violated the constitutional duty to maintain political neutrality concerning the general election and breached the duty to protect the constitution through expressing his dissatisfaction towards the decision of the national election comission. The Court said the specific violation by Roh would not be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order.

Now, I can say The Court has declared standard of gravity under constitutional violation by the President in impeachment trials. In the case of Roh, The Court said that his violation could not fall short the extent of the grave violation of constitution because those violations were not estimated as crucial threat to the constitutional order. But in the case of Park, The Court said that violation constitution abuse of power and she had no will to defend The Constitution. The Court concluded that her wrongdoing was so grave that the people couldn't tolerate it in the view of constitutional order and she betrayed the people's trust.

It means that The Court measured the extent of the constitutional violation on the basis of the standard gravity, whether the violation is deemed as a threat to the basic order of free democracy and whether the President stands against the constitutional order. The peaceful rallies during the impeachment trial period provided a forum for the people to realise the democratic system and the rule of law in Korea. At last, it came to perfection by the final upholding judgment of The Court. The most significant meaning of the process is that the result was achieved by the national sovereignity owner's eagerness that carry out the democratic idea.

All the people respect the judicial procedure as laid down in the constitution. The direct effect of this judgment is to force impeachment president out of office, furthermore the more important effect to the incoming president is to arouse awareness and give a lesson on respecting the rule of law and realising the seriousness of the violation of the presidential obligations. Over the course of the impeachment trials, every justice of the Korean constitutional court did his and her best to fulfil the role as the guardian of the constitutional order and was entirely independent from the parliament, administrative, and any opinions of the surging crowds of pros and cons of impeachment. Modern democracy has faced a lot of challenges, but in the end the fundamental principles and values of the constitution have always prevailed. The sovereignity rested in the people and the rule of law.

Thank you for your attention.

57. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you Justice Lee for this very interesting presentation.

Now our next speaker is Mr. Morar Daniel Marius. He is the judge of The Constitutional Court of Romania.

58. ROMANIA DELEGATION: MORAR DANIEL MARIUS (JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ROMANIA)

Good morning, Ladies and Gentlemen. First of all, I would like to thanks on behalf of The Romanian Constitutional Court to Indonesian Constitutional Court for inviting us to this conference and to stay. I'm very pleased to be here.

I want to talk to you about the one of the principles of the democracy, the independence of the justice. As we already know, the justice is rendered in the name of the law, it's unique, equal, and impartial, and the judges are independent. In Romania, the component of judiciary are The Court of Law with the main mission to achieve justice, the prosecutors office which should present the journal interest of the society, and The Superior Council of Magistracy which is the guarantor of the independence of the justice.

The statute of the judge and prosecutor in Romania, both of them are magistratesm, is constitutionally enshrined, the judges are appointed by the President of Romania, and are irremovable; The sanction, the transfer, or the promotion falls under the competences of this Bureau Council of Magistracy. The Prosecutors carry out their activities under the principles of the legalitiy, impartiality, and under the control of authority of the Minister of Justice.

Regarding the Criminal Justice, an important role is played by the Prosecutors, by the Judicial Police, and by the special Investigative Board. The Prosecutors are organizers in the Prosecutor Office, attached to each Court of the Justice. And the Judicial Police Officers carry out their activities under the control of the Prosecutors. Only this Judicial Body can carry out Criminal Investigations, and only this Judicial Body can collect and administer the evidence in this State. I would like to present you one decision issued by the Constitutional Court of Romania in which the Independence of Justice and the Rights to the Private Personal and the Family Rights and the secrecy of correspondence who were put in the questions.

In 2010, 14 new Criminal Procedural Courts were entered into force in Romania. This Criminal Procedural Court brought the changes regarding the Principles of the Criminal Procedures, including introducing new institutions and amending the already existing ones. Regarding the means of proof of the evidence, the new Criminal Procedural Court regulated the technical surveillance of investigation matters. One of these methods is the technical surveillance, wire taping, and the interception of communication. In accordance with the Romanian Law, the order for the interception, the order for the technical surveillance warrant are issued by the Judges for the rights and freedom.

The enforcement of this warrant is conducted by the Prosecutor itself, or this can be ordered to be conducted by the Judicial Police Officer, by the specially trained people who work in Police force or by the other Specialized State Bodies. This phrases; other specialized State Bodies, was claimed in front of the Constitutional Court to be unpredictable.

In 2016, some people were prosecuted and sent to the trial for various offences. In front of the Ordinary Court, these people, the defendants raised a series of exceptional of unconstitutionality and they said that this phrase and other Specialized Bodies is unclear, and unpredictable; and in their cases, they were under the technical surveillance. The enforcement of the warrant issued by the Judges was not conducted by the Prosecutors, was not conducted by the Judicial Police, but it was conducted by the Romanian Intelligent Services. And they submitted this exception to the Constitutional Court.

Why conducted the Constitutional Review? There are many Constitutional Courts which have to answer the main question, which is the legal nature of this acitivity. And the Constitutional Court stated that we have Procedural Act and not the technical one, because the results of the enforcement of the technical surveillance warrant is the obtaining of the means of the proof of the evidence.

In conclusion, only the Judicial Body, only the Prosecutors, only the Judicial Police on the specially trained workers from the Police can take part in this activities and not from the Other State Bodies. The Constitutional Court observes that the Legistrators was included apart from the Prosecutors or from the Judicial Police

Body; the other Specialized State Bodies in the Article of 142, paragrah 1. And the Constitutional Court observed, tated that this phrase, the Other State specialized Bodies are not clear, we do not know what it means, because it was not defined explicitly or implicitly by the Criminal Procedural Court or by the Other Law. In this condition, Romanian Constitutional Court found the expressions unconstitutional.

Romanian Constitutional Court in accordance with the Case Law emphasizes the necessity of the requirements of the Domestic Legislation. We talk about clarity, accessibility, and predictability. And in the Criminal Field, especially when we talk about the right to private, family, and personal rights, and the secrecy of the correspondence, we need to be very careful.

The constitutional standards imply to know very exactly in this field, the field of interception and wiretapping of the communication, to be very clear which bodies are able, which have the powers to enforce the technical surveillance warrants. And finally, the Constitutional Court found the option of the legislature regarding to other specialized state bodies because the unpredictability balance is unconstitutional.

Now, while conducting this constitutional review, the Constitutional Court needed to answer the following question, what lies behind this phrase? The answer was the Romanian Intelligence Services. Because in Romania after the fall of the communist regime, the enforcement of the technical surveillance warrants was conducted by the officers of the Romanian Intelligence Services despite the fact that there was no legal provision which gave the right to the Romanian National Intelligence Services. But in fact, it was possible because in Romania, the Romanian Intelligence Services replaced the formal intelligence services, securitate, which was rectified by former Romanian communist dictator Ceausescu and also inherited the necessary logistics to make these activities.

Regarding the legal justification—because I told you that there was no legal provision that gave the Romanian Intelligence Services this right—there was a decision by the Supreme Council of National Defense, which established in the Romanian Intelligence Services, it's the national authority in the field of interception of communication. But this decision raised two major problems. First of all, this decision was issued by a constitutional body, but exclusively competent in the safety and national field, not in the field of justice or the field of criminal prosecution. And the second issue is that this decision was classified top secret and no one knew what the content of this decision was, including here the judges and prosecutors. This is why probably the legislature in 2014, when adopting the new criminal procedure code, felt the need to introduce in the Article 142 the expression "other specialized state bodies."

And now the last question, what would have been the situation if the Romanian Intelligence Services was explicitly enshrined in the criminal procedure code? Would it have resisted the constitutional review? The answer is obviously no,

because according to its own law, the Romanian Intelligence Services has no power to carry out criminal investigations, and the Constitutional Court states that it cannot have the powers to make such activities. This is because the Romanian Intelligence Services and other intelligence services because there are more in our country, approximately six or seven have the main task to fight against terrorism and to preserve the national security.

Finally I would like to show that through this Decision No. 51 in 2007, after 27 years after the fall of the communist regime, through this decision the Romanian State has taken the distance from the communist regulations in which the intelligent services had the decisive and important role in all levels of society and in criminal investigations, and also the Romanian State has paid one of the last debts to the rigors of the democratic state.

Thank you very much.

59. TURKISH DELEGATION: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you, Mr. Marius. The next speaker is from Thailand, Mr. Punya Udchachon, the Justice of the Constitutional Court of Thailand. The floor is yours.

60. THAILAND DELEGATION: PUNYA UDCHACHON (JUSTICE OF THE CONSTITUTIONAL COURT OF THAILAND)

Thank you, Mr. Chairman. Excellency the President of the Constitutional Court of the Republic of Indonesia, the President and the Chief of Justice, distinguished guests, Ladies and Gentlemen.

On behalf of the Constitutional Court of the Kingdom of Thailand, I would like to express sincere thanks to the Constitutional Court of the Republic of Indonesia for its kind invitation to the International Symposium today.

May I start this presentation is into three parts as you know briefly. First, the Constitution and principles of democracy. Second, the powers and duties of the Constitutional Court. And, finally, the roles of the constitutional court and is guardian of democracy.

First of all, I would like to address about the principles of democracy under the Constitution of the Kingdom of Thailand, which have the various dimensions of democracy. They are the democratic forms of the government with the King as The Head of State, the sovereignty of the people, rule of law, the separation of powers and the supremacy of the Constitution. In terms of the power and duties of the constitutional court, this we are talking about the significant powers and duties of the constitutional court relating to the principles of democracy as follows.

First, powers and duties to control the constitutional duties of the legislative branch, for example, relating to the constitutionality of its action, membership, problems related to powers and duties, law and draft law. The so called the abstract control and complete control.

Second, to control the constitutionality of the executive branch, for instance, ruling on the constitutionality of its actions, enactment of the emergency degree, membership of the ministers, treaties, and problems relating to the powers and duties of the ministers and powers and duties of the minister. Further, to control the constitutionality of the agencies actions as well.

Ladies and Gentlemen, regarding to the roles of the constitutional court to be the guardian of democracy. The constitutional court, exercised both direct and indirect laws in the country's democratic protection in term of both ideology and practice approach.

That is, to guest stand up norms for its management of law, not to be inconsistent to the democratic principles for respecting rights and participations of minorities in the national assembly, and the content of laws and draft laws concerning to the rights, liberties, protection and the equality. That is regarding to the rules of law, the separation of powers and the social contact for draft amendment the main constitution to the democratic theme.

Lastly, to uphold the principles of the people sovereignty the so called democracy of the people, by the people, and for the people.

Ladies and Gentlemen, now the Constitutional Court of the Kingdom of Thailand is 19 years old. We have a lot of adjustment to protect the democratic principles in practice. For example in 2014, we stood up for the parliament action is the majority lose and the minority rise of membership. And also, we withdraw out of this impeachment for prime minister and more than five ministries because of malpractice for conflict of interest during 19 years.

Again, I would like to describe the slogan of the Constitutional Court of the Kingdom of Thailand is, adhere the rule of law, uphold the democracy, and protect the rights and liberties of the people.

Thank you for the attention.

61. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you Mr. Punya Udchachon.

Now the last speaker is from Timor Leste, Mr. Deolindo dos Santos. He is the president of the Constitutional Court of Timor Leste. The floor is yours.

62. TIMOR LESTE DELEGATION: DEOLINDO DOS SANTOS (PRESIDENT OF THE TRIBUNAL DE RECURSO OF THE DEMOCRATIC REPUBLIC OF TIMOR LESTE)

Assalamualaikum wr. wb. Salam sejahtera kepada kita semua.

Be peace be upon us all. Good tidings for everybody.

First of all, I would like to give my presentation in Bahasa Indonesia, but I am afraid that I may make mistakes in the legal terms and therefore I don't have the audacity to do that in Bahasa Indonesia. So, I am going to do in English. Because my bahasa Indonesia is not like my Bahasa Indonesia, when I was in university. So it is a bit rough now.

The President of the AACC, Your Excellency President of CCJA, Your Excellency Honorary President of the Asian Constitutional Courts and Equivalent Institutions, Honorary Chairs.

First, I want to use the opportunity to say thanks to Professor Arief Hidayat, Honorary Chief Justice of the Constitutional Court of Indonesia for the hospitality that has been provided for my delegation in this symposium

The Constitution of the Democratic Republic of Timor-Leste on the paragraph 1 of its article 1 consecrates that the democratic principle by establishing that, "The Democratic Republic of Timor-Leste is a democratic State based on the rule of law, a sovereign State, independent and unitary, based on people's will and on the respect for the dignity of the human being."

It stands out in this juridical-constitutional precept, two important aspects of the democratic principle which are part of the essence of the Timor Leste State and of all modern states. For the fact of being a democratic State based on the rule of law and based on people's will and on the respect for the dignity of the human being.

The constitution of the State which is based on people's will expressed through universal suffrage, under the terms of article 7 of the Constitution will be represented by a parliament, and the respect for the dignity of the human being and their fundamental rights, liberties and guarantees, constitutes the foundations of the democratic state based on the rule of law and on the full establishment of the democratic principles.

Ladies and Gentlemen, the constitutional principles consecrated on the article 2 of the Constitution of the Democratic Republic of Timor-Leste affirm that the supremacy of the Constitution above the rest of the laws in force, in both of the paragraphs 2 and 3 of the Constitution.

In accordance with the paragraph 2 of article 2 of the Constitution, the State has to be subordinated to the Constitution and to the laws, as a parameter and limit for its acts and for the acts of its organs.

The acts of the State and of its organs are exerted on several areas which are made up with the different functions consecrated in the Constitution, as the functions of the public office, of the legislative power, of the administrative power and of the judicial power.

The assessment of the constitutionality contains in its essence one other scope, the one of the jurisdictional control of legislative acts, whether laws from the National Parliament, decree-laws from the Government or any other executive acts emanated from the organs or from other organs of the State, and the verification of its conformity in relation to the Constitution.

The assessment of constitutionality, as well as the jurisdictional control of legislative and executive acts, is exerted by a specialized court, by a constitutional court or other superior court with the competence consecrated in the constitution for this effect. In the Democratic Republic of Timor-Leste, the constitutional legislators have opted clearly for this second model, in which the functions of the Constitutional Court are exerted by a superior court with the competence consecrated in the constitution for the assessment of constitutionality.

Ladies and Gentlemen, in Timor-Leste, the Supreme Court of Justice is the highest court of the law and guarantees the uniform enforcement of the law. It also has the jurisdiction through the national territory. It also combines of the Supreme Court of Justice to administer justice in the matter of legal constitutional nature (article 124 of our Constitution). In the constitutional matter, Supreme Court of Justice has the competency to review and declare the unconstitutionality and illegality of the normative and legislative acts by the organs of the state, provide an anticipatory verification of the legality and constitutionality of the expertus and referenda verified the case and constitutionality by the commission to rule as a venue of appeal on the suspicion of the norm considers constitutional by the court of the force instant (article 126 of the Constitution).

Therefore, in relation with the constitution complaint to violence to the fundamental constitutional right of citizens (article 152) Constitutional of Timor Leste established the following.

First, the Supreme Court of Justice has the jurisdiction to hear appeals against any of the following court decisions. (a) Decision to refuse to apply illegal rules on the grounds of unconstitutionality, (b) decision to apply legal rules on constitutionality of which was challenged then-and-there in the proceedings. Two, an appeal under paragraph 1 b may be brought only by the part who rise the question on unconstitutionality.

The decision of the Supreme Court of Justice shall be not available. They shall have a general binding effect of the process of abstract and concrete monitoring when dealing with unconstitutionality, article 153 of our Constitution.

The Supreme Court of Justice as the guarantor of the Constitution can make an assessment of constitutionality in judicial proceedings for the examination of the constitutionality of the rules of law which are consecrated from Article 149 to 153 of the Constitution of the Democratic Republic of Timor Leste.

Finally, these proceedings of examination of the constitutionality to the rule of the Supreme Court of Justice as the constitutional court and the principle of democracy and we are still up to the large part of these proceedings focusing on rules regarding to the fundamental rights of Timorese citizens whether the rights of liberty and guarantee or their economic, social, and cultural rights on the context of legal protection for the unity of human being. On its actions for the examination of the complaints with the Constitution on the part of the other organs of the state the respect for the principle of separation of power and independence of power for the democratic principle and for the principle of the dignity of human beings the Supreme Court of Justice left an incredible mark in the history of the building of a democratic state based rule of law.

Thank you for your attention.

63. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you Mr. Santos, the President of the Supreme Court of Timor Leste. Now, we have completed the presentation of this session within less than one hour. That is the record I think. So we have enough time to ask questions and to get answers to these questions. We have actually 30 to 35 minutes for questions and answers. Please introduce yourself while you are asking questions and indicate to whom you are asking.

Ok, lady in the center.

64. AUDIENCE: JULISTA MUSTAMU (UNIVERSITAS PATTIMURA)

Thank you for the opportunity, an extraordinary opportunity which I have. My name is Julista Mastamu from the Faculty of Law of University of Pattimura, Ambon Maluku, Indonesia. I am grateful that my friend whom I have not seen for 18 years – I managed to see him again – the Chair of the Constitutional Court of Timor Leste. This is my colleague way back when we were still students at Pattimura University in Ambon.

I have several questions that I would like to raise to these extraordinary speakers. We know that democracy is vital in the separation of power of a country based on

the Trias Politica principle where the power of the state is mandated by people for the welfare and wellbeing of the people. This Trias Politica is very important to take into consideration when we look at histories around the world with the fact that there is a more dominant executive branch, and absolute power tends to violate human rights and violate the people, and in this extraordinary forum I would like to share my experience as well as obtain experience from others, especially for me as a lecturer of law.

First, is there something that we can do to strengthen the authority of the constitutional court as an institution to uphold the principles of democracy? I would also like you to share any decision, a spectacular decision perhaps that was decided by your Constitutional Court in your country that defended the existence of the Constitutional Court as an institutional, as an institution in upholding the democracy principle. Thank you.

65. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

I think we better to receive the questions first then we will give the floor to our speakers. Any other questions?

66. AUDIENCE: ABU BAKAR (DPR RI)

Yes, Thank you. My name is Abu Bakar. I am a member of the Parliament of Indonesia from Partai Keadilan Sejahtera (Prosperous Justice Party), Commission 3 of the House of the Representatives and also the special task force of anti-terrorist.

This is very enthusiastic discussion with very recent and updated theme. My first question goes to Justice Lee from Korea, thank you for your interesting presentation by comparing the process of impeachment or sharing the process of impeachment trial in Korea. This is a very interesting issue that we face in safeguarding democracy. In article five, your Constitution, the impeachment to your president can be motioned or can be conveyed by the National Assembly if the president violates the Constitution or violates his duty. The motion for impeachment has to be agreed by two-third of the National Assembly so that it can be proceeded to the Constitutional Court.

Now my question is whether the violation, the violation by the president for example, does it have to be proven at the district court first, the general court first before taken to the Constitutional Court? Second question, Justice Lee. You mentioned about rallies done by the people during the impeachment is considered the aspiration of the people. Does the Constitutional Court take this into their consideration when they decide the case or not?

My second question goes to Romania. About interception, tap wiring. This is a very warm debate in our task force, at the anti-terrorist task force as well. This is

something that is, that draws our attention and in a number of cases even the Justice of Constitutional Court was intercepted, the conversations were intercepted. So it is not excluded from interception or tap wiring. And you mentioned that the use of interception by the intelligent can be used to defend the country. It cannot be admissible in the court of law, in the criminal justice or in the criminal court.

My question, will the justice or judges in trial can accept this intelligence procedure? And is interception regulated in your laws and regulations and who gives the permit who give the authority or mandate to do the interception? Is it by letter from the judge or other entities or institutions? This in a very interesting question for me. Thank you.

67. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

My colleague in Indonesian Constitutional Court. Please.

68. INDONESIAN DELEGATION: I DEWA GEDE PALGUNA (JUSTICE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Thank you Mr. Chairman. I would like address my question to His Excellency Justice of Constitutional Court from Romania. First of all, I would like to present my best regards to Justice Mihalea Drumeva if she's still there in the Constitutional Court of Romania.

Let me cite article 21 paragraph 1 to paragraph 3 in your paper. Every person is entitled to address to justice the court in order to defend his rights, freedom, and legitimate interest. The exercise of this shall not be restricted by law. Parties are entitled to a fair trial and to have the cases solved within a reasonable term. First of all I would like to ask you, what does it mean by any person? Does it mean that not only Romanian citizens that have the rights or to have the standing to launch a complaint or a kind of petition before the court or the Constitutional Court or it is also for foreign citizens? (They) may launch complaint before Constitutional Court? In other words, whether the Constitutional Court of Romania admitted what's called a doctrine that every person in respecting of their nationality has the standing to be heard before the Constitutional Court of Romania. The second one, the second question is as to paragraph 3, of Article 21, it is included in your paper, parties shall be entitled to a fair trial and to have their cases. So, within a reasonable term, is there any practice that describes further, what does it mean by a reasonable term in the practice of the Constitutional Court of Romania? Thank you very much, Mr. Chairman.

69. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you. The President of the Commission of Afghanistan?

70. AFGHANISTAN DELEGATION: MOHAMMAD QASIM HASHIMZAI (CHAIRMAN OF THE ICOIC ISLAMIC REPUBLIC OF AFGANISTAN)

Thank you very much. My question is directed to His Excellency the Chairman of the Constitutional Commission of South Korea, in regards to the impeachment of the ex-President, did you examine the testimony presented by the prosecutor or and the different council? Or was it the first trial? Or were you relied on what was presented to you?

Thank you very much.

71. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you, Mr. President. Any other question? Okay, and another President, Professor Hidayat.

72. INDONESIA DELEGATION: ARIEF HIDAYAT (CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Saya berdasarkan undang-undang (...)

Based on the law of the Republic of Indonesia, there is an obligation for the public officials to speak in Bahasa Indonesia, so I do apologize for that, is mandated by law.

The democracy principle, is just one of the principles used in governing the state of the Republic of Indonesia. Upon through study of our preamble, of the 1945 constitution, there are two other principles which are, theocracy and the second, nomocracy.

So, in Indonesia, we are governed by theocracy principle, nomocracy principle, and democracy principle. The theocracy principle, is not only relied on one religion only, but this is taken from by the universal principle of religions. And in Indonesia it is translated as to believe in one God.

So, there are three principles governing our state. And so the Constitutional Court of the Republic of Indonesia in performing its duty, it has to protect these three principles, not only democracy but also to uphold the supremacy of Law and to uphold theocracy based on the belief in one God. And each policy, whether in legal sector, economic sector, cultural sector, has to be based on the theology principle, the belief in one God.

So, when we develop our laws, there will always be an introduction at the top, by the grace of God Almighty. As well as in, all decisions of the court of law, all

decisions, at the start or the heading of the decision, we'll say on the grace of God Almighty. This spirit is also shown in all decisions made in the economic, social, cultural sectors. And this is a consensus, a noble consensus made by our founding fathers when we had selected this principle.

However, the practice is much more complex than what it is expected or said. I would like to obtain a comparison from your and or experience from your Excellency, whether there are any other principles in your country. Or, do you only have secular principle, either is democracy or monocracy?

I would like to ask for you to share this experience and perhaps in the next international symposium we can also take this as a theme. Thank you.

73. CAMBODIA DELEGATION: RATANA TAING (CABINET DIRECTOR OF THE PRESIDENT OF THE CONSTITUTIONAL COUNCIL OF THE KINGDOM OF CAMBODIA)

Thank you so much, Mr. Chair. Let me introduce myself, I'm (inaudible), the Director of the Cabinet of the President of the Constitutional Council of the Kingdom of Cambodia.

I would like to appreciate all the speech from our distinguished speaker. I have one question and it is addressed to Excellency Punya, a Justice of the Constitutional Court of the Kingdom of Thailand.

I would like to hear from your point of view on the constitution-making in the Kingdom of Thailand as Thailand has been working on the democracy for around 80 years and you have 20 constitutions if I'm not wrong, one piece constitution every 4 years if we calculate in these.

However, the situation in Thailand you still keep the social security, administrative stability, development, so I would like to hear from your point of view, how the Constitutional Court of Thailand guarantees democracy, rule of law, and also the principle of the constitutional law in Thai Constitution because Thai case is very special and good to learn for a democratic country. Thank you.

74. AUDIENCE: PATANIARI SIAHAAN (CONSTUTIONAL FORUM)

Thank you. My name is Pataniari from Constitutional Forum. This morning's discussion is on democracy and constitution. We all know that democracy is insufficient if there is no law limiting.

Now I want to ask, how do we limit democracy? And what are the indicators or measurements to know that we have made a proper good limitation of democracy with the latest development in Kenya, and impeachments of president, they were all are supported by motion of the people. But we all know that this motion of

people sometimes does not purely come from the people, sometimes it is politically pressured or influenced. Now I would like to ask, in Rumania, in Thailand, in South Korea, you are experienced in the process of impeachment, including Azerbaijan, how do you measure the motion of impeachment that is still democracy or not? Because this is the national interest that we are talking about, which is the fundamental basis to measure whether this is a national interest or not? And what do you use as measurement in your country? Thank you.

75. INDONESIAN DELEGATION: MARIA FARIDA INDRATI (JUSTICE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Thank you. I'm very intrigued to hear the opinions from the speakers and I have just two questions to Justice Igor Rogov. I am aware that the decision of Constitutional Court is final and legally binding. But at the end of your presentation, you mentioned that the president can revise the decision of the Constitutional Board of yours. What does that mean?

The second question is to Justice Lee. You mentioned that the Constitutional Court will only take constitutional matters on hand, not political matters or cases. As we know, the Constitutional Court is like … it's basically a political court, especially when doing a judicial review to the Constitutional Court of the legislation, because as we see, most the legislations that were brought to the Constitutional Court are legislations that are related to political aspect. Thank you.

76. AUDIENCE: SUNNY UMMUL FIRDAUS (ASSOCIATION OF LECTURES OF SEBELAS MARET UNIVERSITY)

Very well, thank you to the Chair of the session, moderator, for giving me the time. My name is Sunny Umul Firdaus from the Association of Lectures on the subject of Constitutional Court, from the University of Sebelas Maret, Solo.

My question lies or is raised to Thailand, the Constitutional Court of Thailand. I am very much interested in one of the authorities or powers of the Constitutional Court of Thailand, which is to develop Standard Operating Procedure or SOP for the development of legislation in the parliament. I imagine that there is a very good relationship between the court and the parliament to be able to develop legislation in such a way that fulfills the principles of democracy and ideology.

What is the SOP defined by the constitutional court to the parliament to ensure that the legal products are in coherent with the constitution, as you may probably heard in Indonesia the parliament has the duties to create legislation, and certain legislation requires a lengthy time to be developed at the parliament. I apologize to my colleagues from Commission 3 of our house of representatives. For example, just the legislative on general election, it required lengthy time to issue this legislation and but once it was enacted it was immediately brought to the constitutional court

for judicial review. This is what we are seeing in Indonesia. So what is your SOP? Is there a very good relationship between the court and the parliament? And if and when you have the SOP, even when you have the SOP, how many judicial reviews that you have received in the constitutional court of Thailand?

77. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Ladies and gentlemen now is the answer time.

So, I will start with Mr. Santos, and I give each speaker 3 minutes to respond to the question. Thank you.

78. TIMOR LESTE DELEGATION: DEOLINDO DOS SANTOS (PRESIDENT OF THE TRIBUNAL DE RECURSO OF THE DEMOCRATIC REPUBLIC OF TIMOR LESTE)

Thank you so much. I would like to speak in Bahasa Indonesia but I do apologize if I have some Ambonese dialect in it.

I'm not going to answer all questions but there are questions that were raised to me that I think is relevant for me to answer. The first one, the question from the University of Patimura. The need to limit, to ensure that legislation is not developed unconstitutionally and against the interest of the people. As we all know, the power is given by the law. So, the power can be given to the constitutional court according to the need of each country, of state, or of the relevant institution but the constitutional court can be more active or can contribute more actively by providing decisions that can ensure the protection of human rights for the decision of cases that are taken as judicial review.

For example, there are legislations developed in many countries that may be in contradiction with the constitution and this may be brought to the constitutional court. And it is the duty of the constitutional court to review this to see whether the legislation is in accordance with the constitution or not, or is it unconstitutional, so not to violate the rights of the people.

The second question, example of any significant decision that the court has delivered in protecting democracy. There are number of cases of concrete cases that I can take as examples, but I have one particular case that may be relevant to all countries. When the parliament enacted the law on press, on the right of shareholders for media sector, for press sector.

It is only limited or restricted for Timor Leste citizens. It is negative for foreign citizens to enter media businesses. So, only Timor Leste citizens can be the shareholder of business in the media sector. And the legislation was brought to

the constitutional court and the constitutional court did a judicial review. And we decided that it is unconstitutional, and so, therefore … so therefore, we then amend the legislation to include foreign citizens to enable them to own share in companies within the media sector, to open more access to information, and to eliminate discrimination in the media sector. That is one of the examples of the decisions that we have delivered in our court.

There was also question raised to my colleague from Rumania from the parliament if I am not mistaken, which are I also would like to answer. In Timor Leste, do we need certain legislation for wire-tapping or intercepting conversations? We have a separate law for that. We do have a law on that. The authority authorized to do the interception, surveillance is the judge. The judge can give mandate. Why judge? Because this is the privacy of an individual, and the privacy of an individual needs to be protected and ensured. That's why there is a need to have the mandate given by the judge to do any surveillance and interception.

The principles of democracy from Professor Arief mentioning three principles of … three principles in the constitution. I'm a law graduate from the University of Indonesia. Based on the 1945 Constitution, in the Preamble, there are the principles stated in the preamble of the 1945 Constitution and further translated in further articles, if I'm not mistaken article 36. You mentioned about the ideology principle, and other principles in the preamble of the 1945 Constitution with the provisional articles.

I think this is natural for a constitution to have the principles not elaborated in details in the preamble because the principles are then translated in the articles in the following articles. For example, the freedom to observe a religion will be regulated in one of the articles that must be the case. Non-discriminative principles for example, non-discriminative based on religions, ethnicity. There are specific articles governing that in the constitution.

So, yes you are correct. The preamble of your 1945 Constitution has detailed, has regulated in details or has mentioned in details these principles. You are right, Professor.

Lastly from Ibu Sunny from UNS. How many judicial reviews petition that we have received in our court? In Timor Leste almost ... almost. All legislations enacted by the parliament and the government mostly brought to the constitutional court by the parliament with the minimum requirement of two third of the member of the parliament conveying this motion. And according to our law, this motion needs to be published in the state gazette, and to be delivered to the president. And the president can ask for judicial review to the Constitutional Court or in our case to the Supreme Court to the legislation in its entirety or certain articles of the legislation.

So the president has the right to take this to the constitutional court for judicial review, to see whether it is in accordance to the constitution, then if we decide that there isn't any.

Oh, so before the legislation is announced in the State Gazette, the president can take this legislation to the constitutional court to ensure, that the legislation is not violating the constitution and human rights in its entirety or partially. And, if the constitutional court has decided that there is no violation of the constitution, then the president can take the draft of the legislation back to the parliament to proceed with the following procedures.

79. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Okay, thank you very much.

Mr. Udchachon from Thailand.

80. THAILAND DELEGATION: PUNYA UDCHACHON (JUSTICE OF THE CONSTITUTIONAL COURT OF THAILAND)

Thank you Mr. Chairman. Thank you for the question. I would like to briefly talk about the constitutional court and answer your question. The Constitutional Court of the Kingdom of Thailand was set up in 1997. Its the constitution, in that time was the first time to be set up in Thailand, that is the superior court that decides on jurisdiction review to control the constitutionality, in terms of bill, that is already controlled and the act, the so called the posterior control, then we have it for 19 years. In terms of to guarantee the political development, we have two steps to do that for each year.

The first step, we have to hold a democracy class. We have trained currently the high rankings of the agencies of the government of the public sectors and private sectors every year to educate the rule of law, democracy, and human rights. We do it every year.

And, the second step besides the MoU with the faculty of law, in Thailand, we have five past, five weekends in Thailand. We start the MoU with the faculty of law of the universities for five weekends. After that, for the research and training the students in the in the Faculty of Law and the Faculty of Political Sciences.

And, the third step, finally. The students of the Faculty of Law and Political Sciences educate the people in the village. In terms of rights and liberty and in terms of motion to send to the constitutional court, we do it every year. It is my, our constitutional court's in practice.

And, in terms of the trial for the constitutional court, we tried the inquisitorial trial system. We tried to do the spirit of the constitution. We tried to do the conflict of interest to withdraw the politicians, to check mark the practice of conflict of interest. It is to take evidence, to create that.

And in terms of the development of the legislative branch, we also must check the procedures of the national assembly meeting and the content of the bill or act. In the first thing, we check the column of the national assembly before the meeting, it's right or not.

And in terms of proceedings of the regional assembly meeting, we check the head quarter or the headman, or the spokesman, to do the further parliamentary rules or parliamentary rights. It means the Chairman of meeting choose to take the opportunity to have the rights of the opposing party, to discuss to give option in the national assembly. We check this.

And, the last thing, we check for the content of the bill of law, it is consistent with the constitution or not, in terms of rights and liberty, especially human dignity. So, every year we do in practice in terms of practicality. We have evaluation every year. Thank you.

81. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you. Mr. Marius**.**

82. ROMANIA DELEGATION: MORAR DANIEL MARIUS (JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ROMANIA)

Regarding to the first question, regarding the wire taping and the interception of communication, we have in our legislation two different situations. I told you about one of them. The first situation regarding the treaties against the national security, when the technical surveillance warrants are issued by the judge, but normally by the judge in the Supreme Court.

In this situation, then Romanian intelligence services are empowered to enforcement the technical surveillance warrant regardless, whether we have investigation or not.

The second situation is the situation when the prosecutor or judicial police carry out criminal investigation for ordinary offences, ordinary offences, that means except the offences against national security. In this situation I told you, I already told you, only the prosecutor and judicial police body can be empowered to enforce, to put in a force to technical survey warrant which is ordered by a judge, by any judge, regardless the level of the instancy by the firts instancy tribunal court of appeal or high court of cassation and justice.

In the first cases, when we have the criminal offences against the national security, the national intelligence body is habilitate to gathering the evidence and send to the judge.

Regarding the second question, if I understand well, in Romania legislation, we have the exception of unconstitutionality. That means any people, any persons, cannot go directly to The Constitutional Court. But any people, any persons, which are involved in the trial can raise in front of the ordinary judge, an exception of unconstitutionality and the judge submit this exception to The Constitutional Court. In front of The Constitutional Court, any people who get accept in have the right to hearing by the judge of Romanian Constitutional Court.

What means the reasonable term is not, we cannot exactly what means, because depend the circumstances of the cases, the complexity of the cases, the number of people which are involved. But in too many cases The European Court of Human Rights conflicted Romanian because The Romania state because they do not respect the reasonable thing. As the consequence of this decision of The European Court of Human Rights in 2014, when the parliament adopted the new criminal procedure code was introducing a provisional, a legal provision which said that if after one year of the started of the criminal investigation the trial is not finalised, every people which are involved have the right to submit the complaint to the judge of the right and liberty.

Regarding the impeachment, in our constitution we have this institution, but the President can be impeached only for committing of the high treason. But we have in our ... that never happened in Romania. But we have a constitution, another institution of suspension. Suspension of the President for the violation of the constitution and we have one President which once suspended for two times by the referendum organized by the parliament rejected the proposal of the decision by the parliament to suspend the President, and The President of Romania rest in the position.

And the last question, which the number of the constitutional review we have in every year, we are not invite in every year approximately with 3.000 cases, and The Constitutional Court of Romania is to issue in every year approximately over 1.000 decisions. Thank you.

83. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Mr. Lee.

84. KOREAN DELEGATION: JIN SUNG LEE (JUSTICE OF THE CONSTITUTIONAL COURT OF KOREA)

There were several questions to me on the impeachment trials in Korea. So, I have to putting the older question together and answer briefly.

Firts of all, I have to say the history of the impeachment motion. As I said in the presentation, the scandal surrounding the former president was revealed last year. So, from the time the Prosecutors Office investigated various kinds of charges imposed on the former president and her assistances.

So, after the investigation by the prosecution, the prosecutors indicted former president and assistances. In ordinary situation, if there was an ordinary situation, it is desirable the motion by the national assembly should be approved by the National Assembly after the trial of the Ordinary Courts, but the National Assembly members were afraid of the termination of the Presidential term of the former President.

From the time of motion by the National Assembly, there were less than a year to the next Presidential Election, so they were hurried to approve the impeachment motion. So, December last year, the motion was approved by the National Assembly, and just after the approval, the impeachment cases was brought to our Constitutional Court. So, we are given a lot of evidences investigated by the Prosecutor Office, and there was another special Prosecutor appointed by the National Assembly. And the Special Prosecutor investigates more than the Ordinary Prosecutor Office, so we have to have all the documents and evidences submitted to us by the Prosecutors in the impeachment case. So, we are... at the Prosecution and at the Impeachment trial in our court, the Former President refused to have a testimony, so we didn't have the testimony of the Former President.

So, we have to judge by the evidences and the testimony of her assistants in our court. So, I have to say that there was no verification by the Ordinary Court before the motion in our system.

About the second question, as I said that in the presentation, there were a lot of rallies and demonstrations in the course of trial, it was the pros and cons to the former President. So we had no will, the rallies (of pros and cons) were confronting each other bitterly. We had no will to be one-sided; we had to be neutral. So I would like to say we have no one-sided.

And the third question. What is the measure of the motion of impeachment? As I said in the presentation, the bravery was the searching for personal gains and misuse of the power by the very top of the power is explicit breach of the presidential duties. So it is against the national interest. So, we judged by the standard of the gravity as I mentioned.

And the last question from Maria, I agree that Constitutional Court is a Judicial Court as well as Political Court, but we cannot ignore the political issues. But, as we are judges of the court, so we are focusing on constitutional or legal issues rather than focusing on political issues. That's all.

85. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you. Mr. Rogov?

86. KAZAKHSTAN DELEGATION: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

(Incomprehensible because it is delivered in Kazak).

The Constitutional Court will do a re-election or will repeat the meeting. When the quorum reaches 2/3, then the motion is accepted or agreed. If the quorum is not fulfilled, then the meeting will be considered insufficient to take a decision. We have received a number of complaints from the President to the Constitutional Council, but since March last year, the President, based on his personal initiative, has provided corrections to the Constitutional Council. The President does not have such authority, actually. And because of his wish the Constitutional Council is final and binding. That's my explanation. Thank you.

87. AZERBAIJAN DELEGATION: RAUF GULIYEV (SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN)

To be short, I have chosen only two questions to answer. The first is how to enforce the authority of the Constitutional Court. The response to this question is as I mentioned in my presentation. Everything depends on the Constitutional Court. Our court, it's legislation was drawn up in cooperation with the Venice Commission and it's quite a progressive one. Using the competencies and vices in that legislation, the Constitutional Court can itself upgrade its authority and protect the respect within the society.

That is the authority of the Constitutional Court, it completely depends on itself. The second is the question from Honorable Professor Dr. Arief Hidayat, Chief Justice of the Constitutional Court of the Republic of Indonesia. Regarding the response to this question, I would like to say that Azerbaijan is a secular state, a democratic state governed by the rule of law and we have 90% of our population are Muslims. However, alongside with them, we have a strong Jewish community, Orthodox Catholic, and Lutheran communities living in Azerbaijan.

Therefore, all the decisions take into account the secularity of the state adopted on behalf of the Republic of Azerbaijan. Thank you very much.

88. CHAIRPERSON: ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you very much. We have two more minutes to finish this session because we started at 8.50. So I will use this two minutes to summarize the session although

it's almost impossible because we talked about different aspects of the issue of guarding democracy.

Actually, we are talking about the interpretation and application of the constitutional identities. We all have different constitutions and every constitution has a different constitutional identity. Ideologies as well as the principles of democracy, rule of law, human rights, tolerance, and dignity constitute part and parcel of this constitutional identity. But we are not operating in a workroom. We are operating in a society and this constitutional identity is shaped within history and society.

So it's a production of history and culture, and it changes over time depending on the interpretation and application of this constitutional identity. So at the end of the day, we, as the Constitutional or Supreme Courts are in fact the guardians of the Constitutional itself and we are in the position to interpret and to apply the principles and rules of the constitutions and as I said it may change with time and depending on the interpretation of the text itself.

And as the Chief Justice of the Indonesia Constitutional Court, my dear friend, Mr. Hidayat suggested we should perhaps in the future discuss some special aspects of democracy, for instance, the principles of separation of powers or principles of secularism as a constitutional principle. We must organize special symposium or conferences on special topics.

Before closing the session, I would like to thank all the participants and all the speakers for their grace to make their presentations. And I would like to also thank the Chief Justice of the Indonesian Constitutional Court, Mr. Hidayat, Judges of the Indonesian Constitutional Court, Secretary General, all Staff of the Court for the warm and generous hospitality as well as for organizing such a wonderful symposium and the Board of Members Meeting of the AACC. Thank you very much.

89. MASTER OF CEREMONY: RAHMAT IDRIS

As we give our a big round of applause for the Chairperson and the Speakers. We extend our warmest gratitude to all of you for such enlightening elaborations.

Ladies and Gentlemen, we will now invite you to enjoy your break for 20 minutes. We have prepared your coffee and tea as well as scrumptious bites in the room next door. We will reconvene in 20 minutes for the continuation for the second half of our international symposium.

Delegates, Ladies and Gentlemen, please enjoy your coffee break.

INTERNATIONAL SYMPOSIUM SESSION THREE

90. MASTER OF CEREMONY: RAHMAT IDRIS

Ladies and Gentlement, once again good afternoon and welcome to the second half of our international symposium on the Constitutional Courts as the Guardian of the Ideology and Democracy in a Pluralistic Society. It is also in celebration of the 14th Anniversary of the Constitutional Court of the Republic of Indonesia. We sincerely hope that you are all refreshed and rejuvenated after the delicious coffee break.

It is now our privilege to invite our speakers for session 3, the final session of the symposium on the theme of Constitutional Court's Role in Plural Society. Inviting our first speaker from Afghanistan, Chairman of the Independent Commission for Overseas the Implementation of the Constitution of the Islamic Republic of Afghanistan, His Excellency Mohammad Qasim Hashimzai.

We are also inviting our speaker to proceed to the head table President of the Constitutional Court of Benin, His Excellency Theodore Holo. Also please join us on the stage from Cambodia, Director of Cabinet of the President of the Constitutional Council, Mr. Ratana Taing. Also requesting our speaker from Kyrgyz Republic, Vice Chairman of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, Mr. Kuanbek Kirgizbaev. We also invite from Malaysia, Chief Justice of the Federal Court of Malaysia, His Excellency Mr. Mohammad Raus Sharif. And our final speaker for the session from Myanmar, Member of the Constitutional Tribunal of the Republic of the Union of Myanmar, Mr. Myo Myint.

This session will be chaired by Chairman of the Constitutional Council of the Republic of Kazakhstan. We invite his Excellency Igor Rogov. Ladies and gentlemen, our Chair and speakers are ready on the head table. Let us begin by giving them a big round of applause for session 3. May we hand over the session to our Chair, please.

91. CHAIRMAN: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Once again I would like to welcome all of the delegations and participants. I also would like to express my thanks for the trust of appointing me to become the moderator for this final session. The theme that we have for the session is also interesting and very actual especially for all countries, especially for countries which are here. In countries that have plurality because to unify a diverse and pluralistic country with the national interest, with the state interest. As it is with the previous session there were questions given by our friends from Indonesia. Has it been answered yet? Is it correct whether a state can limit the values that may

threaten the state security? In this session, we are going to discuss about this and let us follow the original procedure. So, each speaker will have time about ten minutes. We will abear to the ten minute limit.

First is the presentation from Afghanistan. For the Islamic Republic of Afghanistan, please begin your presentation.

92. AFGHANISTAN DELEGATION: MOHAMMAD QASIM HASHIMZAI (CHAIRMAN OF THE ICOIC ISLAMIC REPUBLIC OF AFGANISTAN)

May peace be upon us all and God's greetings be with us. Constitution is the guardian of the constitution in democracy in the diverse society of Afghanistan. Dear Chairman, Ladies and Gentlemen, I am glad to be here among distinguished personalities of the constitutional courts. As Chairman of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) which is somehow equivalent to constitutional court of other countries, I am proud to be here and speak on behalf of ICOIC

My country has been suffering from our prolonged war which has disrupted practically every aspect of the state affairs including the function of the judiciary. Our commission, ICOIC, despite unrest in the country continues to function in accordance with the constitution and its own law. This commission which has been formed in accordance with Article 157 of the Constitution is an independent commission for overseeing the implementation of the Constitution. Members of the commission have been appointed by the President with the endorsement by the House of People. This commission has its own law. According to this law the commission which is composed of 7 members including the Chairman has a four-year term of office. The commission has a deputy head and a secretary that can be replaced each year. Only the President holds its office for the full term of four years.

The draft law on the ICOIC had gone through difficult stages before it becomes law. The draft law, at first, went through parliamentary stages before it was signed by the President. The President then in accordance with the Constitution sent the draft law to the Supreme Court to consider the constitutionality of its provision. The Supreme Court considered 4 articles of this law to be unconstitutional. One of them was Article 7 of the draft law. The said article had given the members of the ICOIC the right to remove from the office any member of the commission by a majority vote. The Supreme Court considered the above article of the draft law including other three articles and stated them to be unconstitutional. Thus, there articles were removed from the text and subsequently the President signed the draft and made it to become law.

As the guardian of the constitution, the ICOIC law gives the commission the power to see that the President of the country, the Parliament, the Judiciary, government departments, institutions, as well as government and non-government organizations

are following and implementing the Constitution. This commission can also give legal advice to the President and Parliament on issues relevant to the implementation of the Constitution. Moreover, this commission can submit a specific proposal to the President and Parliament to take necessary measures for the purpose to upgrade legislative activities to meet the requirements of the Constitution. As the guardian of the Constitution and democracy in Afghan society, this commission can report to the President upon finding any violation of any article of the Constitution. This commission law only gives the President, both Houses of the Parliament, Supreme Court, Independent Human Rights Commission, Independent Election Commission and Independent Administrative Reform Commission to remit cases relevant to the Constitution for expression of public opinion regarding their constitutionality.

In one of the recent cases where the Attorney General was recalled by the Upper House of the Parliament for questioning, the government referred the case to the ICOIC, asking for the constitutionality of this demand. The ICOIC is the guardian of the Constitution in a democratic society considered the case independently and in view of the provisions of the Constitution. The Constitution provides and makes the government only responsible and answerable to the Parliament while another article of the Constitution defines the government to be only members of the cabinet ministers. Meanwhile, the law on the duties and functions of the Attorney General office contains a provision which makes the members of this office responsible for reporting to the Parliament when called upon. The ICOIC in considering the case stated that as the Constitution is the supreme law, its provisions must prevail on all other laws and as the members of the Attorney General office are discharging quasi-judicial functions they should not be recalled to the Parliament for questioning. It is similar to the Supreme Court judges who cannot be recalled by the Parliament for questioning. Logically if such a practice allows the Attorney General to be questioned about the execution of their professional duties, interference in the judicial or quasi-judicial functions will be possible.

During the past years, many similar important cases were referred to the ICOIC. The ICOIC expressed opinion independently and for the benefits of democracy in the society without deviation from the provisions of the constitution which recognized the presence of power and diversity and pluralistic society of Afghanistan.

Ladies and Gentlemen, as the guardian of the constitution the functions discharged by the above ICOIC in Afghanistan are also discharged by all other constitutional courts around the world and they have been part and parcel of their functions too. Despite many good things to say about constitutionalism, we also should keep in mind that some modern constitutions reflect ambitious programs for transforming existing social, economic, and political interests through political engineering. In some countries the underlining ideal of the Constitution is the creation of new society. This desire for social engineering through constitutionalism is a characteristic of ideological constitution found in some developing countries.

Irrespective of the above when speaking of the guardian of the constitution it requires the creation of institution such as constitutional court that serves to preserve and to control the constitutionality of law. In other words constitutional courts are called to purify the legal system from unconstitutional norms that may be created by other powers of the state. Constitutional courts are also play a function among different levels of contemporary constitutionalism, facilitating the dialog between courts, particularly for the elaboration and protection of human rights.

At the end, I want to thank the Constitutional Court of Indonesia and its Chief Justice, Professor Dr. Arief Hidayat, for his hospitality especially for the high level and perfect organization of the symposium here in Solo. Thank you very much.

93. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you for the information that you have conveyed through your presentation which was very interesting. And now I would like to invite from Benin to convey his presentation, Mr. Theodore Holo, the floor is yours.

94. BENIN DELEGATION: THEODORE HOLO (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BENIN)

I would like to extend my gratitude to the President of the Constitutional Court of Republic of Indonesia for your warm welcome and for hosting this event.

Ladies and Gentlemen, the Constitutional Court of Benin was established by the Constitution on 11th of December 1990. And in its preamble of the Constitution it is said that this wish of the Benin society is to create a state of law with pluralistic society and any, and there's a need to protect the constitution against unconstitutionalism to individual or group. And we have Constitutional Court that consists of judges who are the guarantors for the freedom of people and also the implementer of state institution activities and actions and also to protect and ensure general election and any referendum. And therefore it is clear that democracy is a dominant principle in our country which will serve as the basis for, the basis of principle in our country. And my presentation will talk about the Constitutional Court as the guardian of democracy.

Democracy as mentioned by Abraham Lincoln is government by and for the people. But according to Aristotle it is a power given to each citizen to be given the opportunity to rule and be ruled. This is a progress that we are seeing in the shift of politics and shift of government, but democracy is what we see as suitable for the people in our country and for the politics in our country. And, I would like to focus on the amendment of this principle and also the modalities that we have in implementing this principle.

So, the first one is the amendment and the second one is guarding democracy. The first one, the amendment, is a judicial power from the political parties who have different views to together with government develop legislation that is based on democracy. And, we have to prevent a leads from monopolizing the politics. And the decision from the constitutional court is to strengthen, this wish of the people to implement and to uphold the 1990 constitution. And in Africa and in the sub-Saharan countries, the Francophone countries, the President of the Republic is not an absolute power. However, there are presidents that have been in power too long, and therefore the constitutional court has issued provision to guaranty the prevention of absolute power and to ensure changing of power or changing of leader is done smoothly.

The election of president and members of parliament is conducted by our internal affairs ministry, the government in this case. And so the constitutional court decided to revoke this provocative right and created an autonomous election system, and we've created a system to compile the voters and develop the provision for the election in such a way that it was successfully run.

And, all legislation developed in our country need to go through the constitutional court. And the constitutional court, will see whether the legislation proposed by the parliament is in accordance to our constitution. For example, the decision on 23rd of December 2004 reminded us that executing the right to participate in general election is part of the basic right of the people and this has to be guaranteed by the parliament. And therefore, the commission of general election has to conduct an election that is in accordance to the constitution, in particular the provision about change of powers. When the legislation prohibits or limits the period of duty, there was another legislation enacted by the parliament for the tenure of the member of parliament without limit or without period of time.

And so, the legislation was then also brought to the constitutional court, and the constitutional court considered the legislation to be in violation or in contradiction to the constitution. And there was also an organic law enacted, by the parliament that allows the President of the Republic to raise question to the President regarding political parties. And then it was decided that the presidential term is five years with possible extension for one term of presidency. This we considered as referendum and we decided that the referendum not limit the term and the Constitutional Court decided that the legislation is unconstitutional because it is in contradiction with the principle of change of power or election. So, the Constitutional Court in Benin not only serves as the Guardian of constitution, but also serves as the guardian of democracy, especially in the aspect of change of power and we have the prerogative right for this.

The composition of our Constitutional Court consists of 7 Justices, 4 appointed by the Parliament, 2 Justices with 15 years of experience, and the High Justice and Legal Councilor with 15 years of experience, and a prominent political figure, and 3

other appointed by the President, 1 Judge, 1 Academician, and another official with 15 years of experience.

But what is unique to my country is that the Parliament often contradicts with the Government and they have to be free from conflict of interest, no members of families in other branches of the government. And the 7 members will then determine the Chief of the Constitutional Court and Deputy Chief, meaning if there is a dispute between the parliament and the government, it is clear that the Constitutional Court will have the ability to conduct their duties, or in other words, the Constitutional Court is independent and is free from interference from executive, and judicative, or legislative branches. And we do not have to feel obliged or owe the parliament who have selected us as members of the Constitutional Court, as Board of the Constitutional Court. And everyone can reach out to the Constitutional Court.

So not only the government can reach to the Constitutional Court, but also people, the citizen in general, anyone, and personally this has brought the society closer and more aware about constitution. And made them aware from the political aspect, but also from the best interest of the people. And the role of the Constitutional Court can be seen in our constitution, which says that all decisions of the Constitutional Court, any decision that declare a legislation is contradictory or unconstitutional, the legislation then has to be revoked, and there is no appeal mechanism, and that the decision of the Constitutional Court is binding to all authorities and all state institutions so therefore the public trusts the decision of the Constitutional Court, even when there are people who do not agree with this decision.

And this is our fourth President who was elected to democratic channel election and according to our rule of law. This is the experience that I want to share with you. Thank you for your attention, ladies and gentlemen.

95. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

And the next is from Cambodia. From Cambodia, The floor is yours.

96. CAMBODIA DELEGATION: RATANA TAING (CABINET DIRECTOR OF THE PRESIDENT OF THE CONSTITUTIONAL COUNCIL OF THE KINGDOM OF CAMBODIA)

The distinguished guests, I'm here in the name of His Excellency, Im Chhun Lim, the president of the constitutional council of the kingdom of Cambodia. And in this occasion I would like to extend my sincere thanks to His Excellency Chief Justice, Dr. Prof Arief, the Chief Justice of the Constitutional Court of Indonesia for inviting the constitutional council of the kingdom of Cambodia to take the crucial part in this event. And also in the name of the constitutional council of the kingdom

of Cambodia, and of myself, I would like to send our sincere congratulations to Excellency Chief Justice of Malaysia who is the current president of AACC.

Ladies and gentlemen, yesterday and also in this morning, we all have earned very good experience and knowledge from our respective speakers from different countries, and today, I would like to share the experience and also the knowledge from the context of the Constitutional Council of the Kingdom of Cambodia. And my topic is the constitutional council, a guardian of democracy in Cambodia. My presentation shall be in 3 short parts, the first one is the Constitutional Council of the Kingdom of Cambodia in brief, and I would like to share the second part on the experience and also the competence of the AACC to promote democracy, and also our Core Values and way toward.

Let me brief you about the constitutional council of the kingdom of Cambodia. This council was created by the constitution of 1993 of the Kingdom and started to work in 1998. The council composes of 9 members, three members appointed by his Majesty, the King, and other 3 elected by the national assembly and the other 3 appointed by the supreme Council of Magistracy.

The constitutional council of the kingdom of Cambodia is entrusted with 3 main roles.

- The first role to guarantee the respect of the Constitution. By this mean, the Constitutional Council interprets the Constitution and the laws and also to examine the constitutionality of law.

- The second role is to rule on electoral litigations. Related to election of the the National Assembly Members and the election of the Senators.

- And the last role, to notify His Majesty the King on all proposals to amend the Constitution.

Let me take this opportunity to share with you that the amendment of the constitution of the Kingdom of Cambodia can be done at any part at any time except 3 main important men. The first one cannot affect the constitutional monarchy, the second one cannot affect the liberal multi-party democracy, and this proposal cannot be done in the state of emergency.

Ladies and gentlemen, I would like to share with you the crucial decision of the constitutional council in promoting democracy, human rights and the rules of law in the Kingdom of Cambodia. Article 51 new of the constitution provided the constitution of the Kingdom of Cambodia implement the liberal multi-party democracy. And this provision becomes very crucial, principle for the Cambodian people to enjoy their full rights and freedom which are organized by the article 31 (new) of the constitution. Democracy becomes a big hope for the Cambodian

people as a whole and all the concerned actors shall be well aware of democracy's meaning. The implementation of democracy shall be consistent with the social value, culture, and political history of one state and why democracy may cause political conflict and social capital breaking.

However, the performance of the democracy is, but also the impact from implementation of democracy shall be taken into account. For more than 19 years of working the constitutional council of the Kingdom of Cambodia fulfill the function in conformity with the existing provision of the constitutional law. The Constitutional Council are already committed to fulfill its mandate in consistent with the principle of democracy and also the rules of law of the Kingdom. So you can see that our decision, related to the decision, to promote, to guarantee the respect of the constitution and also to interpret the law to interpret constitution, to examine the constitutionality of law.

We the guardian of the democracy and human rights. The constitutional of the Kingdom of Cambodia. Also, we would like to promote democracy by interpreting some crucial cases. One of the cases related to the examination of the constitutionality of law on organization and the functioning of the ministry of women affairs. One article in this law states that the minister of, the ministry of women affairs shall be a lady, and the constitutional council of the Kingdom of Cambodia declares that this provision is unconstitutional because the Cambodians above 16 are equal before the law. In the examination of the constitutionality of the law on the EECC Extra Ordinary Chamber in the Cambodian Court in the ruling of the former leader Khmer Rouge. Also the Constitutional Council said that the capital punishment shall be prohibited and also cannot exile or any arrest of Cambodian Citizens or extraditing to the different countries. The council also guarantees the full right of demonstration by providing that all the Cambodian Citizens enjoy the full right of demonstration.

We also recognize and respect the international law, international principles. The Court also said in one interpretation that the judges of all labors can also apply the international law, the concern of international principles in the ruling process as well.

Related to the right of worship, the Kingdom of Cambodia Constitution states the Buddhism is the state's religion, but Cambodia is also a multi, diverse, diversity in terms of religions, in terms of cultures, in terms of races. The Constitutional Council said that even the Buddhism is the State's religion, but all of my citizens have the right to worship and the state shall be put under the obligation to guarantee this right.

Ladies and Gentlemen, let me come to these three parts of my presentation. The Constitutional of Council has fulfilled the function in conformity with the existing provisions of the constitution and the law of the kingdom, and also guarantee the

adherence of the constitution of 1993 of the kingdom. That is the core value created to rehabilitate the rule of law and democracy in Cambodia. Thus, the Council has already committed its mandate in consistent with the core values to promote rules of law, to protect independence, and to fulfill neutrality. In keeping those four set of core values, the Constitutional Council is working on the way to promote perfectionism in fulfilment of the council's mandate. In order to reach this, the Council is promoting the quality of decision making to promote quality in the investigation process in the electoral litigation, and to promote the capacity building among the officials, and to strengthen the public trust and confidence. In order to do so, the Constitutional Council strengthen the independence of the Council and to strengthen neutrality. And the last one, like we all yesterday discussed about the constitutional education, the constitutional Council would like to provide the Constitutional knowledge through the publication and also education for the Cambodian Youth.

Let me conclude my presentation. In short, the Constitutional Council of the Kingdom of Cambodia has kept working forward in playing crucial rule along with other concerned institutions to promote rule of law and democracy in Cambodia. The Constitutional Council also wish to share with and earn experience and knowledge from other Constitutional Courts, other Constitutional Councils, Constitutional Tribunals, Constitutional Commissions of other respective countries to promote the global partnership and harmony. Thank you.

97. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you for the presentation and for sharing the experience that you have. It was very interesting because there are only two persons representing the Constitutional Council, the advisor, you and I. And now I would like extend the invitation to the Vice Chairman of the Constitutional Court of the Kyrgyz Republic.

98. KYRGYZ REPUBLIC DELEGATION: KUANBEK KIRGIZBAEV (VICE CHAIRMAN OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF KYRGYZ REPUBLIC)

Distinguished Ladies and Gentleman, allow me to greet all participants of the international Symposium and on behalf of Constitutional Chamber of the Kyrgyz Republic to congratulate the Constitutional Court of the Republic of Indonesia and all the Court's Staff on its 14th anniversary. I want to express gratitude to the organizer for invitation and even to participate in this important event, which is a very important platform for the exchange of experience between the bodies of constitutional control.

And, I would like to take this opportunity to express about two important points. The first one, is the new election of the President of the AACC from Malaysia, Mr. Raus. Thank you. And, I would also like to congratulate the President of the

Constitutional Court of Malaysia and I would like to support your presidency. And also, I would like to congratulate the signing of the MoU between the AACC and the CCJA, which is the association of the Constitutional Courts of Africa that enables the expansion or the insurance of the roles of the constitutional court.

I would like to express that, this is a very good opportunity to exchange opinions, with regards to challenges and issues faced by the member countries. I would like to emphasize that the themes of the international symposium are very relevant because the constitutional courts are indeed the defendants of democracy in the society, where there are a variety of opinions, views, political directions because pluralism is one of the main principles of the democratic structure of society.

I would like to briefly explain upon the pluralism of opinions and political trends in Kyrgyz Republic as well as the role of the Constitutional Chamber in preserving democratic values and the development of pluralism in Kyrgyzstan. Kyrgyzstan has made significant progress, towards democratic development since its independence in 1991. Kyrgyzstan has a diverse and strong civil society and independent media. The NGO and the individual civic activists are actively involved in the political process, voicing issues of concerns to the general public that supported democratic reforms.

The role of the Constitutional Chamber of Kyrgyzstan in strengthening the sovereign democratic state and the formation of a single legal space, preserving the unity of the people of Kyrgyzstan, preserving democratic values and principles, the development of pluralism in society is very significant and undeniable.

The Constitutional Chamber of the Kyrgyz Republic is the guarantor of the protection of the rights and freedoms of citizens and the democratic foundations of the state, while it solves issues exclusively of law, acting independently and no one has the right to interfere, and the decisions of the chamber are binding for legislators, and for those who challenge the law.

The above powers impose on the Chamber greater responsibility for the decisions made, since there are no institutions that could correct the possible error of the body of constitutional control of Kyrgyzstan.

In accordance with Article 97 of the Constitution of the Kyrgyz Republic, "Everyone has the right to challenge the constitutionality of the law and other normative legal act, if he or she considers that it violates the rights and freedoms recognized by the constitution. Which means that practically everyone can apply to the constitutional chamber.

Since its inception in 2013, the chamber has adopted more than 70 decisions that are directly or indirectly related to the protection of human and civil rights and freedoms, democratic values recognized by the Constitution of Kyrgyzstan. These

decisions are related to freedom of speech, thought, conscience and religion, the right to work, education, etc.

I would like to draw your attention to the fact that if the Constitutional Chamber holds that certain provisions of the law are unconstitutional, their actions that violate the constitutional rights and freedoms of citizens cease, which entails the protection of the rights and freedoms not only of concrete applicants, but also of the constitutional order as a whole.

The chamber is the guarantor, the decisive influence on the state system and it is related to the implementation of democratic reforms in Kyrgyz Republic. The Chamber protects the constitutional control and faith in rights and legality. Experience shows that the body of constitutional control plays an important role in the separation of powers and in the effective functioning of a system of checks and balances between the branches of state power and personal interests. As history shows, the usurpation of state power inflicts irreparable damage to democratic values and the desire of peoples to build a state of law.

In my opinion, the uniqueness of the mission of the Court as a whole is that it is the only body of state power in any state which direct duty is to subordinate politics to law, political actions, and decisions to constitutional and legal requirements and forms. The Court is called upon not to allow the usurpation of state power, to constantly maintain a state in which only limited power is possible. Perhaps, this is the main mission of the body of constitutional control as the custodian of democracy and pluralism in a democratic society. Strict adherence to democratic norms and principles laid down in the basic law of the state is the guarantee of a stable political situation in the country.

As a conclusion, I would like to note that the activities of the Chamber to ensure supremacy of the Constitution and its direct action are aimed at achieving the main goal building a democratic social lawful state in the Kyrgyz Republic, one of the highest values of which is a person, his rights and freedoms. Allow me to wish everyone success and fruitful work at today's symposium. Thank you for attention!

99. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you, my colleague. Interesting presentation. And now, I would like to invite the next speaker, Mr. Raus Sharif to deliver his presentation which is his share of experience in the pluralistic society.

100. MALAYSIAN DELEGATION: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Bismillahirrahmaanirrahiim. Walaikum salam wr. wb. Mr. Chairperson, fellow speakers, distinguished delegates, ladies and gentlemen. I am privileged and indeed

honoured to be able to participate in this Symposium to share with you all, the Malaysian Judiciary's Experience on today's topic, "the Constitutional Court's Role in a Plural Society."

Let me begin with a brief note on Malaysian history. Malaysia, originally known as Malaya, attained independence from the British on 31st of August 1957. The British, upon departing our shores, left behind a wealth of legacies which are very much alive and strong today. We have adopted, with local modifications, a bicameral Westminster styled legislature, a common law based judicial system, and a democratically appointed cabinet, all governed and subject to, a written Constitution called the Federal Constitution.

Malaysia today is a peaceful country and home to over 30 million people scattered over thirteen States which form the Federation of Malaysia. We are headed by a Constitutional Monarch, His Majesty the Yang di-Pertuan Agong, appointed every five years on a rotational basis among the nine Malay Rulers of each State within the Federation. Out of 30 million population in Malaysia, 69% are Malays, 23% are Chinese, 7% Indians, and 1% of the population is made up of other minor racial groups. Thus, with the racial composition, Malaysia is a melting pot of cultures, traditions, races and religions.

In 1963, to add to our already rich melting pot, Singapore, Sabah and Sarawak decided to join Malaya to create what we know today as Malaysia. However, Singapore left the federation in 1965 to become an independent State. The people of Sabah and Sarawak are themselves culturally diverse in their own right. The indigenous locals comprising of the Kadazan, Dusun, Bajau, Murut, and Iban, as well as other indigenous ethnic groups, have varied sets of traditions, beliefs and practices.

So, Malaysia, being a country diverse in race, ethnicity and religion, was thought to be prone to major conflict due to the obvious dissimilarities amongst its people. Thank God, by the 31st of this Month, i.e. 31st August, we will be celebrating our 60th year as a united and independent nation.

Ladies and Gentlemen, I believe the continued existence of a democratic Malaysian Society is fundamentally due to the framework enshrined under the Federal Constitution. The Federal Constitution has stood the test of time, and has proven its worth as the roadmap for the nation at times of peace as well as in conflict. As a result, a democratic pluralistic society is very much alive in Malaysia. Equal representation is accorded to all races and minority groups in Parliament, be it in the Upper House, "the Senate" or the Lower House, the "Dewan Rakyat".

Article 45 of the Federal Constitution provides that the Senate shall consist of two members elected from each State of their Federation and the Federal Territories of Malaysia. While His Majesty, the King, shall appoint 40 individuals who in His

Majesty's opinion, have rendered distinguished public service or have achieved distinction in the profession, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interest of aborigines. While Article 46 of the Federal Constitution states that the Dewan Rakyat shall consist of 209 members elected from each State. On the Executive level, Article 43 of the Federal Constitution prescribes that, His Majesty, the King, shall appoint the Prime Minister from a member of the Dewan Rakyat who in His Majesty's judgment is likely to command the confidence of the majority of the members of that House. His Majesty, then, shall appoint Ministers on the advice of the Prime Minister, which shall then form the Cabinet. The Cabinet is the executive arm of government, answerable to Parliament. The members of the Malaysian Cabinet today consist of representatives from each member of the Ruling Coalition known as the Barisan Nasional. Barisan Nasional is a coalition of major political parties representing the major racial groups in Malaysia. This translates into a diverse cabinet with a balanced representation of all the major racial and indigenous groups of Malaysia.

On the judicial level, the courts are well aware of its role as the guardians and protectors of the Federal Constitution. With regard to the continued preservation of the unique balance of diversity, we have in Malaysia, adopted the 1988 Bangalore Principles with modification. As you all now, there are 1988 Bangalore Principles was the outcome of a high level judicial colloquium on Domestic Application of International Human Rights Norms.

The Principles set out values and principles that judges should follow and take note in carrying out their duties and of particular relevance here is the Equality. It states that a judge shall be aware of, and understand diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status, and other like causes. And two, a judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. And three, a judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

The Malaysian Judiciary upholds these principles of Equality and will continue to promote and protect the provisions of the Federal Constitution. To borrow the words of my predecessor, Tun Zaki Azmi, in one of his judgments concerning the customary rights of the natives of Sarawak. And he said this, and I quote.

"… a piece of legislation passed by Parliament or State Assembly may be the will of the majority, but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there, the acclamation that all persons are equal before the law and entitled to the

equal protection of the law when it is illusory. If an established right in law exists, a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen and it follows that if one citizen has a right under the Constitution, there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it."

Ladies and Gentleman, the success and continued existence of any pluralistic society requires tolerance, perseverance, and patience. The Judiciary plays an important role in protecting the fundamental liberties of each member of the pluralistic society. The rule of law must, at the end of the day, reign supreme in any democratic society. As long as the courts understand that all man, woman and child are equal before the law, by God's grace, that society will flourish in the face of adversity and against the odds.

Before I end, I would like again to thank the Chief Justice, Arief Hidayat, and his team at the Constitutional Court of the Republic of Indonesia for having organized this International Symposium and also for the hospitality given throughout our stay here in Solo.

And thank you, God bless, and see you in Malaysia.

101. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you very much. It is very interesting, the presentation on the constitutional control perspective and the presentation was also given by the new president of our association. And now, we invite Myanmar to give the presentation.

102. MYANMAR DELEGATION: MYO MYINT (MEMBER OF THE CONSTITUTIONAL TRIBUNAL OF THE UNION OF MYANMAR)

Mr. Chairman, excellencies, distinguish guests, it is my great pleasure and honor to have this opportunity of presenting in this symposium, on behalf of the Constitutional Tribunal of the Union of Myanmar.

First of all, I'd like to express my heartfelt gratitude to the Chief Justice of the Constitutional Court of the Republic of Indonesia, and I'd like to introduce briefly the facts of the Constitutional Tribunal of the Union of Myanmar.

The existing Constitution of the Union of Myanmar was promulgated in 2008, which has the provision to establish the Constitutional Tribunal of the Union. According to the constitution, the general election was held in 2010 and new government organizations including the Constitutional Tribunal of the Union of Myanmar were formed in 2011. In this way the Constitutional Tribunal came into being for the first

time in the history of Myanmar. It has the power to interpret the provisions of the constitution, to vet the constitutionality of laws passed by parliament, to scrutinize the constitutionality of the administrative bodies, to decide the constitutionality disputes of the unions, regions, states, and self-administered areas. These are the main elements of the functions and duties of the Constitutional Tribunal of Myanmar. The Constitutional Tribunal of Myanmar cannot act initiatively, that is, cannot act *motu proprio*, but only on the application. However, the general public has no right to make the constitutional complains to the Constitutional Tribunal of Myanmar.

The Constitutional Tribunal of Myanmar, sets out the list of six persons entitled to submit directly the constitutional matter to the Constitutional Tribunal. They are the President of the Union, the Speaker of Parliament, the Chief Justice of the Union, and the chairperson of the union election commission. Then, the four other persons are designated to make the submission the constitutional matter to the constitutional tribunal in accordance to the specific procedure. They are the chief ministers of the region in a state, Speakers of regions or state parliament, the Chariperson of the self-administered areas leading bodies and representatives numbering at least 10% of all the representative of the Pyithu Hluttaw. They need to send it through authorized persons, the six of authorites persons are already mention above. Again, the Constitutional of Myanmar empowers not only Constitutional Tribunal, but to the Supreme Court of the Union to issue the Writ of Habeas Corpus, the Writ of Mandamus, the Writ of Prohibition, the Writ of Quo Warranto and the Writ of Certiorari. The issue of a Writ is in fact the remedy for violation of the constitutional rights of a citizen. In other words, it is the matter of constitutionality of the act or omission of an authority. However, these tasks of judicial review are not within the jurisdiction of the Constitutional Tribunal of Myanmar.

Similarly, the Union Election Commission of Myanmar has the power to form the election tribunals for trials of disputes relating to the election. The election tribunals adjudicate the electoral matters most of which are in a way the questioning of the constitutionality of the acts of concerning persons. But, these sorts of constitutional review are also out of the preview of the Constitutional Tribunal. It can, therefore, be viewed that the jurisdiction of the Constitunional Tribunal of Myanmar is not extensive enough and only 6 years experience in the field of the constitutional review system is an early stage of development. However, as the main role of the Constitutional Courts is to interpret and apply the Constitution to test the constitutionality of statutes and thus preserve the Constitution's supremacy, Constitutional Tribunal of Myanmar was in some way able to play that role. Allow me to present an instance, one instance, in brief.

Excellencies, "All the powers should not be vested one hand, in the hands of one person or a group of persons" is the old ideology which existed long before the French great political philosopher "Montesquieu". But this ideology was

enunciated in the middle of 18th century by "Montesquieu" in his book, the *Spirit of Laws*.

All of the democratic nations follow this ideology as the principle of "separation of powers" and enshrined in their constitutions. Myanmar is not exception. Section 11 of the Constitution of the Republic of the Union of Myanmar set out that "the three branches of sovereign power namely, executive, legislative, and judicial are separated, to the extent possible and exert reciprocal control, check and balance among themselves".

Regardless of the above mentioned provision, the Ministry of Home Affairs of Myanmar, sent a letter to the Supreme Court of the Union of Myanmar to confer the first-class Magistrate powers on 27 Sub-Township Administration officers. These officers were serving for the General Administration Department, under Ministry of Home Affairs. It is one of the Executive branch of the Union. The officers were supposed to conduct the duties of administrative officers as well as judges without considering it will defeat the principle of separation of power.

The Chief Justice of the Union of Myanmar brought the case to the Constitutional Tribunal of the Union to obtain decision. It was entertained by the Constitutional Tribunal as Submission No. 1, 2011. The Constitutional Tribunal was held on 14 July 2011 that "if the sub-township administrative officer of the General Administration Department of the Ministry of Home Affairs are conferred the judicial officer, it will not be in conformity with the Constitution of the Republic of the Union of Myanmar." That means it is unconstitutional. And then the plan was abolished.

This is the example that the Constitutional Tribunal of Myanmar definitely played the role of safeguarding the ideology or principle of democracy and preserving the supremacy of the constitution.

His Excellency, as the constitutional review is vital component of democracy, it is known that 38% of all constitutions had constitutional review systems in 1951 and by 2011, 83% of the world's constitutions have the systems of constitutional review. In democratic regimes, all judicial review methods have, as their main purpose, the guarantee of the supremacy of the constitution. In conclusion, the Constitutional Courts, Tribunals, Councils or constitutional review system should be encouraged to develop because it preserves the supremacy of the constitutions, protect the constitutional value and fundamental rights of the people. Thank you.

103. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you very much to Mr. Myo Myint for a very interesting presentation. So with the last presentation, all of the presentations have been listened to. It is very simple and because we are late in starting whereas we have to finish this by 12.00 WIB,

in which you will have lunch and then you will have a journey to go somewhere else. And therefore, we have a limited amount of time for discussion. So, I ask to all participants who want to ask a question, please give a short question and also a short answer. Is there any problem with the microphone?

104. AUDIENCE: BUSTANUDDIN (JAMBI UNIVERSITY)

My name is Bustanuddin from University of Jambi. It is a great honor to attend this International Symposium and to obtain enlightment from many countries.

I just want to ask one question. In the first session, Professor Arief has stated about the concept of theocracy in the democracy. What I want to ask is that in several countries and one of them is probably Afghanistan is that they are based on religion or theocracy. If a country is based on theocracy and they have a constitutional court, then it means that you are able to do judicial review. Now, my question is, how do you revoke the law of God? Do you think there is any other concept when you have a theocracy as part of your law. Is it only partially or something like that? Because I need to have further explanation about this, thank you.

105. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

And thank you very much. We are going to take all of the questions first and then we are going to answer them in sequence. Next, please.

106. AUDIENCE: VICTOR SANTOSA TANDIASA (CONSTITUTION FORUM)

Thank you very much. I am Victor. I am representing my boss. And I just want to ask a short question about the constitutional court in our country and I want to ask about how the constitutional court acts in your place? In Indonesia the Constitutional Court manages to increase the awareness of the Constitution in the state, but behind it there is another problem that becomes very crucial to be discussed, which is the continuation, the response of this MK decision. When someone has already said that a norm is already against the Constitution, then the norm cannot be implemented, but in the implementation in Indonesia, especially for countries, for areas institution that have been declared as against the Constitution or unconstitutional they do not agree with that and they do not actually adhere to the decision and there are also no other sanctions that are being applied to them for not following the order. So, what is happening in your area? What do you do with regard to the Supreme Court's decision? Because in my opinion, if a state organization does not follow the decision of the Supreme Court, then it means it is no longer suitable to be part of the country because they are already going against the decision of the country? So, I really want to know what happens there. I am one of the people who does the judicial review in the constitutional court.

107. AUDIENCE: STUDENT OF UNIVERSITAS NEGERI SEBELAS MARET

Thank you and may God's blessings be with us all. I am from Palembang (inaudible) and I am also a student of Sebelas Maret University. The Constitutional Court is a institution that regulates and guards the rights of the people. The first question is to Cambodia and also to the rest of the panelists. Does your Constitutional Court also handle the electoral result dispute? And then secondly, a question also to Myanmar, I did not really understand when you said that the decision from the constitutional court can be appealed or do you have a judicial review whereas the understanding of a constitutional court is final and binding. The third one, this is a message. I hope that this association can bring a more democratic democracy and also maintain the local wisdom and guarantee the human rights of the people. Thank you.

108. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you. And then next, please.

109. AUDIENCE: SURYAMAN (HASANUDDIN UNIVERSITY MAKASSAR)

I am representing the academic section of Hasanuddin University, Makasar. My name is Suryaman. And this is a very distinguished forum and I am really glad to be part of it. In relation to the constitutional court that we are discussing today, I am very interested in the presentation from the Malaysian delegation who talked about diversity. And diversity we all know that we have some ethnicities as well and also norms that they have in this society. What I want to know is that from diversity I put equality and then I want to have the answer, a complete answer. You already stated that there is something that you put in the constitution in relation to the right of the customary law, and what I want to know is that how do you concretize the protection of the customary law of the people that you have there and I also would like to ask to know about the decision of the Supreme Court in relation to the rights of the customary people in Malaysia? Thank you.

110. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

And we have one more lady. Please give the microphone to her. And after that I am going to give one more opportunity for one person and after that we will start answering. And because of time limitation I apologize for doing so.

111. INDONESIAN DELEGATION: MARIA FARIDA INDRATI (JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Thank you. I need to clarify the question from Mr. Tandiasan, that there are many cases in Supreme Court that have been decided, but not implemented by the institution and this will depend on the issue. For cases in the Constitutional Court which are concrete such as election etc., then we will immediately discuss them and it will be conducted by the people who have already been mandated for executing it, such the KPU, etc. If the law is being agreed but you need to decide it immediately like for example MK has already decided that the implementation of the presidential election using ID card only. It is immediately implemented.

But there are also some other decisions that doesn't need to wait the law is changed, but can be implemented. And the President always said that there are some decisions in which the President immediately implement that. And in the implementation, once we said that it is granted then the decision is immediately effective. But if there are some laws that have been declared as unconstitutional it does not mean that the government that the DPR [House of Representatives] would do the amendment because if we are doing it then President and DPR [House of Representatives] would only change and amend the law based on the decision of the Constitutional Court.

So if there are some areas for example that do not implement the decision of MK [Constitutional Court], probably they don't know that the law has been granted in a judicial review because it is not put in the state gusset but in the state news and it is not being given to any places except for the Constitutional Court website then they don't know it has been decided as such. Thank you.

112. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

So I will allow one more person. Please. The last question.

113. AUDIENCE: AGUS WEKA (INDONESIA)

I want to ask His Excellency from Benin. Bonjour, Monsieur le President. Je me present, je m'appele Agus Weka.

Good morning, Mr. President. Let me introduce myself. My name is Agus Weka. First of all, I would like to ask the new president. (inaudible)

Second, I would like to know what role the Constitutional Court of the Republic of Benin has been actively doing for guarding the democracy and human rights? Also, is there any research body for democracy and human rights issues? Third, I

would like to know, in average, how long does it takes for the Constitutional Court of Benin to come to a decision? What cases are the most common?

Finally, I would also like to know the justice's composition like here in Indonesia, the Justices are appointed by the House of Representatives, The President, also by the Supreme Court. I think that is all from me. Thank you very much.

114. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you. Are there any more questions? There were questions raised to specific speakers, but also there are questions that were raised to everyone in general. Let us listen to the answers from speakers first. But, let us do it in this order, which is to answer the questions that were raised specifically for the speakers first, and then to questions that were raised for all the speakers. Then Myanmar, you have the floor.

115. MYANMAR DELEGATION: MYO MYINT (MEMBER OF TRIBUNAL OF THE CONSTITUTIONAL TRIBUNAL OF MYANMAR)

So, the question was about judicial review of a constitutional court decision and appeal. Regarding the question that I have to answer, it is clearly established that in the Constitution of Myanmar, the decision of the Myanmar Constitutional Court is final and conclusive. Is it okay?

116. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Muhammad Raus Sharif.

117. MALAYSIAN DELEGATION: MOHAMMAD RAUS SHARIF (CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

We don't have much time. So, in regards of the issue of electoral dispute. In Malaysia, if there is a dispute on the result of the election, we have the Election Court that is decided by the judges of the high court. And, if parties are not happy with the decision of the high court, there is the election judge then they appeal to the Federal Court, in addition the Federal Court is final. That is my answer to the issue on the first question.

On the protection of the customary law, as far as we can, the Federal Court in our decision normally will take note of the customary law of the native and will be embodied in our judgment. And, there are quite number judgment issued by the Federal Court, on the issue of the customary rights, and maybe, in fact I myself decided on this issue even if the customary land is being acquired the by

the government, that the native should be compensated as provided for under the constitution. Thank you.

118. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you Mr. Sharif for the answers.

119. KYRGYZ REPUBLIC DELEGATION: KUANBEK KIRGIZBAEV (VICE CHAIRMAN OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF KYRGYZ REPUBLIC)

So, from here I am going to answer the general question that's being given. We have a question that is directed to religion. So I need to underline that our country, so we have to say that the religion is different from the state. And to answer, so, if we need to settle the problem, then it is usually settled in the Court of First Instance until the Supreme Court and then, after that at the second level, what's decided is not actually reviewed by everybody, it's only by the first level and the third level.

120. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you very much for the question which is specific for us.

121. CAMBODIA DELEGATION: RATANA TAING (CABINET DIRECTOR OF THE PRESIDENT OF THE CONSTITUTIONAL COUNCIL OF THE KINGDOM OF CAMBODIA)

For the questions, I think I have two questions to answer, so let me respond to the questions related to the role of the Constitutional Council of the Kingdom of Cambodia in ruling on the electoral litigation. Let me brief you that there are two ... there are three main elections in Cambodia. The first one, is the election of the members of national assembly, the election of the senators, the election of the communal council, district council, or provincial council, capital council.

This the second, role of the constitutional council to rule on the case related to the electoral litigation. Let me separate into three categories the case to the council. One case related to the political party. The registration of the political parties shall be at the Ministry of the Interior. In case the ministry of interior rejects the registration, the concerned political party can file a complaint directly to the constitutional council and the council will rule on this case.

And the second category, related to the registration of the name in the voting list. The individual citizens, if they found no name in the voting list, then losing the name in the voting list, they can also directly file the complaint against the National

Election Committee to the constitutional council, and the council will also rule on this case.

And the third, kind of the case related to the provisional result of the election of the members of the national assembly. Before the official result announcement by the National Election Committee, all the concerned actors have the time of 72 hours to file a complaint against the provisional election to the council, and they will also rule on this case.

That's why the mandate to rule on the electoral litigation in Cambodia is invested in the constitutional council. Let me go to the general question related to the norm, which is unconstitutional in the place of Cambodia, whether or not this norm, this tradition, this belief can be implemented. Until now the constitutional council has not yet got any complaint related to the norm, tradition, which is considered unconstitutional, but in the Article 31 of the Constitution States that Cambodian citizens above 60 are equal before the law.

But, also you can enjoy the same right to believe right practice any religion and also tradition. But, make sure that all these implementations shall be determined by law.

So, you can see that the freedom of belief shall be limited as well because we also care about the social security, political stability, and also the happiness of the people. If the belief violates all these principles, I'm sure that all the constitutional courts and also the concerned acts shall take action into this. Thank you.

122. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you very much. There is also a question to Mr. Theodore Holo of Benin. The first question is about the electoral law.

123. BENIN DELEGATION: THEODORE HOLO (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BENIN)

In Benin, the Constitutional Court in Benin can do this with the approval from our president, we can conduct the legislative election. I'm Sorry. See, the consequence is that all of the general elections have to be conducted by competent people and if the election is on local level, then, those who are concern with this is our supreme court.

There is a delay between the decisions of the court and then in regards to human rights in general, there might be a delay for about 2 months in order for them to check the dossier and make the decision. Where as to control the constitutionality of the law before it is decided, then in any emergency situation, in a specific condition, than it can be extended to 15 days. I just want to emphasize that this should be

submitted to the Supreme Court first, because our Constitutional Court is under the Supreme Court. So, there has to be an approval from the President and the category has to be decided, and this has to be decided by our National Assembly.

And in regards to the general question about the decision of the judges, all of these would depend on the reaction of public opinion. So, if you remember that in the 19th century, Jackson Andrew, the US President, stated that it is a big consequence to decide for the decision without considering the public opinion. And, at that time, and you remember when Trump was elected and he issued a law that limits the immigration condition, and then the judge decided to endorse the law, and Trump just tried to implement it, but at the end of the day it was annuled by the other people after it was decided by the cabinet and the President could not execute their own decision. And therefore, this shows that the government has to be able to control the law, but also they have to be controled by the law. They have to respect the law and they have to appreciate what is being controled by the law. So, this is something that needs to be respected by all of the government bodies. It is the duty of the Benin President to ascertain that the law was implemented. So, he is not the one who does the implementation, but the people who have to apply it are those people who are affected by the law.

So, it has to be done, has to be implemented by the concerned parties, and the President will decide on a law like for example about the public-private partnership. Law has been decided, the President enacts this and it has been decided by the President. And then after that it can be implemented because it has been decided without having to fulfill some constitutional requirements. So, in order to control the constitutionality of this law, then, the President have to give several days transmitting the law to concerned parties to be proposed to the parliament and then, there will be time to make sure the fulfillment of the law towards the constitutional requirements, and then it was put to the head of the parliament who ... or the President is going to officiate the law. So, the President has to respect this law, and therefore the law can be controlled by the President and by the parliament. And it is true that all laws have to respect the previously made law, and any kinds of decisions, has ..., like for example the law that is issued last April. There was an Evangelist who blasphemed our ancestor. And then it was made into a proposal and there was decided that this kind ceremony is being prohibited. And this is like some set of mandate that we have to implement. And that is what I can inform you.

124. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

And next Mr. Mohammad. Kami persilakan. You have the floor.

125. AFGHANISTAN DELEGATION: MOHAMMAD QASIM HASHIMZAI (CHAIRMAN OF THE ICOIC ISLAMIC REPUBLIC OF AFGANISTAN)

Yes, right, the constitution says that there is no law that are not in line with the principle of Islam. But here, I want to express two things, the main principle that religions and beliefs are with the societies. These main principles of Islam are to be observed by all Moslems, and there should not be statutes that are not in accord with the constitution here. But the constitution clearly regulates the rights and responsibilities of the subjects, the state, and president as well, and transwer of power, general election, parliament, judicial, etc. So, there are matters that are regulated in the constitution, but considering Islamic laws, there are basis that are used by Islamic laws that are included in the considerations when composing the constitution. Thank you.

126. CHAIRPERSON: IGOR ROGOV (CHAIRMAN OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN)

Thank you. I would like to extend many thanks to the speakers for sharing the experience that they have. So, if I may conclude, even though we are different in terms of the forms of the governments, monarchy, republic, religion-based one religion or other religions, but there is an effort to make all citizens equal within the territory so that the human rights and freedom or what is known as basic rights, and for the purpose of checks and balances, and the freedom to act, and to secure privacy act, the role of Constitutional Court is very important.

So, to close this session, I would like to extend our gratitude to the host, to Indonesia, and to all colleagues from Indonesia. I would like to wish you congratulation for the anniversary of the Constitutional Court of Indonesia, and this has been a very successful event. I once again would like to congratulate Mr. Muhammad Rauf Sharif for assuming the presidency of AACC, and may success be with you. Thank you for your attention.

127. MASTER OF CEREMONY: RAHMAT IDRIS

For session three, the final session of the International Symposium of the Constitutional Court as the Guardian of Ideology and Democracy in Pluralistic Society, which also brings us almost to the end of our agenda for the International Symposium. As we invite our chairperson and speakers to return to their seats.

Ladies and Gentlemen, we will continue on with the final program of the International Symposium today. I am privileged to invite words of conclusion and also closing remarks from Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia. Ladies and gentlemen, please give a warm welcome for His Excellency, Anwar Usman.

128. INDONESIAN DELEGATION: ANWAR USMAN (DEPUTY CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Assalamualaikum wr. wb. May peace be upon you. Good Afternoon, good greetings to all of us. Excellency, Chief of Constitutional Court of the Republic of Indonesia, Professor Doctor Arief Hidayat. Excellency Raus Sharif, the President of AACC. Excellency Mogoeng Mogoeng, President of CCJA. Excellency Chief Justices, Head of Delegation of Constitutional Courts and Equivalent Institutions in Asia, Justices of the Constitutional Court of the Republic of Indonesia, Heads of State Institutions, members of parliament, justices from previous term of the Board of the Constitutional Court.

Ladies and Gentlemen, distinguished invitees, for the past few days, we have followed these series of this International Symposium with very interesting themes and was conducted in a very dynamic nuance. And, for that, I would like to extend my utmost appreciation to all Delegations and Participants who have participated well.

Ladies and Gentlemen, this symposium was conducted in three sessions. In the first session yesterday, the Delegations from Armenia, Indonesia, Mongolia, Turkey, Uzbekistan, and Russia have delivered their experiences regarding the role of the constitutional court, and the ideology of the state. With a discussion that was led by Raus Sharif of the Federation Court of Malaysia, he conveyed that each country has and adopt a certain ideology without ... stated in the constitution of the respective country. But, there is a fundamental similarity in the constitution of each country, which is the fact that all countries and all constitutions will position the humans, the citizens in the country at the highest rank, at the highest position, and has the most essential role, essential position in the state.

The second session, which was also enlightening, was led by Excellency Professor Zühtü Arslan the President of the Constitutional Court of Turkey. The Delegations from Azerbaijan, Kazakhstan, Korea, Romania, Thailand, and Timor Leste conveyed their experiences and practices in each respective country. From the second session, we have obtained the knowledge and understanding that even though there are varieties in the practices, in the guarding of the constitution, and different constitutions in each country, the constitutional court in principle, has the first and foremost role to protect and to guarantee constitution, which in it there are principles of democracy incorporated in the constitution.

In the third session, Excellency Igor Rogov, the President of the Constitutional Court of Kazakhstan led the session very well, having the theme of the Role of Constitutional Court in the Pluralistic Society. In the session, the delegations from Afghanistan, Benin, Cambodia, Kyrgyzstan, Malaysia, and Myanmar have conveyed their presentations, the variety and interesting roles of each constitutional

court among the pluralistic society that we see and face in each respective country with different systems of governments.

Ladies and Gentlemen, once again I would like to extend our appreciation ... utmost appreciation for the participation of all delegations. Hopefully, the International Symposium is fruitful for all of us to advance the supremacy of law and the nobility of humankind in the world.

And lastly, if throughout the International Symposium, there are shortcomings from our end, from our deepest heart, we would like to extend our sincere apology. And by reciting grace to God Almighty, I now close this International Symposium. That will be all. Thank you. Assalamualaikum. May peace and prosperity be upon you.

129. MASTER OF CEREMONY: RAHMAT IDRIS

Thank you for the conclusion and closing remarks. Delegates, Ladies, and Gentlemen, the closing remarks also wrap all of the agenda of our International Symposium here in Solo, Central Java, Indonesia. This evening we cordially invite all of the Delegates to please join us for a wonderful gala dinner at the majestic Prambanan Temple, which is located in Yogyakarta special region, an approximately 90-minute ride from the central of Solo City. The departure will begin at 3 pm from your respective hotels, both the Alila Hotel and Sunan Hotel. So, please be ready at the lobby of your hotel by 3 pm.

Delegates, Ladies and Gentlemen, my name is Rahmat Idris, on behalf of the organizing committee, the Constitutional Court of the Republic of Indonesia, we thank you all so much for your enthusiastic participation. Let's close it with the biggest, the warmest round of applause from everyone in the audience. Thank you very much. See you tonight in Prambanan.

SUMMARY REPORT INTERNATIONAL SYMPOSIUM

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS

SUMMARY REPORT

INTERNASIONAL SYMPOSIUM

"Constitutional Courts as the Guardian of Ideology and Democracy in a Pluralistic Society"

Wednesday, 9 August 2017

Opening Ceremony

- The opening ceremony of the 4th Congress of the AACC took place at Universitas Sebelas Maret, in Solo, Central Java, Indonesia. The Congress was attended by H.E. Joko Widodo, President of the Republic of Indonesia, H.E. Mr. Arief Hidayat, Chief Justice of the Constitutional Court of the Republic of Indonesia, H.E. Mr. Ganjar Pranowo, Governor of the Central Java Province, Presidents/representatives of the members of the Association of Asian Constitutional Courts and Equivalent Institutions, President of Constitutional Courts and Jurisdictions of Africa, President of Venice Commission, as well as participants from various universities and governmental institutions in Indonesia.

Remarks from the Governor of Central Java

The election of the venue of AACC

The selection of Solo City as the host of the International Symposium is very appropriate because Solo is a place to eat delicious, has a great cultural arts and the most calendar event in Indonesia.

Remarks from the Chief Justice of the Constitutional Court

- H.E. Chief Justice Arief Hidayat stated in his remark that the international symposium takes the theme of Ideology and Constitution in a Pluralistic Society. Chief Justice Arief Hidayat reiterated that this topic is highly relevant to discuss especially by Indonesia and other countries which are pluralistic in nature. In Indonesian historical perspective, plurality is the foundation in establishing independent Indonesia. The 1945 Constitution contains principles and values which serves as the foundation of the state which is Pancasila. In exercising its authority the Constitutional Court position Pancasila as reference in solving constitutional matters.

Opening Remarks from H.E. Joko Widodo, the President of the Republic of Indonesia

- H.E. President Joko Widodo asserted that the 1945 Constitution guarantees the balance of power among state institutions. Under the framework of the constitution the principle of checks and balances among state institutions is enhanced. There is no institution that can hold absolute power. The Constitution also prevents the creation of mobocracy, a system of ruling which is dominated by the mass or certain groups. President Joko Widodo also stated that the country's religious, ethnic and cultural diversity and the right of the citizens is protected by the Constitution. It is the Constitution that emphasizes that no groups can unilaterally impose their will without respecting the rights of other citizens. As a democratic country, Indonesia positions its Constitution as the main reference in building a healthy and institutionalized practice of democracy. In this case, The Constitutional Court has an important role to guard the sovereignty of the state, the constitution and plurality.

Honorary Speech from the new President of AACC – H.E. Mr Rauf Sharif, Chief Justice of Malaysia

- The Malaysian Judiciary congratulated the Constitutional Court of the Republic of Indonesia for organizing the international symposium held on 9-10 August 2017 in Solo. Malaysia is humbled to be given the mandate to lead the AACC and hoped that Malaysia can continue the success of the previous Presidency. The signing of the Memorandum of Understanding between AACC and CCJA is a historic event and a significant step in the cooperation and exchange of views between the two associations as well regions. Furthermore, the task of constitutional courts and equivalent institutions are pivotal as the guardian of the constitution and the rule of law in each country.

Honorary Speech from the President of the Constitutional Courts and Jurisdictions of Africa – H.E. Mr. M.Mogoeng

- In line with the theme of the Symposium, the principle of plurality is important to achieving harmony and peace among the people. Indonesia, a country consisting of diverse ethnics and languages, puts forth Bhinneka Tunggal Ika as the principle ideology in the nation's way of life. In African countries, such values are also upheld with the motto "united in diversity".

- In addressing the challenges, members' institutions need to exchange best practices and lessons learned. The different practices in each jurisdiction of constitutional court and equivalent institution may indeed enrich our views and be regarded as positive inputs.

Honorary Speech from the President of the Venice Commission

- *Venice Commission* is a commission focusing on democracy and law, and serves as the advisor committee for the European Union on constitutional matters.

Constitutional courts are regarded as the guardian of the constitution, separation of power, rule of law, and protection of fundamental rights. To this view, democracy and the rule of law shall be viewed as a fundamental pillar to achieve peace and stability.

SESSION 1: CONSTITUTIONAL COURT AND STATE IDEOLOGY

Chairperson: H.E. Mr. Rauf Sharif, Chief Justice of Malaysia

ARMENIA - H.E. Mrs. Anahit Manasyan, Chief Adviser to the President of the Constitutional Court of the Republic of Armenia

- Stability of constitution does not necessarily connote to absoluteness of constitution. Changes to constitution are unavoidable, but such changes should be carried out in a way that do not contravene the core or the gist of the constitution. Social, economy and politics are among the factors that critically influencing stability of constitution. In the same vein, basic laws should also be adaptable to changes so that they could address complex issues at the national level. Nevertheless, various research revealed that stability of modern days constitution are mostly depend on political stability and that balance of state power that are interrupted by armed uphevals and revolutions could also decrease the viability of constitution.

INDONESIA - H.E. Mr. I. D. G. Palguna, Justice of the Constitutional Court of the Republic of Indonesia

- Irrespective of the conceptual and scholastic disagreement over the term "ideology", reference to Indonesia's Pancasila (Indonesia's Five Basic Principles) should be understood as Indonesia's philosophical fundamental or state fundamental. Its role in nation and character's building is critical, as it is only by upholding Pancasila that the nation's pluralistic society, and importantly, the unity of the nation, can be secured and maintained. Pancasila adopts five basic values, which are belief in God, equality, unity and togetherness, consensus, and social justice. These Pancasila values are enshrined in the Preamble of Indonesia's Constitution and Article II of the Additional Rules of the Constitution stresses unequivocally sthat the Preamble to the Constitution is to be regarded as an integral part and parcel of the Constitution itself. Hence, any laws or political party are deemed as unconstitutional when they contravene Pancasila.

MONGOLIA – H.E. Mr. D.Odbayar, Chairman of The Constitutional Court of Mongolia

- In 2010, the Parliament of Mongolia enacted a new regulation on the procedure of the amendment of the Mongolian constitution. The Parliament determines the structure of the constitution as also the practice in other countries. Through this amendment, there are 20 articles that enshrine the principles of ideology of Mongolia. The

Constitutional Courts of Mongolia is tasked to guard the constitutional structure and ideology of the country. In doing so, the court has the authority to examine constitutional matters and request related institutions to review the prevailing laws and regulations to be in accordance with the constitution. The settlement of cases are based on ideology, interest of the people, and national policies.

TURKEY – H.E. Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Turkey

- The Constitutional Court of Turkey determines the content of national ideology. The court's interpretation and application of state ideology may change over time. According to the current constitution, Turkey is a secular state. To this matter, the constitutional court interprets this principle of secularism with other principles such as laws and human rights. Throughout time, prohibition had been imposed on political parties who opposed secularism. In 2010, Turkey's constitutional court started to introduce constitutional complaint system. The court also emphasized that secularism is important for the freedom of religion and protection against discrimination. To this context, the state must ensure that people with different beliefs live in harmony which has is also underlined by the Constitutional Court of Turkey.

RUSSIA – H.E. Mr. Vladimir Sivitskiy, Head of the Secretariat of the Constitutional Court of the Russian Federation

- Article 13 of the Constitution of the Russian Federation explicitly stipulates that political diversity shall be recognized in the Russian Federation, hence no ideology shall be proclaimed as the State or obligatory one. The genesis of this norm is understandable: it is known that in the Soviet period of our history the communist ideology was established as the State one, which for many years had a negative impact on the state of freedom of opinion and speech in our society. Therefore, the constitutional legislature of Russia has taken measures to ensure that the supremacy of any ideology, which serves as the basis for the prohibition of other opinions, for the suppression of dissent, would not been recurred. This norm, however, shall be perceived dialectically. It means, of course, that no one can impose a system of moral, religious, aesthetic and philosophical views and ideas on society and each of its individual members, in which people's attitudes to reality are realized and evaluated. But it does not imply that there is no system of values being basic for the society. Such values do exist, and they are enshrined in the Constitution of the Russian Federation. The Constitution of the Russian Federation has a special chapter "Fundamentals of the Constitutional Order". The provisions thereof have a priority in interpreting any other provisions of the Constitution of the Russian Federation. Moreover, these principles are not allowed to be revised within the framework of the current Constitution – to change the provisions of chapters of the first and second, a new Constitution must be adopted.

Question and answer session (salient points)

- ***Does Armenia and Mongolia have express constitutional provisions regarding ideology?***

Answer:

Armenia does not have express constitutional provisions on ideology, however the Constitution defines main policies that serve as directive to be uphold by the Government. Before 1992, Mongolia was under a one party system, which also influenced the ideology of the state. Nevertheless, there is no such provisions at the current Mongolia's Constitution, but there are provisions pertaining to the ideas or principles that should preserved and maintained by the State.

- ***As Uzbekistan's Constitution admits different ideologies, how do the State resolve conflicts of interests between proponents of different ideologies? Which Constitutional provisions that the Court resort to?***

Answer:

Uzbekistan's Constitution recognizes different ideologies to the extent that there is not any political group that impose their belief to the state. The rules are addressed more towards political group or civil society organization that is against the Constitution.

- ***Does the Constitutional Courts of the panelist's countries have dissemination program regarding constitutionalism and/or ideology for its citizens?***

Answer:

Except for Indonesia, many of the Constitutional Courts of the panelists' countries do not have specific dissemination programs for their citizens. Nevertheless, citizens can access their Courts' websites. On the other hand, in some panelists' countries, such activities are conducted by their governments.

Thursday, 10 August 2017

SESSION 2: CONSTITUTIONAL COURT AND THE PRINCIPLES OF DEMOCRACY

AZERBAIJAN – Mr. Rauf Guliyev, Secretary General of the Constitutional Court

Constitution of Republic of Azerbaijan was adopted on 1995 through referendum, nation-wide voting. It proclaimed Azerbaijan as democratic, secular and social state governed by the rule of law. The Constitutional Court is a real instrument executing the supremacy of constitution and the values envisaged therein. And the constitutional complaint is

very effective tool enjoyed by individuals to restore their violated constitutional rights and freedom. The last constitutional modifications and amendments adopted as a result of referendum and alongside with other legal aspects enlarged the list of constitutional rights as regards to the rights to private life and introduced such important notion as the principle of proportionality. It should be mentioned that this principle is very often applied by European Court of Human Rights.

KAZAKHSTAN – H.E. Mr.Igor Rogov, Chairman of the Constitutional Council of the Republic of Kazakhstan

The ideological and political diversities are recognized in the Republic of Kazakhstan based on article 1 of the Constitution of Kazakhstan. Recognition of ideological and political diversities presupposes freedom of choice and confession to citizens of certain values, but at the same time does not interfere with their voluntary association on the basis of common views and ideas. First, the Basic Law determines the principles on which the nation is built. Given the universally recognized human values and the requirements of fundamental international documents, the constitution provides for such fundamental principles as the supreme value of the human is the person, the equality of people, the prohibition of discrimination against anyone for any motive, the inviolability of property, pluralism of opinions, the inalienability of natural rights and freedoms, sovereignty of the citizens and others. Secondly, the constitution clearly sets out the goals to which the nation is moving. For example, article 1, paragraph 1, of the Basic Law of Kazakhstan stipulates that the Republic shall establish itself as a democratic, secular, legal and social state whose highest values are the person, his life, rights and freedoms. Third, the Constitution determines how to achieve these high goals. In Kazakhstan, they are directly indicated by the fundamental principles of the Republic's activity, stipulated in paragraph 2 of Article 1 of the Constitution, according to which the state policy is being created and implemented, and the main directions of functioning of sovereign Kazakhstan are formed: public consent and political stability, economic development for the benefit of the whole people, Kazakhstan's patriotism , The solution of the most important issues of state life by democratic methods, including voting at the republican Referendum or in Parliament. The bodies of constitutional justice play an important role in protecting and realizing constitutional values. Through the constitutional control, they act as their "custodians" and are an effective guarantor of the functioning of the country's legislation and ultimately of law enforcement, within constitutional and legal matter.

KOREA– H.E. Mr. Jinsung LEE, Justice of Consttutional Court of Korea

There were two lesson in South Korea corncerning impeachment cases. First The Case of Roh Moo-hyun in 2004 and Case of Park Geun Hye in 2016-2017. In the case of Roh, the Court at first acknowledged the violations of the president's duty, but his violations could not fall short of the extent to the grave violation of the constitution because those violations were not estimated as a crucial threat to the constitutional order.

In the case of Park, the court said that her violations constitute an abuse of her power and she had no will to defend the Constitution. The Court concluded that her wrongdoing was so grave that the people couldn't tolerate it in view of the constitutional order and she betrayed the people's trust. It means that the Court measured the extent of constitutional violations on the basis of the standard of gravity.

ROMANIA– H.E. Mr. Daniel Marius MORAR, *Judge of the Constitutional Court of Romania*

The citizen has the possibility to start the constitutional review of law and Government ordinance provisions – the main power of the Constitutional Court of Romania –, thus being the beneficiary of a jurisdictional guarantee aimed at ensuring the observance of the fundamental rights and freedoms enshrined by the Constitution. Therefore, the citizen acquires an essential role in the process of removing all flaws of unconstitutionality from the legislation and, implicitly, in the development of Romanian constitutional law.

THAILAND – H.E. Mr. Nurak Marpraneet, President of the Constitutional Court of the Kingdom of Thailand

The roles of the Constitutional Court as guardian of democracy, it can be seen that the Constitutional Court is judicial organisation mainly exercising powers in control of constitutionality. This is said to be a great crucible to pave any norms relating to enforcement of the constitution as the supreme law of the land, especially in conformation with constitutionality. Such roles concerning democracy, the Constitutional Court, hence, play both direct and indirect roles in the country's democratic protection in terms of both ideological and practical approaches.

TIMOR LESTE – H.E. Mr.Deolindo dos Santos, President of Supreme Court

The judicial function of the State is subordinated itself to the Constitution and to the rest of the laws in force, and yet, this function, which is exerted by the courts, does not limit itself to the strict compliance with the law, under the terms of article 119.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), which establishes that *"the courts are independent and subjected only to the Constitution and to the law"*.

The judicial function, in the administration of justice is expressed also in the name of the people, - (under the terms of paragraph 1 of article 118.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL)-, and, on the inspection of law enforcement, in the scope of the principle of separation and interdependence of powers, - as consecrated on article 69.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -, is the materialization of the democratic principles.

Question and Answer Session (Salient Points)

- ***In an impeachment process in Korea, does the case on the violation by the President should be tried by the ordinary court first?***

  In Korea the impeachment trial does not go to the ordinary court first. The case may be referred directly to the Constitutional Court upon the motion of National Assembly. The Prosecutor Office presents lot of evidence to the Constitutional Court.

- ***Is there any landmark decision in the Constitutional Court or equivalent institutions of the panelist's countries which show the strengthening of the role of Constitutional Court and democracy?***

  Each Constitutional Court or Equivalent Institution indeed issues landmark decision which strengthen the role of the Court and democracy. The decisions might vary from the problem of annulling the law which discriminate national citizens and foreign citizens just like the case of constitutionality review of law in Timor Leste to the decisions which uphold the principle of checks and balances among branches of state power.

SESSION 3: CONSTITUTIONAL COURT'S ROLE IN PLURAL SOCIETY

AFGHANISTAN – H.E. Mr. Hashimzai, Chairman of the Independent Commission for overseeing the implementation of the Constitution (ICOIC)

As a guardian of the constitution the functions discharged by the above ICOIC in Afghanistan are also discharged by all other constitutional courts around the world and they have been part and parcel of their functions too. Many modern constitutions reflect ambitious programmes for transforming existing social, economic and political interests through political engineering. In some countries the underlying Ideal of the Constitution is the creation of new society.

This desire for social engineering through constitutionalism is a characteristic of ideological constitution found in many developing countries. Irrespective of the above when speaking of guardian of constitution it requires the creation of institution such as constitutional court that serve to preserve and to control the constitutionality of the laws. In other words constitutional courts are called to purify the legal system from unconstitutional norms that may be created by other powers of the state. Constitutional courts also play a function among different levels of contemporary constitutionalism, facilitating the dialogue between courts, particularly for the elaboration and protection of human rights .

BENIN– H.E. Mr. Theodore Holo, President of The Constitutional Court

After more than seventeen years of military-Marxist regime, Following national and international pressures, Benin changed its philosophy. Beninese people, after aovir reaffirmed its opposition to any dictatorial regime, solemnly affirms its determination to create a state of law and pluralistic democracy, in which fundamental human rights, public liberties , The dignity of the human person and justice are guaranteed, protected and promoted as the necessary condition for the true and harmonious development of each Benin, both in its temprelle dimension. Thus, the constitution enshrines the creation of a state of law, which combines democracy and pluralism.

the Constitution establishes a Constitutional Court, which, according to its Article 114, is the highest jurisdiction of the State in constitutional matters. Consequently, it is the judge of the constitutionality of laws, the guarantor of the fundamental rights of the human person and of public liberties, the regulating organ of the functioning of the institutions and the activity of the public authorities. Detailing these powers, Article 117 states that it must rule on the constitutionality of organic laws and laws in general before they are promulgated; The Rules of Procedure of the National Assembly, the High Authority for Audiovisual and Communication and the Economic and Social Council before their implementation, as to their conformity with the Constitution; The constitutionality of laws and regulatory acts alleged to infringe the fundamental rights of the human person and public liberties in general on the violation of human rights; Conflicts of attributions between the institutions of the State. Under the same article, it ensures the regularity of the election of the President of the Republic and decides, in case of dispute, the regularity of legislative elections. In addition, the Constitution makes it a judge of the vacancy of the Presidency of the Republic (Article 50) and the right of amendment of the Members (Article 104). Thus, the Basic Law makes the Constitutional Court the guardian of the fundamental rights and freedoms of the citizens as well as the constitutionality of the devolution and the exercise of power. It gives it a leading role in the construction of the rule of law, makes it a hyper constitutional court in the concert of the constitutional courts in Africa

CAMBODIA– H.E.Mr. IM Chhun Lim, President of the Constitutional Council of the Kingdom of Cambodia

The Constitutional Council has fulfilled the functions in accordance with the high level of an acceptable standard of neutrality, independence, and impartiality. Furthermore, The Constitutional Council has committed to move toward to the point of nationally and internationally recognition at larger scale. Thus, the Core Value of the Council: ***Respect Rule of Law, Protect Independence, Fulfil Neutrality*** is formed.There are some notable decisions made by the Council and have been seen key principles to safeguard Democracy in Cambodia.

(i) Key decisions to promote democracy and fundamental rights:

(a) The Constitutional Council guarantees the respect of equal rights by determining that Khmer citizen of both sexes is equal before the law.

(b) The Constitutional Council denied the death penalty by guaranteeing the respect the provision of Article 32 of the Constitution.

(c) The Constitutional Council prohibits Khmer citizens from depriving Khmer nationality, exiling, or arresting and extraditing to other foreign countries.

(d) The Constitutional Council protects human rights and public order by examining the law on demonstration

(ii) Key decisions to protect the rights of the child:

(a) The Constitutional Council determines that the judicial judges shall consider other international instruments that are beneficial to the rights of the child once they rule cases concerning to minors.

(iii) Key decisions to protect human rights:

(a) The Constitutional Council defined the freedom to believe and rights to worship by guiding all citizens, who are belonged to different religions to respect the principles of human rights.

KIYGYZSTAN– H.E. Mr. Kuanbek Kirgizbaev, Deputy Chairman of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic

The uniqueness of the mission of the Constitutional Court as a whole is that it is the only body of state power in any state which direct duty is to subordinate politics to law, political actions and decisions to constitutional and legal requirements and forms. The Constitutional Court is called upon not to allow the usurpation of state power, to constantly maintain a state in which only limited power is possible. Probably, this is the main mission of the body of constitutional control as the custodian of democracy and pluralism in a democratic society. Strict adherence to democratic norms and principles laid down in the basic law of the state is the guarantee of a stable political situation in the country.

MALAYSIA– H.E. Mr. Raus Rauf, Chief Justice of The Federal Court of Malaysia

In Malaysia, the Principles set out values and principles that judges should follow and take note in carrying out their duties and of particular relevance here is on Equality. It states that: (i) A judge shall be aware of, and understand, diversity in society and

differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds'). (ii) A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. (iii) A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.(iv) The Malaysian Judiciary upholds these principles of Equality and will continue to promote and protect the provisions of the Federal Constitution.

MYANMAR– H.E.Mr. Myo Myint

As the constitutional review is vital component of democracy, it is said that 38% of all constitutions had constitutional review systems and by 2011, 83 % of the world's constitutions have the systems of constitutional review. In democratic regimes, all judicial review methods have as their main purpose the guarantee of the supremacy of the constitution. Constitutional Courts/ Tribunals/ Councils or constitutional review system should be encouraged to develop because it preserve the supremacy of the constitutions, protect the constitutional value and fundamental rights of the people.

Question and Answer Session (Salient points)

- ***Does the Constitutional Courts or Equivalent Institutions of the panelist's countries have jurisdiction to settle election dispute?***

  Not all Constitutional Courts or Equivalent Institutions have jurisdiction over settlement of electoral dispute. Election cases in Malaysia is tried by election court while in Benin a citizen may go to the Constitutional Court if they do not find their name in the voter's list. Constitutional Council of the Kingdom of Cambodia also has the power to adjudicate on electoral disputes.

- ***What is the nature of independence of the Constitutional Court of the panelist's country and its decision?***

  The Constitutional Court or Equivalent Institution is independent of other branches of government. Decisions on constitutional matters is final and binding. No appeal may be allowed to challenge the decision.

ANNEX

OPENING CEREMONY

REMARKS OF THE GOVERNOR OF CENTRAL JAVA ON THE OPENING OF THE INTERNATIONAL SYMPOSIUM OF ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS SOLO, AUGUTS 9, 2017

Assalamu'alaikum Wr. Wb.

Good afternoon and peace be upon us all.

Honorable, President of the Republic of Indonesia, Mr. Jokowi and all ministers of Working Cabinet of the Republic of Indonesia and heads of state institutions;

Honorable, Chief Justice of the Constitutional Court of the Republic of Indonesia and justices;

Members of delegates of fellow countries;

Rector, academicians and all invitees;

With gratitude to God Almighty, *Alhamdulillah*, it's a pleasure for me to be able to gather together with you all, the guardians of democracy and constitutions from various Asian countries at the commencement of the International Symposisum of the Constitutional Courts and Equivalent Institutions among Asian countries.

On behalf of the regional government and the people of Central Java, I would like to bid you welcome and extend my gratitude for choosing the city of Solo as the host of this symposium. Hopefuly, the atmosphere and the friendliness of the people of Solo, will make you feel at home and enthusiastic to do your activities from the beginning to end.

Solo is a city of art and culture. Solo is the Spirit of Java. When in Indonesia, specifically in Java, your visit is not complete if you haven't visited Solo. I believe, during your stay in this city, you will hear interesting stories about the city of Solo. And of course, through the activities in this symposium in Solo, you can also get a lot of things and information on the role of constitutional courts from various Asian countries that will be beneficial for the consittutional development and constitutional activities in your respective countries.

Ladies and Gentlemen, we are fully aware that the presence of Consittutional Court is truly important to safeguard the constitution and make sure that the constitution is in line and in the same breathing rhythm with the state ideology.

In this context, Central Java is always committed to safeguard Pancasila as the state ideology. This is truly because Central Java is the fortress of Pancasila. Not only strongly vocing the principles of Pancasila, these principles are also expressesed in actions and work. Indeed, amids the diversity of the people of Solo as well as Central Java, we are committed to continue cultivating the Unity in Diversity. Central Java will always be in the forefront of safeguarding the specific nature of Indonesia in its Diversity that is in line with the state ideology of Pancasila and our constitution.

And, one more time, I would like to extend my gratitude for choosing Solo as the place to host this symposisum. This, indeed, will strengthen the determination and commitment of Central Java to be the guardian of Pancasila, 1945 Constitution, Bhinneka Tunggal Ika (Unity in Diversity) and of course, the unitary sate of the republic of Indonesia as deem non-negotiable.

May Solo reflect the light of togetherness among Asian countries in safeguarding their constitutions. And may Solo be able to give deep impression that is unforgettable to you all.

So, after the closing of these activities, we hope that you can enjoy and trace the beauty of the diversity of cultures and travel destinations in Solo and surrounding cities in Central Java in general. Enjoy the food, and don't forget to buy the souvenirs. Every place in Central Java has its own typical souvenirs. I believe they will be your *klangenan* (something that you love or have great interest in), so that next time when you have the opportunity, you can return to Solo and Central Java to specifically enjoy a vacation with you families and relatives.

I think, to make my remarks short. Before I end it, allow me to share a few Javanese proverbs.

Urip iku urup (Life is light), which means that our lives should cast light of goodness and benefits for others.

Desa mawa cara, negara mawa tata, which means each area or country has its own norms/ customs that should be respected.

I hope we can all get insights from the proverbs to achieve a better quality of life.

That's all what I can share with you at this moment. Please accept my sincere apology.

Wabbilahi taufik wal hidayah

Wassalamu'alaikum Wr.Wb.

Governor of Central Java,

H. Ganjar Pranowo, SH. MIP.

WELCOMING REMARKS FROM THE HEAD OF CONSTITUTIONAL COURT IN THE OPENING OF INTERNATIONAL SYMPOSIUM IDEOLOGY, CONSTITUTION, AND DEMOCRACY

Surakarta, August 10, 2017

Assalamu'alaikum Wa Rahmatullahi Wa Barakatuh.

Warm greeting to all of us.

Om swastiastu

Namo buddhaya.

- Honorable, Mr. President of the Republic of Indonesia, as well the first lady Ibu Joko Widodo;
- Honorable, the Chief Justices and Justices of Asian Constitutional Courts and Equivalent Institutions;
- Distinguished Guests, the Heads of the State Institutions;
- The Deputy Chief and the Judges of Constitutional Court of the Republic of Indonesia;
- The Ministers of the Working Cabinet, and other Government Officials
- The Governor of Central Java, Bapak Ganjar Pranowo;
- The Major of Surakarta, Bapak FX. Rudyatmo;
- The Dean of Universitas Sebelas Maret, Prof. Dr. Ravik Karsidi;
- The Academicians from the Campuses across Indonesia;
- Invitees; and
- All in attendance, the participants of the Symposium.

Praise be to Allah, the Almighty God, because of his blessings, *Allah Subhana wa Ta'ala*, we all can gather here to mark the Opening of this International Symposium in good condition.

I'd like to extend my warmest welcome to all participants of the Symposium, from both country members of AACC and other participating countries, as well as various parties from Indonesia. Welcome to Indonesia, welcome to the city of Solo. I'd like to

express my gratitude for accepting the invitation and participating in this International Symposium.

The honorable Mr. President,

Ladies and Gentlemen,

It is imperative to inform Mr. President that the International Symposium is conducted as part of the series of the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions or the AACC, which was conducted on...(day)

Board of Members Meeting of the AACC is conducted in Indonesia as the continuation of the 3rd Congress of the AACC in Bali on August 10, 2016. In the three-day Congress in Bali Indonesian Constitutional Court was mandated to continue leading the AACC for another year until a new President of the AACC is appointed. With regard to that, the Board of Members Meeting was conducted in August, 2017.

In the Board of Members Meeting, which was conducted yesterday, it was agreed that the Constitutional Court of ... (country) be the President of the AACC for the office term of ... (time/year) until ... (time/year). Along with the new leadership of the Constitutional Court of ... (Country), the AACC will continue to have the ever stronger presence in fostering regional cooperation in the field related to the efforts of the country members to uphold the principles of democracy, human rights, constitutions, togetherness, and peace.

Honorable Mr. President,

Ladies and Gentlemen,

This International Symposium is going to discuss the theme of Ideologies and Constitution in Plural and Diverse Societies. This theme is very relevant to discuss, especially for Indonesia and other countries with high level of diversity.

Indonesia consists of approximately 1,128 ethnic groups. There are more than 17 thousand islands with no fewer than 546 local languages. Its people have different religions and beliefs. Their customs and traditions are also varied. Up to this day, the diversity has been well-cultivated.

In the perspective of Indonesian History, the diversity has served as the basis for the establishment of Indonesian Independence. Then, the diversity was firmly adopted by the founding fathers when formulating the 1945 Constitution in 1945. The 1945 Constitution holds the values of Pancasila (the Five Pillars), which are the foundation, philosophy, visions, and the cosmology of Indonesian Nation, which have been agreed as the basis and principle of the establishment of Indonesian Independence. That is Pancasila, the ideology of Indonesian, the best way of life of Indonesians with their diversity. Therefore, Pancasila and the 1945 Constitution have served as the milestone of the convergence and diversity.

Honorable Mr. President,

Ladies and Gentlemen,

Based on the 1945 Constitution, the Constitutional Court has a function to safeguard the 1945 Constitution. In its function, the Constitutional Court ensures that the laws and regulations are in accordance with the values of the 1945 Constitution as the highest legal basis. In line with its function to safeguard the 1945 Constitution, in principle, the Constitutional Court also has a role as the guardian of the ideology. It is stipulated in the 1945 Constitution that the 1945 Constitution is comprised of the Preamble and the Chapters. Those two parts are a unity, i.e. the philosophical embodiment of the foundation and ideology of Pancasila. Therefore, when the Constitutional Court conducting its power to review a bill against the Constitution, the basis of the constitutional review is not only the articles in the Constitution but also the preamble, which is the embodiment of Pancasila's values.

When exercising its powers, Pancasila is positioned as the 'benchmark' or the 'testing ground'. Whether requested or not, the Constitutional Court conducts the interpretation of a law within the context of Pancasila. It should at least find the link between the norms of the bill being reviewed and Pancasila. In the framework of Indonesia's legal system, Pancasila's values are the legal ideals (*rechtsidee*), the source of all legal sources, and the guidelines of national law politics.

Honorable Mr. President,

Ladies and Gentlemen,

In safeguarding the 1945 Constitution, the Constitutional Court of Indonesia has proved itself through its many decisions. For example, the Constitutional Court has made constitutional interpretation of article 33, 1945 Constitution, especially on the phrase of 'the ruler of the country' (*Penguasa Negara*) as *the people being collectively constructed by the 1945 Constitution to give the mandate to the head of the state to create policies and actions of organizing, regulating, governing, and overseeing as much as possible for people's prosperity.* Thus, the bill of law which has proved to be in contradictory with article 33, will certainly be declared as unconstitutional because, for sure, it will hamper the attainment of people's prosperity, and fail to be the law that fosters social justice for all Indonesians.

In another decision, the Constitutional Court has provided legal interpretation on the relationship between the state and religions. The state has the power to regulate or limit the freedom to act. But it cannot interfere with the freedom to embrace religions and beliefs in its interpretation of freedom to be. The State's regulation regarding religious life is made merely to provide protection for its citizens, not to intervene with the freedom to think and believe.

In principle, I would like to reiterate, that in exercising its powers, the Constitutional Court ensures that the bills in Indonesia, in this case the bills of law are in accordance with Pancasila's guidelines. First, the law aims at and ensures the nation integration, in

terms of its territory and ideology. Second, the law simultaneously builds democracy and nomocracy. Third, the law aims at creating social justice. The law should create religious tolerance.

Honorable Mr. President,

Ladies and Gentlemen,

With that kind state of mind, the Constitutional Court of the Republic of Indonesia has taken its role as the guardian of the constitution, as well as the guardian of the ideology, Pancasila Ideology in pluralistic society.

Considering the difference in histories, political systems, legal systems, and ideologies embraced, I am sure that the constitutional courts in other countries have different roles and experiences. Therefore, it will be so interesting to learn about those different experiences, especially when the constitutional court has to face ideological issues in diverse societies. It is the different experiences that we are interested in.

Therefore, this symposium has invited the Constitutional Courts and Equivalent Institutions from ... (Countries), from Asian and other regions to share their roles and experiences. I hope that the symposium will be the right and effective forum to exchange information, share experiences, express ideas, and present points of view. I hope that whatever emerges in this symposium will enrich our knowledge and understanding.

It is not something inconceivable that from this symposium, we will have follow-up actions, in both academic and practical domains, in both domestic and global levels. At the domestic level, I hope that it will be beneficial for fostering Pancasila Ideology and all its experiences. At the global level, the values of Pancasila, which are universal in nature, can serve as references for other nations in the world to create harmony, peace, and civilization, which are more dignified for all human races.

To all participants of the symposium, I'd like to extend my warmest welcome and do enjoy the symposium.

Before I end my remarks, I would like to express my deepest gratitude to the President of the Republic of Indonesia, Mr. Ir. Joko Widodo, for his appreciation for the Constitutional Court of the Republic of Indonesia, by making time to be present in this event. I'd like to request the President of the Republic of Indonesia to give his welcoming remarks and to officially open this event.

Thank you.

Wassalamu'alaikum wa rahmatullahi wa barakatuh

Om Shanti shanti om

Namo buddhaya

REMARKS OF PRESIDENT OF THE REPUBLIC OF INDONESIA AT THE OPENING OF INTERNATIONAL SYMPOSIUM ON IDEOLOGY, CONSTITUTION AND DEMOCRACY

Surakarta, August 10, 2017

Assalamu'alaikum Wa Rahmatullaahi Wa Barakatuh,

Peace be upon us all,

Om swastiastu,

Namo buddhaya,

- Honorable, Chief Justice, of Constitutional Court of the Republic of Indonesia, Prof. Dr. Arief Hidayat, Deputy Chief Justice, and Constitutional Justices;
- Honorable, Chief Justice and Equivalent Institutions from fellow countries,
- Heads and members of delegations of Association of Asian Constitutional Courts member countries;
- All Ministers of Working Cabinet;
- Governor of Central Java;
- Mayor of Surakarta;
- Rector of Sebelas Maret University;
- All academicians from campuses all over Indonesia;
- Invitees; and
- Participants of the symposium

Praise be to the All Mighty God that this morning we can gather here to attend the Opening of the International Symposium held by Constitutional Court of the Republic of Indonesia.

I bid you welcome to Indonesia, to all our guests from other countries who are friends of Indonesia. To everyone, welcome to the city of Surakarta, also known as Solo, in the Province of Central Jakarta. This city is my birth city. This is the city where I live and where I grew up. I was also serving as the mayor of this city of Solo for two periods, from 2005 to 2012, before being appointed to be the governor of Special Region of the Capital City, Jakarta.

Even until now, I still have a house in Solo, even though recently, I spend more time in Jakarta. Solo: the Spirit of Java. That's the motto of this city. Please enjoy and experience the philosophy of this motto while you are in Solo.

Honoroble Ladies and Gentlemen,

I'm happy with the organizing of this symposisum. In addition to being held in the city of Solo, this symposium also upholds an important and actual theme: **Ideology and Constitution in Varied or Pluralistic Society.**

It's been the nature of Indonesian nation to be a pluralistic nation. All areas in Indonesia is rich in diversity. Different ethnic groups, languages, customs, relgiions, beliefs and groups, all different but united to form independent Indonesia. That is what we call our unity in diversity, from varied background, but united as one.

What has strongly united our diversity from the establishment of our country until now to form one nation: The unitary state of the Republic of Indonesia? It's Pancasila. Pancasila is the founding philosophy of our country, the state ideology, the source of all sources of the legal system of the country and orientation in the life of our country.

Honorable Ladies and Gentlemen,

For Indonesia, Pancasila is the state ideology. This means that, Pancasila has become collective agreement regarding how this country can achieve collective goal as well as settle the state problems on varied philosophical values and cultures, be it based upon ethnic, race, regions, as well as relgions. All is melted to be Pancasila, the state ideology, without any more boundaries due to differences.

Pancasila has become national consensus because in it there are true ethnical values rooted in the cultural and religious values highly upheld by the society in the nation since way before the establishment of the independent Indonesia.

Approaching the Independence of Indonesia in 1945, these values were developed and synthesized by the founding fathers of Indonesia incorporating various global views on nation building. In the path of development of this country, these values were discussed and formulated as a consesus officiated by all founding fathers to become the state foundation and ideology of Indonesia. As stated in the fourth paragraph of the preamble of the 1945 Constitution. Thus, Pancasila becomes the soul of the 1945 Constitution, as the legal document of the establishment of the state as well as the highest law of the Indonesian nation.

Because Pancasila is the soul of teh highest law, Pancasila becomes the sould of the nation. The souls is the guidance of life and death. A country without a soul stops to exist. The same is true for Indonesia.

Honorable Ladies and Gentlemen,

To give illustration of Pancasila, I remember a historical moment when President Soekarna, the first president of the Republic of Indonesia, gave a speech in front of the US Congress on May 17, 1956. With high confidence, President Soekarno describes Pancasila s the five guiding principles of our national ife. First: Believe in one Supreme God. Second: Nationalism. Third: Humanity. Fourth: Democracy. Fifth: Social Justice. Every time each principle was mentioned, the audience gave a big applause, and the speech ended with a long standing ovation.

The speech at least demonstrated two points. First, all principles in Pancasila become the guiding ideology of every aspect of life of our nation, the running of our country, as wellas the guiding ideology in the formulation and implementation of law. Moreover, Pancasila produces the law and framework of the legal system that fit the soul of the Indonesian nationa, that is the legal system of Pancasila.

Second, even though Pancasila originated from Indonesia, the values contained in it can be universally accepted. The godly values, humanity values, unity, democracy and social justice are not limited by space and time and for certain group of people only. Pancasila, with its five principles, has become phenomenal introduction in human civilization, on how one nation builds unity, accord, harmony, justice and welfare for all citizens. Pancasila serves as a model of living togetherness, not only for Indonesian nation, but also for the world community.

With Pancasila, Indonesia becomes the hope and reference for international society to build peaceful, just and wealthy world in the midst of plurality. With Pancasila, Indonesia becomes the reference for all nations the world over to face new challenges in managing diversity and differences.

Honorable Ladies and Gentlemen,

Holding on to Pancasila, Indonesia is able to continue developing Pancasila sas the foundation, paradigm and orientation in national development. This means that, national development should reflect the values in Pancasila. Development is directed to produce whole persons in Indonesian nation. A person who is not self-centered, but who prioritize the needs of interests of the society. A person who doesn't seek for material needs but most importantly spiritual happiness. With Pancasila, the development is conducted to assist Indonesian citizens to achieve their goals and meanings of life to achieve spiritual and physical welfare.

With Pancasila as the paradigm, Indonesian national development is conducted to bring to reality social justice for all the people based on religiousity, respect for human rights, commitment for unity and togetherness to safeguard the existence of the nation and to highly uphold constitutional democary values.

Honorable Ladies and Gentlemen,

It is important for me to underscore in this occasion that for Indonesian nation, Pancasila as state ideology is final. With Pancasila, Indonesia that is rich in variety, can mantain tolerance and diversity, can live peacefully and in harmony, can work hand in hand to advance this country. By continuously holding on to Pancasila and the 1945 Constitution, Indonesia can make itself to be a just, prosperious, and dignified country in the international sphere.

Finally, I would like to extend my appreciation to the Constitutional Courg of the Republic of Indonesia in the international spehre. For this purpose, let's use this forum to contribute for confirming the state ideology, Pancasila, to tell the world that Indonesia has Pancasila and with the values in it, Indonesia can help develop peace in the world civilization and develop constitutional spirit and to develop the spirit of unity in diversity all over the world.

By saying "Bismillahirrahmanirrahim', I declare this Internationally Symposium officially opened.

Thank you.

Wassalamualaikum Wa Rahmatullahi Wa Barakatuh.

Om shanti shanti shanti om.

Namo buddhaya.

SESSION I

"CONSTITUTIONAL COURT AND STATE IDEOLOGY"

CHAIRPERSON: MALAYSIA

CONSTITUTIONAL STABILITY AS AN IMPORTANT PREREQUISITE FOR STABLE DEMOCRACY

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As a rule, the stability of Constitution is presented as unchangeability of constitutional regulations in legal literature. I have another viewpoint regarding the mentioned issue, which will be presented within the frames of the article.

In the contemporary science, the stability doesn't exclude changes. It expresses the possibility of the system to keep a **dynamic balance** during a long period of time and to be unchangeable within the frames of the time ***in previously defined or reasonably expected conditions***.

From the viewpoint of Constitution "stability", "changeability" and "development" are also not mutually exclusive terms. The essence of stability isn't based on the idea of preserving the system from changes, but on the idea of establishing opportunities for taking the mentioned changes into account. At the same time, the above-mentioned shouldn't presuppose a possibility to thoroughly change the "core", "kernel", the essence of the system. The reason is that each system has a concrete integrative quality, which forms the mentioned whole system and the initial condition, from which the transition to new positions takes place.

The above-mentioned leads us to a conclusion that the term "stability of the Constitution" presupposes a possibility of changes, but such changes, within the frames of which the main quality of the system, the "core" of the Constitution is held.

Therefore, the stability is the characteristic of the Constitution, which presupposes its viability and unchangeability in the conditions of unchangeable social relations, taking into consideration the circumstance that in this case we speak not about the static, but the dynamic stability, when the "core", the essence of the Constitution isn't subject to thorough changes, but the Constitution itself is able to adapt to changing social relations, being their initial regulator.

We believe that for the realization of the mentioned aim and the formation of the feature of stability the Constitution should be self-sufficient, which, to our mind, presupposes that the mechanisms necessary for the realization and protection of the Constitution, as well as for the regulation of social relations should be included in the Constitution, giving an opportunity to solve various arising problems on the basis of constitutional norms. At the same time, the above-mentioned doesn't mean that the Constitution should prescribe all the details of the regulation of social relations, but means that the Basic Law should give an opportunity to find necessary regulations for solving various arising problems, in other words, should have necessary and sufficient system of constitutional self-defense.

The feature of self-sufficiency also presupposes that besides regulating the existing social relations, the Constitution should raise corresponding aims, conditioning the development of the mentioned relations, to which the concrete social society should seek.

For being stable constitutional norms should also constitute an interrelated, systemic integrity. In case, when the Constitution prescribes norms, which separately define effective regulation, but together, as an integrity, aren't able to properly regulate the social relations, the Basic Law won't be able to implement its functions, hence, also be stable.

At the same time, notwithstanding the importance of the above-mentioned technique of determination of constitutional norms, during their realization the logic that there are not and can't be any conflicts between the constitutional regulations should be considered as initial. In other words, they should be interpreted not in an isolated and conflicting manner, but on the basis of their logical interconnections, considering the Constitution as a consistent, thorough document.

At the same time, though from the aspect of the stability of Constitution the mentioned constitutional solutions have an exceptional importance, not only the above-mentioned circumstances ensure the existence of the noted feature of the Basic Law.

For being stable the Constitution, among other circumstances, should be able to implement its functions, which is conditioned not only by the existence of the above-mentioned constitutional solutions, but also by a number of external factors.

According to many authors the stability of the Constitution thoroughly depends on the political system. They believe that constitutions are subject to political actors and events and exist only during such a timeframe, within which they are expedient from the political point of view, and no more.

It should be noted that various research show that the stability of modern constitutions mostly depends on political stability, and the interruption of the balance of the state power in the result of armed upheavals, revolutions, etc. have the greatest impact on decreasing the viability of the Constitution. For example, 66% of the constitutions of the Latin American countries, which lost their effect in 1946-2000, were replaced just during these events.

We also believe that from the point of view of the discussed issue politics is an important factor, as the political environment has an undeniable impact on the choice of constitutional solutions and their factual realization. At the same time, we should take into consideration that this impact isn't unilateral, as the Constitution, in its turn, defines the rules, within the frames of which the state, hence, also the political power should act.

Therefore, the stability of the Constitution is conditioned not just by this or that change of correlation of political power, but generally, by the corresponding level of constitutional and political culture of the society.

Hence, we should be guided by the logic that the Constitution should be not a tool for the politics, but a bound, framework for it. Moreover, the constitutional developments should express not the current political preferences and interests, but be superior to them and define fundamental legal framework for political actors and events.

The next issue we would like to consider within the frames of this article is the interrelations between the stability of Constitution and time.

According to many authors time is the initial circumstance, conditioning the existence of the feature of stability of the Constitution. They consider that the stability of the Basic Law is conditioned by the durability of its force in time, i.e. by the circumstance how long it stays in force.

We believe that the effect of Constitution during a long period of time can be conditioned not only by the circumstance that the latter is a social agreement concerning the basic rules of the social existence and defines the fundamental values and principles, which are typical for the given historical stage of a social society, but by various political, social, economical and other factors.

For example, the Constitution of Columbia of 1886 was replaced just in 1991, being in force for 105 years. Nevertheless, the main reason for this was not its authority, but unsuccessful attempts to convene constituent assembly.

Hence, we think that the Constitution is stable not because it isn't amended during a long period of time, but vice versa, it isn't often changed, as it prescribes the fundamental values and principles typical for the given historical stage of the social society, such structural solutions, which are necessary to organize the social life in accordance with constitutional norms and principles, as well as to make the constitutional norms and principles in conformity with the developing social relations.

The next question which arises in this context is the following: is there any concrete period of time, during which the Constitution should stay in force, to be considered stable?

According to Thomas Jefferson laws, including Constitution, should mechanically lose their force, taking as a basis the circumstance that today's majority can restrict just

itself and today's minority, but it can't restrict the future majority and minority. He considered 19 years as the optimal period for the action of the Constitution, taking as a basis the average period of life generally and the average period of active life of adults during these years in Europe.

Taking into consideration our viewpoint concerning the interrelations between the stability of the Constitution and time, we consider that it isn't expedient to mention a concrete period of time, in conditions of which the Constitution should stay in force to be considered stable.

The action of the Constitution during a long period of time, when it is simultaneously the initial regulator of social relations, certainly, speaks about its viability, hence, also stability. But this doesn't theoretically exclude such a situation, when, acting even during a very short period of time, the discussed feature will be typical for the Basic Law. For example, in cases when the Constitution is replaced just because of the change of the political power.

Hence, we believe that it isn't expedient to mention a concrete period of time, which itself presupposes the existence of the feature of stability of the Constitution.

At the same time, the most acceptable situations are the ones, when the Constitution, which has been acting during a long period of time, is simultaneously the initial regulator of social relations, being in conformity with the process of their development, in which conditions the Constitution becomes viable, hence, also stable.

Summarizing the above-mentioned, it should be noted that the stability is the feature of the Constitution, which presupposes its viability in conditions of changing social relations.

At the same time, in this context we speak not about the static, but the dynamic stability, when the "core", the essence of the Constitution isn't subject to fundamental changes, but the Basic Law itself is able to adapt to developing social relations, to become a stimulus for their development, which presupposes that the latter should be self-sufficient, constitutional norms should constitute a correlated, systemic integrity, should regulate not only the existing social relations, but raise corresponding aims, conditioning the development of the mentioned relations and to which the given social society should seek, and in the result the Constitution should be able to effectively implement its functions.

Driven by the need of implementation of the principle of rule of law, improvement of constitutional mechanisms for guaranteeing the fundamental rights and freedoms of the human being, ensuring a full balance of powers and increasing the effectiveness of public administration, in accordance with a decree of the President of the Republic of Armenia, issued on September 4, 2013, a Specialized Commission on Constitutional

Reforms[1] was established, which prepared the concept of the mentioned reforms and submitted it to the President of the Republic on October 15, 2014. It should be mentioned that on October 10-11, 2014, " the European Commission for Democracy through Law" of the Council of Europe (the Venice Commission) adopted an opinion on the draft concept of the constitutional reforms of the Republic of Armenia during its 100th Plenary Session, describing the draft concept as a good and valuable basis for the preparation of a package of concrete amendments, which would strengthen democratic principles and establish necessary conditions for ensuring the rule of law and respect for human rights within the country[2]. On March 14, 2015, the President of the Republic approved the concept submitted by the Commission, on the basis of which a package of the concrete amendments was prepared, which was adopted by the referendum held on December 6, 2015.

The above-mentioned shows that among the most essential objectives of the process of constitutional reforms in the Republic of Armenia were also the implementation of the principle of rule of law, improvement of constitutional mechanisms for guaranteeing fundamental human rights and freedoms, which, to our mind, were among the most important achievements of the mentioned process and will be presented within the frames of the presentation.

1 Hereinafter referred to as the Commission.
2 http://moj.am/storage/uploads/CDL-AD2014027-e_.pdf

"PANCASILA" AS STATE IDEOLOGY AND THE CONSTITUTIONAL COURT[1*]

I D.G. Palguna[2**]

"This country, the Republic of Indonesia, does not belong to any group, nor to any religion, nor to any ethnic group, nor to any group with customs or traditions, but the property of all of us from Sabang to Merauke"

Soekarno, the 1st President of the Republic of Indonesia.

This paper is not intended to add more debate and complexity stemming from the notion of "ideology"[3] that have been occurred since its invention by the 18th century's French Scholar, Antoine-Louis-Claude Destutt de Tracy in his magnum opus, *Elemens d'idéologie* (1801-1815), a four-volume treatment of methodology and philosophy, consists of *Idéologie proprement dite* (1801), *Grammaire* (1803), *Logique* (1805), and *Traité de la volonté et de ses effets* (1815).[4] It was said that *Ideology*, which was introduced soon after his appointment to the *Institut National* in 1796, was de Tracy's attempt to create a secure foundation for all the moral and political sciences by closely examining our sensations and ideas as these interacted with our physical environment. He believed that one could resolve all ideas into the sensations that produced those ideas and thereby examine their soundness.[5]

There are now dozens of definitions of ideology among scholars within the field of social sciences, some of which even contradictory among themselves, which reveal conceptual complexity (as well as controversy) of the notion or terminology. Adorno *et.al.*, for example, define ideology as "An organization of opinions, attitudes, and values

1 * Presented at an international symposium which was integral part of Asian Association of Contitutional Courts and Equivalent Institutions (AACC) Conference's agendas, held in Surakarta (Solo), Indonesia, August 7-10, 2017.

2 ** Justice of the Constitutional Court of the Republic of Indonesia.

3 As, for instance, stated by Teun A. van Dijk, "It's almost routine. Studies of ideology often begin with a remark about the vagueness of the notion and the resulting theoretical confusion of its analysis"; see Teun A. van Dijk, 1998, *Ideology A Multidisciplinary Approach*, SAGE Publications: London-Thousand Oaks-New Delhi, p. 1. Or, as reflected in John Gerring statement, "Few concepts in the social science lexicon have occasioned so much discussion, so much disagreement, and so much selfconscious discussion of the disagreement, as 'ideology'. Condemned time and again for its semantic excesses, for its bulbous unclarity, the concept of ideology remains, against all odds, a central term of social science discourse", see further John Gerring, "Ideology: A Definitional Analysis", in *Political Research Quarterly*, Vol. 50, No. 4 (December 1997), p. 957-959.

4 See further, Thomas Jefferson (Ed.), 2009, *A Treatise on Political Economy by The Count Destutt Tracy*, the Ludwig von Mises Institute, Auburn: Alabama (firstly published in 1817 by Joseph Mulligan: Georgetown, D.C.)

5 Robert J. Richards, 1993, *Ideology and the History of Science*, Kluwer Academic Publishers: the Netherlands, p. 103.

– a way of thinking about man and society",[6] while Seliger conceives ideology as "Sets of ideas by which men posit, explain and justify ends and means of organized social actions, and specifically political action, irrespective of whether such actions aims to preserve, amend, uproot or rebuild a given social order".[7] Other scholar, Hamilton, formulates the definition of ideology as "a system of collectively held normative and reputedly factual ideas and beliefs and attitudes advocating a particular pattern of social relationships and arrangements, and/or aimed at justifying a particular pattern of conduct, which its proponents seek to promote, realize, pursue or maintain".[8] Meanwhile, Geertz offers a rather simple definition by saying ideology as "Maps of problematic social reality and matrices for the creation of collective conscience".[9] An elaborate definition described by Lane. He says ideology is "A body of concepts [which]: (1) deal with the questions: Who will be the rulers? How the rulers will be selected? By what principles will they govern? (2) constitute an argument; that is, they are intended to persuade to counter opposing views; (3) integrally affect some of the major values of life; (4) embrace a program for the defense or reform or abolition of important social institutions; (5) are, in part, rationalizations of groups interests – but not necessarily the interest of all groups espousing them; (6) are normative, ethical, moral in tone and content; (7) are … torn from their context in a broader belief system, and share the structural and stylistic properties of that system".[10] As if to add more confusion to the notion, Mullins explains ideology as "A logically coherent system of symbols which, within a more or less sophisticated conception of history, links the cognitive and evaluative perception of ones social condition – especially its prospect for the future – to a program of collective action for the maintenance, alteration, or transformation of society".[11]

A rather succinct, but thoughtful, statement by Gerring may represent the conceptual complexity (or controversy), "One is struck not only by the cumulative number of different attributes that writers find essential, but by their more than occasional contradictions. To some, ideology is dogmatic, while to others it carries connotations of political sophistication; to some it refers to dominant modes of thought, and to others it refers primarily to those most alienated by the status quo (e.g., revolutionary movements and parties). To some it is based in the concrete interests of a social class, while to others it is characterized by an absence of economic self-interest. One could continue, but the point is already apparent: not only is ideology farflung, it also encompasses a good many definitional traits which directly at odds with one another".[12]

Apart from the conceptual disagreement among scholars as to the notion of "ideology" mentioned above, by referring *Pancasila* (literally means "five basic principles") as state ideology in this paper, it should be understood merely as the nation's philosophical fundamental or state fundamental establishing the Republic of Indonesia. It is believed

6 Theodore Adorno *et. al.*, 1950, *The Authoritarian Personality*, Harper: New York, p. 2.
7 Martin Seliger, 1976, *Ideology and Politics*, George Allen & Unwin.: London, p. 11.
8 Hamilton in John Gerring, "Ideology: A Definitional Analysis", *Political Research Quarterly*, Vol. 50, No. 4 (December 1997), p.959.
9 *Ibid.*, p. 958.
10 Robert Lane, 1962, *Political Ideology: Why the American Common Man Believes What He Does*, Free Press: New York, p. 14.
11 Willard A. Mullins in John Gerring, *loc.cit.*
12 John Gerring, *op.cit.*, p.957.

that, considering the diversity the nation inherits as a pluralistic society – in terms of ethnicity, race, religion, language, and culture – only by sincerely accepting and holding *Pancasila* as the state fundamental, and the state ideology as well, the unity of the nation can be maintained.

Pancasila was firstly introduced by Soekarno (or Bung Karno as he fondly known), one of the nation's founding figures and the first president of the Republic. In his acclaimed-historic speech on June 1, 1945, Soekarno, then a member of the so-called *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan* or *BPUPK* (or Board of Inquiry for Independence Preparation Measures), stated that Independent Indonesia should be established upon five basic principles, he called *Pancasila*,[13] which shall serve as the nation's "philosophical foundation", namely: (1) Indonesian Nationalism, (2) Humanity or Internationalism, (3) Democracy, (4) Social Welfare, and (5) the belief in God. The speech was uttered as a response to a simple yet fundamental question launched by K.R.T. Radjiman Wedjodiningrat, who was then the BPUPK's chairman, during the BPUPK's plenary session. The question was: what should be the foundation of the Independent Indonesia? Soekarno conceived the question as a challenging quest for philosophical foundation or *"philosofische grondslag"* (a Dutch terminology) or *"weltanschaaung"* (a German one)[14] which he described as the "foundation, philosophy, in-depth thought, spirit, in-depth passion on which the building of eternally Independent Indonesia will be established".[15] He, however, humbly emphasized that he did not create all the five basic principles but he just simply "dig it from the Indonesian soil".

Soekarno's proposal was unanimously accepted by all members of BPUPK on condition that it needs a reformulation.[16] After being reformulated, *Pancasila* was then included in, and became integral part of, the Preamble of the Indonesian Constitution, called the Constitution of 1945 (or *Undang-Undang Dasar 1945* in Bahasa Indonesia, commonly abbreviated as *UUD 1945*). The Constitution of 1945 was officially adopted on August 18, 1945 – a day after Soekarno and Hatta, on behalf of the Indonesian nation, proclaimed the Indonesian Independence. Now the five basic principles of *Pancasila* consists of (1) the Oneness of God the Almighty (*Ketuhanan Yang Maha Esa*), (2) A just and civilized Humanity (*Kemanusiaan yang adil dan beradab*), (3) the Unity of Indonesia (*Persatuan Indonesia*), (4) Democracy with the guidance of wisdom in assembly/representation (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawatan/perwakilan*), and Social Justice for all the people of Indonesia (*Keadilan social bagi seluruh rakyat Indonesia*).

It is strongly belief that the national integrity of Indonesia, as a nation which is founded upon a pluralistic society, can only be secured and maintained if *Pancasila* is

13 That's the reason why 1st of June is now commemorated as "Pancasila Day".

14 Soekarno interchangeably used these terminologies as the translation of "philosophical foundation" (or "landasan filosofis" in Bahasa Indonesia) in his speech.

15 RM. A.B. Kusuma, 2004, *Lahirnya Undang-Undang Dasar 1945*, Badan Penerbit Fakultas Hukum Universitas Indonesia: Jakarta, p. 150.

16 For further details, see, *ibid.*, compared to Saafroedin Bahar *et.al.*, 1992, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI) 29 Mei 1945-19 Agustus 1945*, Sekretariat Negara Republik Indonesia: Jakarta.

able to transform itself into a living ideology where all Indonesian accept, internalize, and practice its concepts, principles, and values as their way of life. Yudi Latif, a young scholar, stated in his much-acclaimed writing that *Pancasila,* as a morality basis as well as a compass for the nation-state Indonesia, has its strong ontological, epistemological, and axiological foundations. Each and every principle of the *Pancasila* has its historical, rational, and actual justification that could drive the nation's pursuit for great achievements of civilization if it is consistently comprehended, internalized, trusted, and implemented.[17] As a philosophical foundation, according to a late prominent scholar, Notonagoro, *Pancasila* is served as the philosophical basis for the state and its legal order. Accordingly, *Pancasila* shall be the philosophy of life, and way of life as well, where the organization of the state established on the basis of people sovereignty pursuant to Indonesia's positive laws, including the Constitution, is derived from in the pursuit of the nation's goal, that is physical and spiritual happiness of all the people of Indonesia.[18]

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With all the above mentioned description, a question arises: what then the concepts, principles, and values contained in the *Pancasila*? A thorough study conducted by Suprapto reveals that *Pancasila* contains the concepts of (a) religiosity, (b) humanity, (c) nationality, (d) sovereignty, and (e) sociality. The concept of religiosity contains acknowledgement on the existence of religions and the beliefs in God the Almighty – a concept that have been upheld by the Indonesian ancestors since ancient times. While in the concept of humanity, of which Soekarno fondly named it "internationalism", there is thought to respect human dignity as a personality who has its own particular traits – from which, then, the ideas of freedom of thought, freedom of expression, and freedom of choice are derived. As to the concept of nationality, it explains that the idea of "nation", contained within it, is not "nation" in a narrow sense referring to a certain group or a certain region, instead it encompasses the unity of all people and territory stretching across the archipelago that used to be the territory of the Dutch Colonial administration. Meanwhile the concept of sovereignty confirms the idea of democracy that upholds the supreme will of the people. The exercise of the idea, however, must be guided by wisdom in assembly/representation in accordance with the Indonesian culture. Lastly, the concept of sociality is a concept which figures out the goal of the nation, that is physical and spiritual well-being of all people of Indonesia.

As to the principles contained in *Pancasila*, they are nothing else but the five basic principles forming the *Pancasila* as a whole. The first principle (the Oneness of God the Almighty) acknowledges, *inter alia*, the existence of varied religions and beliefs in God; everyone is free to hold his or her own religion or belief in God; no one shall be allowed to force his or her religion or belief to the others; there shall be mutual respect among individuals holding different religion or belief. The second principle (A just and civilized Humanity) contains, *inter alia*, respect for human nature and dignity, human freedom to

[17] See further, Yudi Latif, 2011, *Negara Paripurna. Historisitas, Rasionalitas, dan Aktualitas Pancasila*, Gramedia Pustaka Utama: Jakarta, especially pp. 42-46.

[18] See Kaelan, 2013, *Negara Kebangsaan Pancasila. Kultural, Historis, Filosofis, Yuridis, dan Aktualisasinya*, Paradigma: Yogyakarta, p. 50-51.

express its aspiration and opinion, and the nation plurality. The third principle (the Unity of Indonesia) contains, *inter alia*, pride of the nation's state of the art and achievements of its people, loving the nation and the motherland of Indonesia, developing patriotism to save-guard the nation's integrity. The forth principle (Democracy with the guidance of wisdom in assembly/representation) contains, *inter alia*, insight that consensus must be primarily upheld in making decisions for the common interest, any decision or policy for the sake of the common interest must consider the fulfillment of justice; avoiding majority domination as well as tyranny of minority. The fifth principle (Social Justice for all the people of Indonesia) contains, *inter alia*, that economic development must be arranged as a joint effort upon the foundation of togetherness, vital branches of production affecting public life must be put under the state control, all natural resources must be controlled by the state and must be used for betterment or well-being of the people, the poor and the neglected children must be taken care by the state, a social security system covering the entire people must be built as well as empowering those who are weak and poor to uphold human dignity, the state must ensure the rights of educations for all citizens.

Meanwhile, values that the *Pancasila* contained are**:** value of belief in God which explains the belief of the existence of transcendental power which is called God; value of equality which explains the equal treatment to all human being without any discrimination based on sex, ethnicity, race, group, religion, customs, culture, etc.; everyone is treated equal before the law and everyone has the equal opportunity in any field of life according to his or her potentials; value of unity and togetherness upholding the existence of Indonesia as a pluralistic society which consists of various components forming one integral unity where every component is equally respected and becomes inherent part of the nation-state system; value of consensus which explains the existence of open-minded attitude guided by the spirit of togetherness to reach decision; and, lastly, value of welfare which explains the fulfillment of human needs, physically and spiritually, so as to create security, peace, and happiness.[19]

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Last question: does all the description pertaining *Pancasila* mentioned above has something to do with the Constitutional Court of the Republic of Indonesia (hereinafter referred to as "the Court")? The answer is absolutely "Yes, it does". According to Article 24C paragraph (1) of the Constitution of 1945 (hereinafter referred to as the "the Constitution"), the Court, whose verdict is final and binding, shall have the power to adjudicate cases, among others, on the constitutionality of law and on the dissolution of political party considered to be in contradiction with the Constitution. By "Constitution", pursuant to Article II Additional Rules of the Constitution, it means the Preamble and the Articles of the Constitution. Hence, a law or a political party might be considered unconstitutional not only if the law or the political party proved to be in contradiction with any Article of the Constitution but also if the law or the political party proved to be

[19] All description on *Pancasila's* concepts, principles, and values mentioned above are cited and summarized from Suprapto, 2013, *Pancasila*, Konpress: Jakarta, pp. 9-30.

in contradiction with the Preamble of the Constitution. It has been mentioned previously, *Pancasila* is an integral part of the Preamble of the Constitution. Accordingly, it goes without saying that a law or a political party might be considered unconstitutional if it is proved that the law or the political party is against the *Pancasila*.

As to preamble of a constitution, it is important to note that preamble is an important part of a constitution because, as Kelsen says, it contains a solemn introduction expressing political, moral, and religious ideas promulgated by the constitution. That's why the nature of preamble is more ideological rather than juridical.[20] From a preamble, we can also identify the character of a state to be founded upon a constitution: whether it is designed to uphold the will of the people or simply the will of a ruler installed by the grace of God.[21] "The preamble", Kelsen adds, "serves to give the constitution a greater dignity and thus a heightened efficacy".[22]

Meanwhile, a study conducted by Henc van Maarseveen and Ger van der Tang describes that there are two types of preamble: declaratory and programmatic. A preamble of the former character contains statement of legal issues or principles, while a preamble of the latter one contains guidance of certain measures that have to take or uphold or formulates certain purposes to pursue.[23] Van Maarseveen and van der Tang emphasize further:

Regardless of its type, a preamble can often provide an important guide to the constitution's political intentions and background and in particular to how the constitutional provision should be interpreted. In some cases the preamble can be considered as putting into words a number of political values which are then implemented in the constitution's norms. The values established in the preamble provide guidelines for putting these norms into practice. The importance of these values becomes apparent in cases where the courts are required to apply the provisions of the constitution. To make their decision, they will in certain cases have to refer to the preamble. A preamble can, however, also provide guidelines for determining the general nature of a constitution.[24]

The preamble of the Constitution of 1945 is, undoubtedly, falls within the type of a programmatic preamble. The 4th Paragraph of the Preamble confirms that the Constitution to be built shall be the further elaboration of the 17th August 1945 Proclamation of Independence. It contains not only measures that have to take and purposes to pursue by the establishment of the Republic of Indonesia, it also enshrines the very foundation of the nation-state: the *Pancasila*.[25]

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20 Hans Kelsen, 1961, *General Theory of Law and State* (translated by Anders Wedberg), Russel & Russel, New York, p. 260.

21 *Ibid*., p. 261.

22 *Ibid*.

23 Henc van Maarseveen and Ger van der Tang, 1978, *Written Constitution, A Computerized Comparative Study*, Oceana Publication Inc.-Sijthoff & Nordhoff: New York (USA)-Alpen aan den Rijn (Netherlands), p. 252.

24 *Ibid*., p. 253.

25 For further details on the programmatic character of the Preamble of the Constitution of 1945, see I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional (Constitutional Complaint). Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitutional Warga Negara*, Sinar Grafika: Jakarta, p. 494-512.

Furthermore, according to the Law on the Constitutional Court (Law Number 24 of 2003 as amended by Law Number 8 of 2011 or *Undang-Undang tentang Mahkamah Konstitusi*, commonly abbreviated as UUMK), a law can be considered unconstitutional not only if its substances or materials (its article or its paragraph in an article or any part of it) proved to be against or contradictory to the Constitution[26] but also if the procedure or the process establishing the law is in contradiction or inconsistent with the Constitution.[27] If the Court rules any material of a law is unconstitutional the Court shall expressly declare the material of the law no longer has its legally binding power.[28] While, if the Court rules that the procedures or the process establishing the law is unconstitutional, the Court shall expressly declare that the law as a whole is no longer has legally binding power.[29]

As to unconstitutionality of political party, the UUMK says that a political party can be considered unconstitutional if its ideology or its principles or its purposes or its programs or its activities proved to be in contradiction with the Constitution.[30] If a petition on dissolution of a political party is upheld by the Court, the verdict of the Court shall be followed by annulling the registration of the political party.[31]

The verdict of the Court shall come into force by the time of its announcement in a full bench session that is open to public.[32]

26 Known as "material judicial review", see Article 51A paragraph (5) of UUMK.
27 Known as "formal judicial review", see Article 51A paragraph (4) of UUMK.
28 Article 56 paragraph (2), Article 57 paragraph (1) of UUMK.
29 Article 56 paragraph (4), Article 57 paragraph (2) of UUMK.
30 Article 68 paragraph (2) of UUMK.
31 Article 73 paragraph (1) of UUMK.
32 Article 47 of UUMK.

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THE CONSTITUTION OF MONGOLIA AND THE ISSUE OF IDEOLOGY IN MONGOLIA

D.Odbayar
CHAIRMAN OF THE CONSTITUTIONAL COURT OF MONGOLIA

Honorable Chairman,

Honorable Presidents,

Chairmen and Chief Justices of Constitutional Courts,

Ladies and Gentlemen,

Let me begin by extending a warm welcome on behalf of the Constitutional Court of Mongolia to the Constitutional Court of the Republic of Indonesia for hosting this international symposium and inviting us to this important event.

It gives me immense pleasure, unspeakable, to be participating in this symposium. In support of making this symposium fruitful and successful like the previous ones, I would like briefly present this topic on the concept of ideology in relation with the Constitution of Mongolia and how it is upheld by the Constitutional Court of Mongolia.

The Constitution is not only the fundamental law of the state, it is also the document of the entire nation of consensus determining the progress and development of the state. If we take into consideration the progress and development of the state, it is many related with aspects among them an ideology of the state.

There have been various terminology on ideology. It is acceptable that ideology is a set of doctrines of beliefs that are shared by the members of several groups or that from the basis of a political, economic or other system. It is a body of that ideas that reflects the beliefs and interests of a nation, political systems, etc. and underlies political actions.It is also that body forming a political or social program along with the devices for putting it into operation.

Mongolia, in its history, has enacted four constitutions. The present democratic

constitution is passed in 1992. The previous three constitutions were passed in 1921, 1940 and 1960 respectively. Mongolia is also a country which dedicated 70 years of its history to the strong ideological period of single political party the ideological foundation was socialism. Why ideology of socialism was engaging such a long period of history? There were many reasons. One of the main reasons was that this ideology was constitutionalized and the guardian was only solely dominating political party.

With the enactment of new Constitution of 1992, ideology of the nation and state has shifted to democracy, constitutionalism, secularism so and so. With the introduction of the open market economy various expression of ideology were introduced into Mongolian society, like different form of ownership of property , human rights, supremacy of law, freedom and equality etc.

Mentioning these aspects I would like to note that any doctrines or beliefs when they are situated in the fundamental politico-legal documentsnamely Constitution, become ideology of a nation or state in any socio-economic formation.

If we read the Constitution of Mongolia, it ends with the word, that are "learn and abide". Calling the nation to "learn and abide", the constitution proves the ideology is body of formulated doctrines, thoughts or principles that guides individual, social movement, institution or group. Perhaps in some extend that may be felt like a speculation that is imaginary or visionary.

In whatever case, the Constitution is the main instrument for determining the ideology of the state and the Constitutional Court is the guardian of ideology in a pluralistic society while in non-pluralistic, a single political party.

Let me speak and as to how to guard the ideology in Mongolian content. The reply is, in our opinion, that the basic structure of the Constitution should be stable, it should not amended, after all damaged. The parliament of Mongolia passed in the year of 2010, the law on the Procedure of amendments to the Constitution of Mongolia.

Mongolia has determined the notion of "Basic structure" first time in its legal history in the above mentioned law through the same notion itself is formulated through the judicial precedent mainly in common law countries while in the law are bare acts, or the Constitution itself in civil law countries as unamendable provisions of Constitution.

Mongolia parliament has declared 22 provisions and sub-provisions of the Constitution as unamendable provisions having named after as "Basic structure of the Constitution of Mongolia".

All these 22 provisions maybe considered provisions which contains ideological principles of the State and the nation.

The Constitutional Court of Mongolia while protecting "Basic structure " of

Mongolian Constitution at the same time it protects the state ideology. But the principle of being as subject to the Constitution, the Constitutional Court only will definitely be kept, to be strictly observed and followed as the Constitutional Court of Mongolia is the only competent organ with powers to exercise a supreme judicial review over the enforcement of the Constitution and the guarantee for strict observance of the Constitution.

The Constitutional Court of Mongolia examines and decides disputes regarding a breach of the Constitution on its own initiative pursuant to the petitions of information from citizens or the request by the Parliament of Mongolia, the President, the Prime Minister, the Supreme Court, and the Prosecutor General of Mongolia. While citing this, it is important to note and inform that the decided disputes used on the citizens petitions occupy more than 90% among all cases.

All cases are decided grounding the reasoning related with ideology, public interest, social policy under the reasoning of the Constitutional violation.

At the end I would like to express deepest gratitude to our friends from Indonesia for successful presidency and to wish good achievement and big success to our friend from Malaysia during its Presidency.

Thanking you all very much for kind attention.

THE CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN AS THE MAIN PROVISION OF THE BASIS OF IDEOLOGICAL DIVERSITY

Bakhtiyar Mirbabayev
EX-CHAIRMAN OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN, CANDIDATE OF LEGAL SCIENCES, DOCENT

Dear Chairman!

Ladies and gentlemen!

The Constitution of the Republic of Uzbekistan proclaims Uzbekistan as a sovereign democratic state with a republican form of government. According to Article 12 of the Constitution in Uzbekistan social life develops on the basis of a diversity of political institutions, ideologies and opinions. No ideology can be established as a state ideology. This norm establishes ideological pluralism as the basis for the development of society. Shavkat Mirziyoyev, the President of the Republic of Uzbekistan, said in his speech: "The Basic Law has created ample opportunities for the formation and free activity in the country of various non-governmental non-profit organizations and political parties that are an integral part of civil society, consolidated the basic principles and provisions of our electoral system. Our Constitution, in full accordance with the requirements of the Universal Declaration of Human Rights and other major international documents, guarantees personal rights and freedoms, political, economic and social rights of man and citizen, and creates the necessary conditions for its spiritual growth and comprehensive harmonious development".

Indeed, the functioning of a democratic and legal state and civil society is possible only on the basis of the diversity of ideologies, because people are by nature not the same and it is impossible to reduce the diversity of their opinions and beliefs to any one system of views, to develop a universal notion of universal well-being. The impossibility of reflecting in one theory all the complexity of the world order was said by ancient Greek philosophers. Thus, Plato spoke of the need to show tolerance for other views, to recognize the freedom of thought. It is the multiplicity of the constituent elements of society that forms the basis of ideological diversity.

The diversity of ideologies presupposes such a state in society and the state where one can create political parties and other public associations acting on the basis of the Constitution and laws to express and implement various political ideas and views, but none of the ideologies should be elevated to the status of official state ideology.

The diversity of ideologies is the constitutional principle of the organization of public life, which presupposes the freedom of a person to adhere to any ideology and to conduct social activity on its basis. Each ideology seeks to formulate the ideal principles of the organization of life, but only in the aggregate all ideologies and theories provide adequate knowledge of human society.

In the conditions of the formation and development of civil society, people are deeply interested in manifesting the freedom of the human spirit, as the diversity of ideologies creates healthy competition.

The diversity of ideologies is guaranteed through the consolidation of the corresponding rights and freedoms of man and citizen (for example, freedom of opinion and belief, conscience and religion, association, etc.).

Recognition of the diversity of ideologies by the Constitution of the Republic of Uzbekistan implies the right of every person, political party, public association to freely develop, profess and propagate ideas, theories, concepts regarding the economic, social, political structure of human society, offer practical recommendations to the authorities and society, publicly defend their views and views .

The establishment of one ideology as a state ideology is a particular danger. This is prohibited by the Constitution of the Republic of Uzbekistan. Such a ban is one of the main guarantees from a totalitarian regime. Totalitarian regimes do not allow diversity of ideologies. Under a totalitarian regime, the Constitution establishes any one ideology and the population is forced to follow it. For example, the Marxist-Leninist ideology in the Soviet republics. Uzbekistan, like other republics of the post-Soviet space, was faced with a phenomenon where social life developed only on the basis of the only Marxist-Leninist ideology elevated to the rank of official state ideology. However, with the attainment of independence, one of the main principles of democratic development of Uzbekistan was a complete rejection of one-party system.

But nevertheless it is impossible to carry out the processes of modernization and reforming a society without ideology. This is proved by history, by experience of independent development of the country. Throughout their life, the people and the nation improve, enrich their national ideology. Because ideology is not a set of frozen dogmas. This is an ongoing process, and while life continues, in the course of its development, there will be more and more demands placed on ideology.

Vacuum in the sphere of ideology is unacceptable. A person who has his own opinion, believing in the correctness of choosing his own way, will always look with confidence

in the future. He is not afraid of the diversity of opinions in society, on the contrary, relying on modern knowledge and philosophical views, the truth of life, he will be able to recognize any malicious intentions, to prevent a threat. Young people, who do not yet have sufficient life experience, are very susceptible to various kinds of negative influences.

In Uzbekistan, the idea of national independence which leads to the consolidation of the people in achieving the progress of society is being implemented. Moreover, on the one hand, the national idea should not rise to the level of the dominant state ideology; on the other hand, the national idea should become a unifying banner for people, parties and public organizations with different views on ways to ensure peace, prosperity of the country and the well-being of the people; The common interests of the nation, society and the state.

The idea of national independence, being a social phenomenon, a national phenomenon, becomes leading with respect to the ideologies of various political parties and social groups. It does not become a political weapon in order to strengthen the existing power. The idea of national independence serves the socio-political progress of Uzbekistan, expresses the interests of the entire people, all political parties, groups and movements.

It is necessary to work constantly to improve the national ideology that meets the interests of the nation, which determines the continuous development and renewal.

In accordance with the Constitution in the Republic of Uzbekistan, the state ensures observance of the rights and legitimate interests of political parties and other public associations, creates equal legal opportunities for them to participate in public life.

Intervention of state bodies and officials in the activities of public associations, as well as interference of public associations in the activities of state bodies and officials, is not allowed.

It is prohibited to create and operate political parties, as well as other public associations that have the aim of violently changing the constitutional system, opposing the sovereignty, integrity and security of the republic, the constitutional rights and freedoms of its citizens, propagandizing war, social, national, racial and religious enmity, encroaching on health and morality of the people, as well as paramilitary associations, political parties on national and religious grounds. It is forbidden to create secret societies and associations.

Dissolution, prohibition or restriction of the activities of public associations can take place only on the basis of a court decision.

In many countries, the adoption of such a decision is attributed to the competence of their constitutional courts.

In the Republic of Uzbekistan, such a decision is lawful to adopt courts of general jurisdiction, and not the Constitutional Court.

Of course, we understand that the case of the constitutionality of the activities of political parties and other public organizations is not civil or administrative, it is essentially a constitutional matter, and therefore it must be considered by the Constitutional Court. In the Republic of Uzbekistan, large-scale reforms are currently underway in the judicial system. It seems that with time the consideration of such cases by the law can be attributed to the jurisdiction of the Constitutional Court.

ДОКЛАД

на Международном симпозиуме «Конституционный суд как страж идеологии и демократии в плюралистическом обществе» (Суракарта, Индонезия, 9–10 августа 2017 года), Сессия 1 «Конституционный суд и государственная идеология»

Роль Конституционного Суда в объективировании конституционной идеологии России

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Статья 13 Конституции Российской Федерации прямо говорит, что в Российской Федерации признается идеологическое многообразие, никакая идеология не может устанавливаться в качестве государственной или обязательной. Генезис этой нормы понятен: известно, что в советский период нашей истории была установлена в качестве государственной коммунистическая идеология, что долгие годы негативным образом сказывалось на состоянии свободы мнений и слова в нашем обществе. Поэтому конституционный законодатель России принял меры к тому, чтобы господство какой-либо идеологии, служащее основанием для запрета иных мнений, для подавления инакомыслия, не повторилось.

Эту норму, однако, нужно воспринимать диалектически. Она означает, безусловно, что никто не может навязывать обществу и каждому отдельному его члену систему нравственных, религиозных, эстетических и философских взглядов и идей, в которых осознаются и оцениваются отношения людей к действительности. Но она не значит, что отсутствует система базовых для общества ценностей.

Такие ценности есть, и они закреплены Конституцией Российской Федерации. В Конституции Российской Федерации есть специальная глава «Основы конституционного строя» (это первая глава Конституции). Ее положения имеют приоритет при интерпретации любых иных положений Конституции Российской Федерации. Там, а также в ряде положений главы второй Конституции «Права и свободы человека и гражданина» в концентрированном виде выражается

конституционная идеология Российской Федерации. Причем не допускается пересмотр этих принципов в рамках действующей Конституции – чтобы изменить положения глав первой и второй, нужно принимать новую Конституцию. Это, безусловно, налагает на Конституционный Суд высокую ответственность за их интерпретацию, то есть и за правильное объективирование конституционной идеологии.

Чем отличается конституционная идеология от той государственной или обязательной идеологии, установление которой запрещено?

Во-первых, она не предполагает вмешательства в личную сферу человека. Человек может придерживаться любых идеологических взглядов. При этом нужно сделать оговорку, что в России запрещены действия, направленные на возбуждение ненависти либо вражды, а также на унижение достоинства человека либо группы лиц по признакам пола, расы, национальности, языка, происхождения, отношения к религии, а равно принадлежности к какой-либо социальной группе. Но речь идет именно о публичных действиях, в том числе совершенных с использованием средств массовой информации либо сети «Интернет». Конституционный Суд неоднократно подтверждал конституционность запрета такого рода действий и конституционность ответственности за них. Также по прямому указанию Конституции запрещается создание и деятельность общественных объединений, цели или действия которых направлены на насильственное изменение основ конституционного строя и нарушение целостности Российской Федерации, подрыв безопасности государства, создание вооруженных формирований, разжигание социальной, расовой, национальной и религиозной розни.

Во-вторых, конституционная идеология адресована прежде всего самому государству и непосредственно налагает императивные обязательства именно на него. В какой-то мере это система самоограничения государства в интересах человека и общества. Конечно, конституционная идеология транслируется в законодательные и иные правовые нормы, которые обязывают и других субъектов правоотношений, а через эти нормы – в правоприменительную практику. Но в исходном виде это именно критерий для деятельности, в том числе нормотворческой, самого государства.

В-третьих, конституционная идеология выражена в конституционно-правовых категориях. Это правила наиболее высокого уровня и универсального значения, обеспечиваемые государством, прежде всего судебной властью. И основную роль в их обеспечении выполняет Конституционный Суд, так как соотносит с ними текущее нормативное регулирование.

В-четвертых, конституционная идеология России соответствует современным стандартам демократического правового социального светского государства. Она предполагает, что государство должно следовать этим стандартам. Речь, однако, не идет о слепом следовании всем тем интерпретациям этих стандартов, которые предлагают, например, межгосударственные органы по правам человека. На 3-м Конгрессе Азиатской ассоциации конституционных судов и эквивалентных органов был представлен российский опыт нахождения баланса между тенденциями к универсализации представлений о том, какими должны быть основные права человека в мире, с одной стороны, и конституционным

правопорядком, отражающим конституционную идентичность конкретной страны, с другой. В контексте темы сегодняшнего симпозиума хотел бы подчеркнуть, что конституционная идентичность страны – это не продукт какой-то специально вырабатываемой идеологии, а естественным образом исторически сформированная социокультурная данность. И именно она влияет на конституционную идеологию, а не конституционная идеология – на нее.

В-пятых, важным элементом конституционной идеологии России как раз и является уже упомянутое идеологическое и связанное с ним политическое многообразие, а также светский характер государства, которые прямо закреплены в Конституции. То есть если что-то навязывалось бы обществу в качестве обязательного миропонимания, это не соответствовало бы самой конституционной идеологии.

Важный вопрос – являются ли конституционные принципы в совокупности синонимом конституционной идеологии, или же все-таки некоторые принципы лежат за ее пределами. Как представляется, критерием отнесения конституционных принципов к сфере конституционной идеологии является определение ими взаимоотношений по линиям «государство – общество», «государство – человек» и в какой-то мере «человек – общество» и «человек – человек». При этом есть принципы, которые отражают организацию самой государственной власти (например, принцип разделения властей или принципы федерализма) или иерархию источников права (например, высшая юридическая сила конституции). Вряд ли их можно отнести к сфере конституционной идеологии. Но грань здесь очень тонкая: например, принцип, согласно которому носителем суверенитета и единственным источником власти в Российской Федерации является ее многонациональный народ (статья 3 Конституции России) в силу содержательной насыщенности выходит за пределы организационного и является одной из принципиальных идеологических основ функционирования российского государства.

Каким образом Конституционный Суд объективирует конституционную идеологию России?

Во-первых, он применяет конституционные принципы, прямо выраженные в Конституции. Это является естественной составляющей деятельности Конституционного Суда. Применение содержащих конституционную идеологию принципов к предмету рассмотрения позволяет Конституционному Суду выработать правовую позицию и разрешить вопрос о конституционности или неконституционности правового акта.

Назову лишь наиболее важные и часто применяемые Конституционным Судом составляющие конституционной идеологии Российской Федерации, прямо выраженные в Конституции Российской Федерации. Прежде всего, это конституционные характеристики России в качестве правового и социального государства. Они часто служат непосредственным правовым основанием для принятия Конституционным Судом конкретных решений. При этом категория «правового государства» фактически трансформировалась в принцип верховенства права. А понятие «социального государства» используется Конституционным Судом в своих выводах и за пределами сферы реализации социальных конституционных прав. Конституционная же характеристика России как демократического

государства обычно реализуется через принцип принадлежности власти народу, также прямо указанный в Конституции.

Кроме того, это такие принципы как: высшая ценность прав и свобод человека и направленность смысла, содержания и применения законов, деятельности законодательной и исполнительной власти, местного самоуправления на реализацию прав и свобод; неотчуждаемость основных прав и свобод человека и их принадлежность каждому от рождения; недопустимость нарушения прав и свобод других лиц при осуществлении прав и свобод человека и гражданина; равенство прав и свобод и равенство возможностей для их реализации; свобода экономической деятельности; признание и защита равным образом частной, государственной, муниципальной и иных форм собственности. Этим перечнем состав конституционных принципов, прямо выраженных в Конституции и оставляющих конституционную идеологию Российской Федерации, конечно, не ограничивается.

Во-вторых, Конституционный Суд выявляет такие конституционные принципы, которые прямо в Конституции не указаны, но имплицитно там присутствуют. Значительная часть из них лежит в сфере конституционной идеологии. К таким выявленным конституционным принципам следует отнести, в частности, такие как гуманизм, справедливость, обеспечение взаимного доверия во взаимоотношениях личности и публичной власти, правовая определенность, баланс конституционных ценностей. Это наиболее значимые и универсальные принципы, выявленные Конституционным Судом. Они фактически являются базовыми для оценки Конституционным Судом любой оспариваемой нормы.

Принципиально то, что Конституционный Суд не «изобретает» новые конституционные принципы, а именно выявляет их. Он не претендует и, как представляется, не должен претендовать на то, что именно он формирует конституционную идеологию. Конституционная идеология в полном объеме – и в эксплицитной, и в имплицитной форме – содержится в самой Конституции. Иногда имплицитные принципы, составляющие ее, можно выявить обычными средствами толкования ее текста. Но всегда необходимо исходить из духовно-культурных начал общества, так как именно волей народа Конституция обрела жизнь.

Красной нитью через практику Конституционного Суда Российской Федерации проходят слова конституционной преамбулы о том, что многонациональный народ Российской Федерации принял Конституцию, чтя память предков, передавших нам любовь и уважение к Отечеству, веру в добро и справедливость, стремясь обеспечить благополучие и процветание России, исходя из ответственности за свою Родину перед нынешним и будущими поколениями. В аргументации Конституционного Суда Российской Федерации в последние годы все чаще используются отсылки к Преамбуле, где наиболее ярко и эмоционально выражена суть чаяний и устремлений народа, связанных с принятием Конституции.

И конечно, при объективировании конституционной идеологии Конституционный Суд не может не учитывать возможное общественное восприятие своей позиции. Он обязан «слушать пульс» народного волеизъявления. В этом аспекте своей деятельности он менее свободен, чем при принятии решений по конкретным вопросам, где общественное мнение для него не должно быть

ориентиром. Так, например, по конкретному вопросу о возможности смертной казни в России, Конституционный Суд не побоялся сказать, что в стране сложился конституционно-правовой режим, в рамках которого – с учетом международно-правовой тенденции и обязательств, взятых на себя Российской Федерацией, – происходит необратимый процесс, направленный на отмену смертной казни, и поэтому возобновление смертной казни невозможно. При этом преобладающая часть российского общества – за смертную казнь. Критика нашего решения звучала, но она не была ударом по репутации Конституционного Суда.

Если же орган конституционного правосудия будет совершать ошибки, выявляя в качестве имплицитного элемента конституционной идеологии то, что не будет воспринимается в таком качестве народом, это может рано или поздно привести к утрате доверия к нему общества. Причем принцип независимости суда не будет заслоном от этого недоверия. Поэтому в ряде случаев предпочтительнее воздерживаться от объективирования элементов конституционной идеологии, если нет уверенности, что их понимание органом конституционного правосудия будет отражать общественные устремления.

В заключении остановлюсь на таком важнейшем элементе конституционной идеологии России как принцип баланса конституционных ценностей. Он имеет различные проявления – баланс частных и публичных интересов, сбалансированность прав и обязанностей, баланс между правами и законными интересами различных лиц, недопустимость злоупотребления правом, баланс диспозитивного и императивного методов правового воздействия, баланс интересов Российской Федерации и интересов ее субъектов и так далее.

Баланс конституционных ценностей – это основополагающий принцип конституционной идеологии России и одновременно – основной методологический инструмент деятельности Конституционного Суда. Если спросить, что основное в деятельности Конституционного Суда ответом будет – баланс конституционных ценностей.

Возможен вопрос – а почему не права человека, а именно баланс ценностей. Никто не отрицает значимость конституционных прав и их защиты. Но часто в правоотношениях права и интересы одного человека противостоят правам и интересам другого. Если же другая сторона правоотношений – публичная власть, казалось бы, при установлении баланса между правами лица и публичными интересами первые должны быть превалирующими. Но и здесь все неоднозначно. Как показывают, например, решения Конституционного Суда по налоговым вопросам, по вопросам об очередности исполнения обязательств предприятия при недостатке средств, нельзя не учитывать, что на другой стороне – где речь вроде бы идет о публичном интересе – тоже люди с их потребностями, удовлетворяемыми за счет бюджета. То есть и в случае коллизии публичных и частных интересов установление баланса конституционных ценностей требует определенной проработки, а не является линейным.

В своей лекции «Суть права» на Санкт-Петербургском международном юридическом форуме Председатель Конституционного Суда Российской Федерации профессор Валерий Зорькин отметил, в частности, что «увлекшись защитой индивидуальных прав человека, мы стали забывать, что человек, как

говорил Аристотель, по природе своей существо … общественное. … Нам нужна сейчас такая корректировка либерально-индивидуалистического подхода к правопониманию, которая привнесла бы в само понятие права идеи солидаризма. То есть нужна правовая теория, синтезирующая в рамках понятия права идеи индивидуальной свободы и социальной солидарности. Потому что и то, и другое – это имманентные составляющие сути человека, а значит, и сути права». Он напомнил, что для русской философии «характерно стремление соединить идею абстрактного, обезличенного формально-правового равенства с … идеей ответственности каждого не только за себя, но и за других, – стремление … согласовать в рамках понятия права разум и дух, свободу и милосердие, право и правду, индивидуальное и социальные начала». Поэтому вполне естественно, что подход, основанный на балансе индивидуального и общественного, лежит в основе российской конституционной идеологии.

THE ROLE OF THE CONSTITUTIONAL COURT IN OBJECTIFICATION OF THE RUSSIAN CONSTITUTIONAL IDEOLOGY

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HEAD OF THE SECRETARIAT
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Article 13 of the Constitution of the Russian Federation explicitly stipulates that political diversity shall be recognised in the Russian Federation, no ideology shall be proclaimed as the State or obligatory one. The genesis of this norm is understandable: it is known that in the Soviet period of our history the communist ideology was established as the State one, which for many years had a negative impact on the state of freedom of opinion and speech in our society. Therefore, the constitutional legislature of Russia has taken measures to ensure that the supremacy of any ideology, which serves as the basis for the prohibition of other opinions, for the suppression of dissent, would not been recurred.

This norm, however, shall be perceived dialectically. It means, of course, that no one can impose a system of moral, religious, aesthetic and philosophical views and ideas on society and each of its individual members, in which people's attitudes to reality are realised and evaluated. But it does not imply that there is no system of values being basic for the society.

Such values do exist, and they are enshrined in the Constitution of the Russian Federation. The Constitution of the Russian Federation has a special chapter "Fundamentals of the Constitutional Order" (this is the first chapter of the Constitution). The provisions thereof have a priority in interpreting any other provisions of the Constitution of the Russian Federation. Therein, as well as in several provisions of the second chapter of the Constitution "Human and Citizen Rights and Freedoms", the constitutional ideology of the Russian Federation is expressed in a concentrated form. Moreover, these principles are not allowed to be revised within the framework of the current Constitution – to change the provisions of chapters of the first and second, a new Constitution must be adopted. This, of course, imposes on the Constitutional Court a high responsibility for their interpretation, that is, for the correct objectification of constitutional ideology.

What is the difference between the constitutional ideology and that State or obligatory ideology, the establishment of which is prohibited?

First, it does not imply interference in the personal sphere of a person. A person can adhere to any ideological views. At the same time, it is necessary to make a reservation that actions aimed at incitement of hatred or enmity are prohibited in Russia, as well as for humiliating the dignity of a person or a group of persons on grounds of gender, race, nationality, language, origin, attitude to religion, belonging to a social group. But these are exactly the public actions that we are talking about, including those committed using media or the Internet. The Constitutional Court has repeatedly confirmed the constitutionality of the prohibition of such actions and the constitutionality of responsibility for committing them. Also, under the direct stipulation in the Constitution, creation and activities of public associations whose goals or actions are aimed at violent change of the foundations of the constitutional system and violation of the integrity of the Russian Federation, undermining the security of the State, creation of armed formations, and incitement of social, racial, national and religious discord are prohibited.

Secondly, the constitutional ideology is addressed primarily to the State itself and directly imposes imperative obligations thereon. To some extent, this is a system of the State self-restraint in the interests of human and society. Of course, the constitutional ideology is transmitted into legislative and other legal norms, which oblige other subjects of legal relations, and through these norms – into law-enforcement practice. But in its original form it is precisely the criterion for the activity, including the rule-making, of the State itself.

Thirdly, the constitutional ideology is expressed in the constitutional and legal categories. These are the rules of the highest level and universal significance ensured by the State, preeminently by the judiciary. And the main role in their enforcement is carried out by the Constitutional Court, as it relates current normative regulation thereto.

Fourthly, the constitutional ideology of Russia corresponds to the modern standards of a democratic law-governed social secular state. It assumes that the State must follow these standards. It is not, however, a question of blindly following all those interpretations of these standards that are proposed, for example, by interstate bodies on human rights. At the 3rd Congress of the Asian Association of Constitutional Courts and Equivalent Institutions, there was presented the Russian experience of establishing a balance between the tendencies towards the universalisation of the concept of what the fundamental human rights in the world should be, on the one hand, and the constitutional legal order reflecting the constitutional identity of a specific country, on the other. In the context of the theme of today's Symposium, I would like to emphasise that the constitutional identity of a country is not a product of some specially developed ideology, but a sociocultural givenness historically formed in a natural way. And it is it that influences over the constitutional ideology, but not the constitutional ideology – over it.

Fifthly, the already mentioned ideological and related political diversity, as well as the secular nature of the State, which are directly enshrined in the Constitution, is an important element of the constitutional ideology of Russia. That is, if something was imposed on the society as an obligatory world perception, it would not correspond to the constitutional ideology itself.

An important question is whether the constitutional principles in conjunction are synonymous with constitutional ideology, or whether some principles lie beyond its limits. It seems that the criterion for classifying constitutional principles in the sphere of constitutional ideology is their definition of relationships on the lines "State – society", "State – human" and to some extent "human – society" and "human – human". However, there are principles that reflect the organisation of the State power itself (for example, the principle of separation of powers or the principles of federalism) or the hierarchy of sources of law (for example, the supreme legal force of the Constitution). It is unlikely that they can be attributed to the sphere of constitutional ideology. But the line here is very subtle: for example, the principle according to which the bearer of sovereignty and the only source of power in the Russian Federation is its multinational people (Article 3 of the Constitution of Russia), by virtue of its rich content, goes beyond the organisational one and is one of the fundamental ideological foundations for the functioning of the Russian State.

In what way does the Constitutional Court objectify constitutional ideology of Russia?

Firstly, it applies the constitutional principles expressed directly in the Constitution. This is an immanent part the Constitutional Court's activity. Application of the principles containing constitutional ideology to an issue under consideration allows the Constitutional Court to elaborate a legal position and resolve the issue of constitutionality or unconstitutionality of a legal act.

I shall list the most important and the most frequently applied by the Constitutional Court elements of constitutional ideology of the Russian Federation directly expressed in the Constitution of the Russian Federation. First of all, these are constitutional characteristics of the Russian Federation as a law-governed and social state. They often serve as a straightforward legal ground for the Constitutional Court to adopt certain decisions. With that the category a "law-governed state" has been *de facto* transformed into the principle of the rule of law. The notion of a "social state" is being used by the Constitutional Court in its reasoning even beyond the sphere of realisation of social constitutional rights. In the meantime the characteristic of Russia as a democratic state is usually being realised via the principle of appurtenance of public power to the people which is also enshrined in the Constitution.

Moreover, these are the principles of: the supreme value of human rights and freedoms and aiming of the sense, content and application of laws, activities of the legislature, the executive and local self-governance to implementation of rights and

freedoms; inalienability of fundamental human rights and freedoms and their belonging to everyone from the moment of birth; impermissibility of violation of human rights and freedoms while realising human rights and freedoms of the others; equality of rights and freedoms and equality of realisation thereof; freedom of entrepreneurship; recognition and protection of private, state, local and other forms of property. This listing of the constitutional ideology principles of the Russian Federation, of course, is not exhaustive.

Secondly, the Constitutional Court reveals such constitutional principles which are not explicitly stipulated in the Constitution but rather exist therein implicitly. A bigger part thereof belongs to the sphere of constitutional ideology. These revealed constitutional principles include, in particular, humanism, justice, security of mutual trust in the relationship between an individual and public authority, legal certainty, and balance of constitutional values. These are the most significant and universal principles revealed by the Constitutional Court. They *de facto* are the basis for the assessment by the Constitutional Court of any contested provision.

It is of principle importance that the Constitutional Court does not "invent" new constitutional principles but reveals them. The Court does not claim and, as it seems, cannot claim that this is the Court itself which creates constitutional ideology. Constitutional ideology in its entirety – both explicitly and implicitly – is contained in the Constitution itself. Sometimes the implicit principles being a part of the later can be identified by the usual means of interpreting its text. However, it is always necessary to proceed from the spiritual and cultural principles of the society, since it was the will of the people which inspired the life of the Constitution.

The guideline of all the practice of the Constitutional Court are the words of the Constitutional Preamble that the multinational people of the Russian Federation adopted the Constitution revering the memory of ancestors who have passed on to us their love for the Fatherland and faith in good and justice, striving to ensure the well-being and prosperity of Russia, proceeding from the responsibility for our Motherland before present and future generations. The argumentation of the Constitutional Court within the last years more often uses references to the Preamble, where the essence of the aspirations and goals of the people associated with the adoption of the Constitution are expressed the most vividly and emotionally.

And of course, when objectifying constitutional ideology the Constitutional Court cannot but adhere to possible social impact of its position. It has to "listen to the pulse" of the people's will. In this aspect of its activity the Court is less free than when deciding on specific issues, where the Court is not guided by public opinion. For example, on the specific issue of the permissibility of death penalty in Russia, the Constitutional Court was not afraid to say that the country had a constitutional legal regime according to which, with regard to international legal tendency and the obligations assumed by the Russian Federation, an irreversible process aimed at abolishing death penalty is going on, and, therefore, the resumption of death penalty is impossible. At the same time, the

predominant part of the Russian society is in favour of death penalty. The criticism of our decision was pronounced, but it was not a blow to the reputation of the Constitutional Court.

If, however, the body of constitutional justice makes mistakes, revealing as an implicit element of the constitutional ideology notions which will not be perceived as such by the people, this may sooner or later lead to a loss of social trust thereto. What is more, the principle of the Court's independence will not be a barrier from such distrust. Therefore, in some cases it is preferable to refrain from objectification of the elements of constitutional ideology where it is not certain that their understanding by the body of constitutional justice will reflect public aspirations.

In conclusion I would like to address such an important element of Russian constitutional ideology as the principle of balance of constitutional values. It has different emanations – balance of private and public interests, balance of rights and obligations, balance of rights and lawful interests of different persons, impermissibility of abuse of law, balance of dispositive and imperative methods of legal regulation, balance of interests of the Russian Federation and the constituent entities thereof *etc.*

The balance of constitutional values is the fundamental principle of Russia's constitutional ideology and, at the same time, this is the main methodological tool of the Constitutional Court's activity. If one asks what the core of the Constitutional Court's activity is, the answer would be – the balance of constitutional values.

There is a possible question – why not human rights, but the balance of values exactly? Nobody denies the importance of constitutional rights and protection thereof. However, often in legal relations the rights and interests of one person are in opposition to the rights and interests of another. If the other side of legal relations is the public power, it would seem that the former should be prevailing when establishing a balance between the rights of a person and public interests. But even in such a situation everything is ambiguous. As, for example, demonstrated by the decisions of the Constitutional Court on tax issues, on the issue of the order of priorities in execution of the enterprise's liabilities in case of a lack of funds, one cannot ignore that on the other side – where it seems to be about public interests – there are people with their needs too, those, whose needs are covered by the budget. That is, in the case of a conflict of public and private interests, the establishment of a balance of constitutional values requires some elaboration, which is not a linear one.

In his lecture "the Essence of Law" delivered at the St. Petersburg International Legal Forum the President of the Constitutional Court of the Russian Federation, professor Valery Zorkin stressed, in particular, that "[f]ascinated by protection of individual human rights, we began to forget that man, as Aristotle said, is by nature is… a social creature… We need now such an adjustment of the liberal-individualistic approach to legal understanding, which would introduce the idea of solidarity into the very notion of law. We need a legal theory that synthesises within the framework of the notion of the law the ideas of individual freedom and social solidarity, because they both are the immanent

components of the essence of man and, hence, the essence of law". He reminded that the Russian philosophy is characterised by the "strive to unite the idea of abstract, impersonal formal legal equality with the idea… about everyone's responsibility not only for themselves, but also for others. The aspiration… to harmonise within the concept of law the mind and spirit, freedom and mercy, right and truth, individual and social principles". That is why it is natural that the approach based on the balance of individual and social lies in the foundation of the Russian constitutional ideology.

SESSION II

"CONSTITUTIONAL COURT AND PRINCIPLES OF DEMOCRACY"

CHAIRPERSON: TURKEY

REPUBLIC OF AZERBAIJAN

Constitution of Republic of Azerbaijan was adopted on 1995 through referendum, nation-wide voting. It proclaimed Azerbaijan as democratic, secular and social state governed by the rule of law. After acceding the Council of Europe, Azerbaijan government undertook some commitments regarding constitutional reforms and as a result of successful implementation of such commitments there were held the constitutional referendum in 2002 and every individual living in Azerbaijan obtained the right to apply directly to the Constitutional Court. This right was also granted to Ombudsman and courts. It should be noted that the Venice Commission of the Council of Europe withheld very useful assistance to Azerbaijan as to drawing up of legal procedure of submission of individual complaints and their examination in Constitutional Court.

The Constitutional Court is a real instrument executing the supremacy of constitution and the values envisaged therein. And the constitutional complaint is very effective tool enjoyed by individuals to restore their violated constitutional rights and freedom. The last constitutional modifications and amendments adopted as a result of referendum and alongside with other legal aspects enlarged the list of constitutional rights as regards to the rights to private life and introduced such important notion as the principle of proportionality. It should be mentioned that this principle is very often applied by European Court of Human Rights.

Namely based on this principle, the Constitutional Court of Azerbaijan adopted in this year a very important decisions as regards to the ensuring made important constitutional freedom and freedom of movement. The citizen of United Kingdom, Mr. Clark Gordon Morris applied to the Constitutional Court of Azerbaijan with complaint against normative-legal act providing for a ban to leave the country without full payment of alimonies. This gentleman got married in Azerbaijan, then divorced and his contract was canceled by an oil company where he worked.

The district court imposed the sums of alimonies to be paid by Clark Gordon Morris. The Department responsible for exception of decisions asked the court to impose a ban to him to leave the country unless the full execution of the court decision. Thus, the applicant was obliged to stay in Azerbaijan. But after several months his labor visa expired and moreover he had no money to pay for the alimonies. However, he explained the readiness to pay alimonies and he can leave the country and go to

UK where he had his property.

Taking into account the urgency of a case as well as the amount of damage that can caused as a result of spending a times by means of exhaustion of all remedies before applying to the Constitutional Court, this person applied to Constitutional Court and asked to cancel the decision of district court and to abolish the normative legal act which the court ruling was based upon. The Constitutional Court of Azerbaijan in its decision recognized the right to freedom of movement as one of the fundamental rights guaranteed by the Constitution of Azerbaijan. At the same time, the Court challenged the normative act was not canceled since it was recognized as corresponding to Constitution. The point which the Constitutional Court substantiated its position was the principle of proportionality.

Namely this principle that was introduced into constitution gave an opportunity to Court to state in its decision that the measures of aims imposed by state bodies including district court was not proportional to constitutional rights and freedoms. Therefore, assuming the readiness of compliance to achieve the cancelation of district court in Court of Appeal, the Constitutional Court addressed to all courts which have been involved and will be involved in examination of that case to inquire very carefully the restriction of constitutional right paying importance to the principle of proportionality.

Dear Ladies and Gentlemen,

Since 1998, the plan of Constitutional Court of Azerbaijan adopted 360 decisions and 38 of these decisions were adopted on this basis of individual complaints. The direct access of people to Constitutional Court proved to become very effective mean of restoration of constitutional rights and freedoms and as a result of ensuring of principles envisaged in Basic Law.

THE CONSTITUTIONAL COUNCIL AS THE GUARDIAN OF THE CONSTITUTIONAL VALUES IN THE REPUBLIC OF KAZAKHSTAN

Chairman
of the Constitutional Council
of the Republic of Kazakhstan
Igor Rogov

Dear presiding and participants of the symposium!

Let me on behalf of the Constitutional Council of the Republic of Kazakhstan to greet you. Also, I would like to congratulate the Constitutional Court of Indonesia on its 14th anniversary and express gratitude to the organizers of the forum for the invitation and excellent organization of work.

Today's symposium is devoted to an actual topic. In the modern world, the ideological diversity and democratic nature of governance consist of the basic constitutional values of most countries that claim to be a democratic and legal state. They are enshrined in the constitutions of many countries, which establish the duty of the state to respect, protect and support extraction.

Article 1 of the Constitution of Kazakhstan states that ideological and political diversities are recognized in the Republic of Kazakhstan.

Recognition of ideological and political diversities presupposes freedom of choice and confession to citizens of certain values, but at the same time does not interfere with their voluntary association on the basis of common views and ideas. We can talk about a certain degree of conventionality, about the need for ideology or a national idea that reflects the interests of the overwhelming majority of citizens. I believe that the central link that accumulates all these components of the national idea and ideology is the constitution because it determines the main directions of the society movement and the states that allow to answer the question: "Where are we going? What is our ultimate goal? And how can we achieve it? ".

First, the Basic Law determines the principles on which the nation is built. Given the universally recognized human values and the requirements of fundamental international documents, the constitution provides for such fundamental principles as the supreme value of the human is the person, the equality of people, the prohibition of discrimination against anyone for any motive, the inviolability of property, pluralism of opinions, the inalienability of natural rights and freedoms, sovereignty of the citizens and others.

Secondly, the constitution clearly sets out the goals to which the nation is moving. For example, article 1, paragraph 1, of the Basic Law of Kazakhstan stipulates that the Republic shall establish itself as a democratic, secular, legal and social state whose highest values are the person, his life, rights and freedoms.

Third, the Constitution determines how to achieve these high goals. In Kazakhstan, they are directly indicated by the fundamental principles of the Republic's activity, stipulated in paragraph 2 of Article 1 of the Constitution, according to which the state policy is being created and implemented, and the main directions of functioning of sovereign Kazakhstan are formed: public consent and political stability, economic development for the benefit of the whole people, Kazakhstan's patriotism , The solution of the most important issues of state life by democratic methods, including voting at the republican Referendum or in Parliament.

The bodies of constitutional justice play an important role in protecting and realizing constitutional values. Through the constitutional control, they act as their "custodians" and are an effective guarantor of the functioning of the country's legislation and ultimately of law enforcement, within constitutional and legal matter.

In the practice of the Constitutional Council of Kazakhstan, a number of appeals have been related to the subject of discussions of this symposium.

In 2002, on the appeal of the Head of State, the Constitutional Council considered the Law on Political Parties adopted by the Parliament for compliance with the Constitution. In its decision, the Constitutional Council noted that the right to freedom of association in political parties is a collective right that is exercised by citizens of the Republic jointly and at the personal choice of each of them. Participation in the activities of political parties, as well as activities of political parties, should not violate the human rights and freedoms guaranteed by the Constitution. Equally, like membership in any political party, it does not relieve a citizen of the Republic from performing constitutional duties.

The Constitutional Council has repeatedly considered the issues of legislative regulation of the status of religions and the right to freedom of religion. As noted in his decisions, the secular nature of the state, as provided by Article 1 (1) of the Constitution, implies the separation of religion from the state. According to Article 14 of the Constitution, all are equal before the law, which, in the context of the subject of research, implies the equality of all religions and religious associations before the law, preventing any

religions and religious associations from giving any advantages to others and prohibiting discrimination based on religion, beliefs or for any other reasons.

As the society develops further, in the implementation of international legal norms and the purification of the national legal system from the rudiments of the totalitarian past by eliminating the inevitable inconsistencies and contradictions in the legislation, , Kazakhstan pursues a policy of gradual liberalization and democratization of the mechanism of state administration and strengthening of guarantees for the protection of rights and freedoms of citizens as the supreme value of the state.

To this end, in our country at the beginning of this year, the next constitutional reform was carried out, the essence of which is the redistribution of certain powers of the Head of State between the Parliament and the Government with the strengthening of the independence and responsibility of the latter, the democratization of the political system as a whole, and the modernization of instruments for protecting the foundations of the constitutional system.

Some of the novels concern the activities of the Constitutional Council and affect the issues discussed today. If earlier the only subject on the initiative of which the so-called subsequent constitutional control could be carried out was a court, now this right is granted to the President of the Republic, who in the interests of protecting human and civil rights and freedoms, ensuring national security, sovereignty and integrity of the state, sends appeals to The Constitutional Council on consideration of the law or other legal act that has come into force for compliance with the Constitution of the Republic.

This innovation is an effective mean for ensuring compliance with the current legal framework of the Constitution of the Republic of Kazakhstan and is mainly aimed at protecting human and civil rights and freedoms.

The competence of the Constitutional Council is supplemented by one more authority - to issue a conclusion on the conformity of the proposed amendments and additions to the Constitution to the requirements specified in clause 2 of Article 91 of the Basic Law, before they are submitted to a republican referendum or to the Parliament. This norm establishes a list of especially protected constitutional values that can not be changed in any cases, even by revising the Basic Law itself. These include: the independence of the state, the unitarity and territorial integrity of the Republic, the form of its governance, as well as the aforementioned fundamental principles of the Republic's activities laid down by the Founder of Independent Kazakhstan, the First President of the Republic of Kazakhstan and his status.

To ensure the inviolability of these constitutional provisions in the conduct of constitutional reforms in the future, a mandatory constitutional review mechanism has been introduced. This is due to the fact that if there are structures at the legislative and subordinate levels (the prosecutor's office, judicial authorities, etc.) that follow the observance of the above constitutional principles in the law-making and law enforcement

process, then there was no such special mechanism at the constitutional level. Now it is entrusted to the Constitutional Council, which will give an opinion on whether the amendments to the Constitution of the country do not infringe on the values noted. Such experience is known to exist in many foreign countries.

At the initiative of the Head of State, Article 73 (4) of the Constitution was excluded, which provided for the right of the President of the Republic to object to the decision of the Constitutional Council and regulated the procedure and consequences of their consideration. The adopted decision aimed at strengthening the Constitutional Council, increases the responsibility and tightens the requirements for the activity of the body of constitutional control. As many foreign experts note, with these constitutional amendments, the Constitutional Council of Kazakhstan is now, by its competence, equal to the constitutional courts of a number of European countries.

I think that this conference will help all of us to better understand the existing problems, exchange positive experiences and outline ways of further work to ensure the inviolability of the fundamental constitutional values of our countries.

Thank you for attention.

IMPEACHMENT TRIALS OF THE PRESIDENT IN KOREA

Jinsung LEE
JUSTICE, CONSTITUTIONAL COURT OF KOREA

1. A review on the impeachment procedures against the President

Modern democracy faces a lot of challenges all over the world. Some of the challenges come from foreign states, but most of them are brought about by the internal problems of a state. These are the repression and trampling of basic human rights, the misuse of power by the very top of power, and the corruption of high-ranking officials. They are typical examples of the violations of constitutional obligations. In order to prevent high level officials from violating constitutional or legal duties and to force them out of their public office when violated, most of the countries have designed their own constitutional impeachment systems suited to their needs and social and political situations.

In some bicameral parliamentary countries, once the House of Representatives passes a motion for impeachment, the Senate has the power to make a decision on impeachment. Other bicameral countries and some unicameral countries have a system where the Constitutional Court or equivalent institution has to adjudicate via an impeachment trial after the Parliament's motion for impeachment. The former system has a tendency to concentrate on the political issues in the adjudication procedure. On the contrary, the latter system can afford to look into the constitutional or legal issues on impeachment trial rather than merely focusing on the political issues.

Korea has the latter system. Article 65 of the Korean constitution states that (1) In case the President … has violated the Constitution or other Acts in the performance of official duties, the National Assembly (NA) may pass a motion of impeachment. (2) A motion for the impeachment of the President shall be proposed by a majority of the total members of the NA and approved by two thirds or more of the total members of the NA. The Korean Constitutional Court has an exclusive jurisdiction over the impeachment trial. According to the Constitution, the Court has focused on constitutional or legal issues in the course of the impeachment trial.

2. Impeachment process of former President Park in 2016–2017

A scandal surrounding former President Park erupted and was revealed by the media in July 2016. At her first apology to the people, Park admitted her reliance on a long time shadowy confidante Choi in searching for advice regarding Park's public speeches. But it was not the end of the scandal, but the start of further revelations. Park allowed her to meddle in state affairs; policy making and governmental personnel appointments by way of getting in touch with her in confidence and handing over presidential papers. Also they were at the center of the scandal over corruption and influence-peddling. Especially, Park abused her power to force some conglomerates to give away seventy million dollars in order to establish two foundations for pursuing Choi's personal gains.

As the suspicious scandal became rapidly widespread, more than ten million people took to the streets all over the country and continued to hold massive candlelit rallies for seventeen weeks in a row since last October. At first, they demanded Park to step down from her office, but after her repeated denials, people asked the NA members to impeach and punish her criminally.

The NA voted in favor of the motion to impeach Park on 9th December 2016. The motion was passed by an overwhelming number of votes (234 votes for impeachment among the total 300 votes). Even though the ruling party had 128 members in NA, not less than half of the ruling party members agreed to impeach her.

On the one hand, people's candlelit rallies resulted in the approval of the motion in NA and triggering the impeachment trial according to the constitutional system. That was an effective way to collect and integrate the people's opinions. On the other hand, millions of people supporting strongly President Park also held rallies against the impeachment. Even though the two parties held rallies at the same time, there was no arrest or casualties in the course of four months long rallies until the judgment was made by the Constitutional Court. It is hardly necessary to reiterate the importance of the freedom of holding rallies and demonstrations as one of the basic rights in the Constitution.

3. Issues and rulings of the impeachment trial in 2017

According to the Korean constitution, President Park was suspended from exercising her power just after the motion for impeachment had been passed. Even though the Prime Minister took the position of acting president, the Court was aware of the need to avoid delays in order to minimize the risks of a vacuum at the heart of managing state affairs. After three pre-trial proceedings and seventeen oral proceedings for three months, on March 10 the Court upheld the parliamentary impeachment, making Park the first Korean leader to ever be removed from her office. This landmark Court decision was issued unanimously.

The Court said that she neglected her presidential duty by leaking documents containing confidential information … She also infringed on the property rights and managerial freedom of private companies by forcing them to give away a vast amount of

money in order to establish two foundations for her confidante's profit-making activities. Her wrongdoings are an abuse of her power and constitute the crucial violations of the constitutional and legal duties of carrying out public interests as the president.

The Court also noted; she had no will to defend the Constitution and her violation of the Constitution and laws constitute a betrayal of the people's trust and cannot be tolerated by the people. She impaired the spirit of democracy and the rule of law. Taking the negative impacts and seriousness of her wrongdoings into consideration, the benefits of ousting her greatly outweighed the benefits of keeping her presidential term.

But the Court rejected other charges, including abusing her power to remove public officers and a newspaper company president from their offices, citing a lack of evidence.

Also regarding her alleged violation of duty of good faith while the ferry Sewol was sinking in 2014, which resulted in more than 300 passengers' deaths, the Court said her failure in duty of good faith was not the object matter of judicial judgments. In contrast, two justices including me concluded that it should be the object of judicial review and she seriously violated her duty. In concurring opinion, they said that if she had made reasonable efforts at the moment of emergency, she would have been able to grasp the seriousness of the tragedy earlier and properly do what she had to do as a national leader.

4. A comparison of two presidential impeachment cases in Korea

Former President Park was the first female president and the first one removed from office by the impeachment trial in Korean history. She has been put in detention and tried on eighteen criminal charges in the criminal court.

So thus far, there have been two presidential impeachment trials: the first was against the late President Roh Moo-hyun in 2004. It is worthy of notice that we compare these two cases in the rulings, because the first one was rejected, while the second was upheld.

The ruling of the first decision was that Roh violated the constitutional duty to maintain political neutrality concerning the general election, and breached the duty to protect the Constitution through expressing his dissatisfaction towards the decision of the National Election Commission. The Court said the specific violations by Roh could not be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order.

The violation by Roh didn't have a significant meaning in terms of the protection of the Constitution and such violation could not be deemed to evidence the betrayal of public trust on the part of the President to the extent that the trust should be deprived of. There is no valid ground justifying removal of the President from office.

Now I can say that the Court has declared a standard of gravity on the constitutional violations by the president in impeachment trials.

In the case of Roh, the Court at first acknowledged the violations of the president's duty, but his violations could not fall short of the extent to the grave violation of the constitution because those violations were not estimated as a crucial threat to the constitutional order.

In the case of Park, the court said that her violations constitute an abuse of her power and she had no will to defend the Constitution. The Court concluded that her wrongdoing was so grave that the people couldn't tolerate it in view of the constitutional order and she betrayed the people's trust. It means that the Court measured the extent of constitutional violations on the basis of the standard of gravity.

It is impossible and unnecessary to take all the presidential wrongdoings into consideration in impeachment trials. Therefore, the Court established a rule that justices should focus on the constitutional estimation of the violation of presidential duties; whether the violation is deemed as a threat to the basic order of free democracy, and whether the president stands against the constitutional order.

5. A lesson to the coming presidents

The Court decision brought a dramatic end to Park's presidential term and she was removed one year earlier from her office in disgrace.

During the impeachment trial period, the peaceful rallies provided a forum for the people to realize the democratic system and the rule of law in Korea. Even though the Korean people suffered a lot of political and social chaos, the period starting from the people's nonviolent protests and ending in the final judgment by the Constitutional Court defined in era in the history of the Korean democracy. The most significant meaning of this process is that the result was achieved not by violent and unlawful means, but by the national sovereignty owner's eagerness to carry out the democratic ideal in the true sense. All the people respected and agreed on following the judicial procedure as laid down in the Constitution.

The direct effect of this judgment is to force the impeached president out of office. Furthermore the more important effect to the coming presidents is to arouse awareness and give a lesson on respecting the constitution and realizing the seriousness of the violation of presidential obligations.

Over the course of the impeachment trial, every justice of the Korean Constitutional Court did his/her best to fulfill the role as a guardian of the constitutional order and was entirely independent from any opinions of the surging crowds of pros and cons on impeachment, as every judge in the world would have done. Modern democracy has faced a lot of challenges, but in the end, the fundamental principles of constitutional order have always prevailed; the sovereignty vested in the people and the rule of law.

Thank you.

CONSTITUTIONAL COURTS AND THE PRINCIPLES OF DEMOCRACY. *THE INDEPENDENCE OF JUSTICE*

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I. With regard to the legal enshrining and the forms of protection of the principle of the independence of justice, according to the provisions of Article 124 of the Romanian Constitution, justice is rendered in the name of the law, it is unique, impartial and equal for all citizens, and judges are independent and subject only to the law**.**

Under Chapter VI of Title III – Public authorities – of the Romanian Constitution, the components of the judiciary are: *the courts of law*, with the constitutional mission to achieve justice, under Article 126 (1) of the Basic Law, i.e. to settle, by applying the law, disputes between legal subjects with regard to the existence, scope and exercise of their subjective rights, *the Public Ministry*, representing the general interests of the society and safeguarding the legal order, within its judicial activity, under Article 131 (1) of the Constitution, as well as *the Superior Council of Magistracy*, fulfilling the role of guarantor for the independence of the justice, under the constitutional norm in Article 133 (1).

The safeguards for the independence of justice are covered by the statute of judges and prosecutors (magistrates), which is constitutionally enshrined. According to Article 125 of the Basic Law, the judges appointed by the President of Romania are irremovable; appointment proposals, as well as the promotion, transfer and sanctions applied to judges fall within the competence of the Superior Council of Magistracy, and the office of judge is incompatible with any other public or private office, except for teaching positions within the higher education system. According to Article 132 of the Constitution, public prosecutors carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice and the office of public prosecutor is incompatible with any other public or private office, except for teaching positions in the higher education system.

In order to achieve criminal justice, an important role is played by the criminal prosecution bodies, which, according to Article 55 of the Criminal Procedure Code, are: the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies. Public prosecutors are organised in public prosecutor's offices attached to courts of law and they carry out their activity within the Public Ministry. The duties of the criminal investigation bodies of the judicial police are fulfilled by specialised staff of the Ministry of Administration and Interior specifically appointed under the law, and the duties of the special criminal investigation bodies are fulfilled by officers appointed under the law. The criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out their criminal prosecution activity under the direction and supervision of the prosecutor. According to the law, these bodies are the only ones competent to carry out the criminal prosecution, so they are the only ones legally authorised to collect and administer evidence in this stage of the criminal trial.

II. Next, we shall present two relevant decisions **issued by the Constitutional Court of Romania**, during its recent activity, following a series of exceptions of unconstitutionality raised by citizens, in cases where the principle of the independence of justice was put into question, with direct consequences on a series of fundamental rights safeguarded by the Constitution, i.e. free access to justice, the right to personal, family and private life and the right to the secrecy of correspondence.

Relevant constitutional provisions:

- Article 21 (1) to (3): *Free access to justice*

(1) Every person is entitled to address to justice the courts in order to defend his rights, freedoms and legitimate interests.

(2) The exercise of this right shall not be restricted by any law.

(3) Parties shall be entitled to a fair trial and to have their cases solved within a reasonable term.

- Article 26: *Personal, family and private life*

(1) Public authorities shall respect and protect personal, family and private life.

(2) All natural persons have the right to freely dispose of themselves unless they thereby infringe upon the rights and freedoms of others, on public order, or morals.

- Article 28: *Secrecy of correspondence*

Secrecy of letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.

- Article 53: *Restriction on the exercise of certain rights or freedoms*

(1) The exercise of certain rights or freedoms may only be restricted by law and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without prejudice to the existence of such right or freedom.

- Article 124: *Administration of justice*

(1) Justice shall be rendered in the name of the law.

(2) Justice shall be a single one, impartial, and equal for all.

(3) Judges are independent and subject only to the law.

The new Romanian Criminal Procedure Code, which entered into force in February 2014, brought changes to the content of the principles underlying the Romanian criminal procedural law, by introducing new institutions or amending the ones already existing. For the legal subjects in the criminal trial (parties, main litigants, prosecutor), as well as for the courts of law competent to settle the requests, pleas, challenges lodged by them, its entry into force was a real challenge, on the one hand, from the perspective of safeguarding the fundamental rights and freedoms, and, on the other hand, from the perspective of adapting themselves to the new procedural norms. With regard to evidence, means of proof and evidentiary process, the Criminal Procedure Code regulates the special surveillance or investigation methods, including: the interception of conversations and communications, access to a computer system, video, audio or photo surveillance, tracking or tracing through technical devices, getting telephone records, retention, remittance or search of mail items, request and receipt, under the law, of financial trading data, as well as of personal financial data, the use of undercover investigators, the ascertaining of a corruption offence or the signing of a convention, controlled delivery or the identification of the subscriber, owner or user of a telecommunication system or computer access point. What is relevant for our analysis here is the category of special methods involving the interception of conversations and communications, the access to a computer system,

video, audio or photo surveillance, tracking or tracing through technical devices, as well as getting telephone records. According to Article 139 (1) of the Criminal Procedure Code, technical surveillance is ordered by the Judge for Rights and Liberties, when the conditions set by law are cumulatively met for certain offences. The procedure for the issuance of a technical surveillance warrant is provided for in Article 140 of the Criminal Procedure Code. Enforcement of a technical surveillance warrant, as provided under Article 142 (1) of the Criminal Procedure Code, is conducted by the prosecutor, who can also order that it be carried out by the criminal investigation body or by trained personnel working in the police or by ***other specialized State bodies***. Complementarily, according to paragraph (2) of Article 142, the providers of public electronic communication networks or the providers of electronic communication services available to the public or any type of communication or financial services must cooperate with the criminal prosecution bodies, with the authorities listed under Article 142 (1) respectively, within their competence, for the enforcement of electronic surveillance warrants.

By analysing Article 142 (1) of the Criminal Procedure Code, through **Decision no. 51 of 16 February 2016***, published in the Official Gazette of Romania, Part I, no. 190 of 14 March 2016*, the Court found that the acts carried out by the bodies under Article 142 (1), second sentence, of the Criminal Procedure Code were part of the evidentiary process taken as the basis for reporting on technical surveillance activities, which constituted a means of proof. For this reason, only criminal prosecution bodies may take part in such activities, as specifically mentioned in Article 55 (1) of the Criminal Procedure Code, namely: the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies. The Court held that the enforcement of a technical surveillance warrant, as provided for under Article 142 (1) of the Criminal Procedure Code, was achieved by procedural acts. In other words, Article 142 (1) of the Criminal Procedure Code does not cover the technical activities, which are laid down in Article 142 (2) of the Criminal Procedure Code, indicating the persons bound to cooperate with the criminal investigation bodies in the enforcement of a technical surveillance warrant, namely the providers of public electronic communication networks or the providers of electronic communication services available to the public or any type of communication or financial services.

In this context, the Court noted that the legislator has worded Article 142 (1) of the Criminal Procedure Code so as to include, apart from the prosecutor and the criminal investigation body, also the trained personnel working in the police and ***other specialized State bodies***. These specialised State bodies have not been defined, either explicitly or indirectly, in the Code of Criminal Procedure. Likewise, the impugned norm does not provide for a specific scope to their activity, although, in Romania, in compliance with a series of special regulations, there are numerous bodies specialized in different fields, without, however, having any duties related to criminal investigation. Moreover, the Court considered that the regulation in this field was only possible by statutory law and not by lower ranking administrative regulations, adopted by other bodies instead of the legislative authority, which were characterized by a higher degree of instability or inaccessibility.

By referring to its constant case-law, the Constitutional Court essentially emphasized the need to observe the requirements of quality of domestic legislation, in that it must, in order to be compatible with the rule of law, meet the criteria of accessibility, precision and predictability. These requirements must be inherent to any enactment, all the more so to regulations which allow the public authorities to interfere with the intimate, family and private life and to have access to the correspondence of persons.

Taking into account these arguments and the intrusiveness of the technical surveillance measures, the Court found that it was imperative to have such carried out on the basis of a clear legislative framework that is precise and foreseeable for the person who is subject to this measure, just like for the criminal prosecution bodies and the courts of law. Otherwise, it would lead to the possibility of a discretionary/abusive action in violation of certain fundamental rights that are essential in a State governed by the rule of law: the respect for intimate, family and private life, and the secrecy of correspondence. It is widely accepted that the rights set forth in Article 26 and Article 28 of the Constitution are not absolute rights, yet restraints thereupon must be in compliance with Article 1 (5) of the Basic Law, which thus requires a high degree of precision in the terms and concepts used, given the nature of the fundamental rights affected by limitation. Consequently, the constitutional standard of protection for the intimate, family and private life and for the secrecy of correspondence requires that such limitation must be achieved through a regulatory framework that determines in a clear, precise and predictable manner which bodies shall be authorized to carry out operations that interfere with the sphere of constitutionally protected rights.

The Court therefore held that the legislator's choice was justified insofar as it concerned the technical surveillance warrant being enforced by the prosecutor and the criminal investigation bodies, which are judicial bodies according to Article 30 of the Criminal Procedure Code, and by trained officers working in the police, since these may have received the assent to act as judicial police under Article 55 (5) of the Criminal Procedure Code. Nevertheless, this option is not justified where it relates to "***other specialized State bodies***", without further specification anywhere in the Code of Criminal Procedure or in other special laws. For all these reasons, the Court upheld the exception of unconstitutionality and found that the phrase "***or by other specialised State bodies***" in Article 142 (1) of the Criminal Procedure Code was unconstitutional.

While carrying out its constitutional review, the Constitutional Court had to answer the following question: what lies behind the phrase "***other specialised State bodies***"? In Romania, after the fall of the Communist regime, the evidentiary processes taken as the basis for reporting on technical surveillance activities, which constituted a means of proof in the criminal proceedings, therefore the enforcement of the authorisation issued by the magistrate, was carried out by the Romanian Intelligence Service. This was possible despite the fact that there was no legal provision authorising this body to conduct such criminal procedural acts. In practice, the situation was justified by the fact that, by replacing the previous intelligence service – the Securitate – the Romanian Intelligence Service inherited the logistics necessary to conduct the interception of communications.

From the point of view of the "legal justification", there was a public claim about the existence of a decision of the Supreme Council of National Defence, designating the Romanian Intelligence Service as the national authority for communication interception. But this decision raised two major problems: first of all, it had been issued by a constitutional body, competent exclusively for the field of national safety and security, and, secondly, it had been classified as "top secret", therefore with an uncertain existence and with a content that was inaccessible to the public, including to judges and prosecutors. This was probably the reason for which the legislator, when it adopted the new Criminal Procedure Code, felt the need to create a legal framework in this field, by introducing the phrase "***other State bodies***", so vast and unpredictable, which made it be found as unconstitutional.

What would have been the situation if, instead of this phrase, the Romanian Intelligence Service had been expressly indicated by the criminal procedural norm as the body authorised to enforce the technical surveillance warrant? Would have such a norm resisted the constitutional review? The answer is obviously no. According to the law governing its organisation and functioning, the Romanian Intelligence Service does not have any powers in terms of criminal investigation or, as found by the Constitutional Court as well, the enforcement of the technical surveillance warrant is a component of the criminal investigation and not a strictly technical one. Intelligence services cannot have powers in the field of criminal investigations, as their field of activity is expressly delimited by law, i.e. to collect, verify and use the information necessary in order to find, prevent and fight any action that, according to the law, might pose a threat to Romania's national security.

In conclusion, we consider that, through the Constitutional Court's Decision no. 51 of 16 February 2016, Romania has clearly distanced itself from the Communist regulations and practices, when the intelligence services played a decisive role in the society and especially in the field of the criminal investigation, thus "paying" one of the last debts of the Romanian State to the rigors of the principle of the independence of justice, underlying a democratic State, governed by law and moral principles.

In the same field of the special surveillance or investigation methods, depending on the stage of the criminal prosecution where the technical surveillance measure is ordered, the capacity of the person subject to this measure is different. Thus, during the *in rem* criminal prosecution, the person subject to the technical surveillance measure has no capacity in the criminal file, as no criminal charge has been brought against him/her. During the *in personam* criminal prosecution, the person subject to technical surveillance can have the capacity of suspect in the criminal file, and, if the criminal action has been initiated, the person subject to technical surveillance can have the capacity of a person indicted in the criminal trial.

In this context, starting from the idea that, by the very ordering of the technical surveillance measures, the subject of these measures suffers a severe intrusion into his/her right to private life, the existence of a review of the legality of the technical surveillance

measure ordered is mandatory in compliance with the conditions set by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms related to access to a court for the purpose of safeguarding the right to private life.

However, it results from the interpretation of the provisions of the Criminal Procedure Code that any potential challenge referring to the legality of the technical surveillance measures can be lodged only by the person indicted (capacity obtained once the criminal action is initiated), while the other persons subject to technical surveillance are excluded from the right to challenge this measure. Or, it is precisely this hypothesis, where the persons subject to these measures do not acquire any capacity in the criminal trial, which is very frequent in the judiciary practice. Under these circumstances, the Court had to examine the extent to which the absence of a judicial review with regard to the technical surveillance measure observed the conditions referring to the restriction on the exercise of the right of access to justice.

Thus, through **Decision no. 244 of 6 April 2017**, *published in the Official Gazette of Romania, Part I, no. 529 of 6 July 2017,* the Court upheld the exception of unconstitutionality and found that the legislative solution provided for by the provisions of Article 145 of the Criminal Procedure Code, which did not allow for the legality of the measure of technical surveillance to be challenged by the person to which it applied, if the latter was not indicted, was unconstitutional. When arguing its solution, the Court held that that technical surveillance could be ordered during the criminal proceedings if the conditions referred to in Article 139 (1) and (2) of the Criminal Procedure Code were met, with regard to any person, irrespective of their capacity during the criminal proceedings. It results from the analysis of the constitutional and conventional provisions and from the analysis of the case-law of the Constitutional Court and of the European Court of Human Rights that, in what concerns the technical surveillance measures, which represent an intrusion into the private life of the persons subject to these measures, there must be an *a posteriori* review of the authorisation and enforcement of the technical surveillance. Thus, the person subject to technical surveillance must be able to exercise this review in order to verify the fulfilment of the conditions set by law for taking this measure, as well as the methods to enforce the technical surveillance warrant, procedure regulated by the provisions of Articles 142 to 144 of the Criminal Procedure Code. From this perspective, the *a posteriori* review in this field must refer to the analysis of the legality of the technical surveillance measure, irrespective if this review is carried out during the criminal trial or independent thereof. The review of the legality of the technical surveillance measure represents a guarantee of the right to private life, which outlines and, together with the other elements necessary and acknowledged at constitutional and conventional level, determines the existence of a proportionality between the measure ordered and its purpose, as well as its necessity in a democratic society.

Therefore, the Court found that the regulation of the way in which the legality of the technical surveillance measure could be challenged, by excluding the other persons, other than the person indicted, suspects or persons having no capacity in the criminal case, from the possibility to have access to a court of law competent to examine this aspect,

was unconstitutional, as it represented a violation of the provisions of Articles 26 and 53 of the Constitution, as well as of Articles 8 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Considering these essential elements from the perspective of the protection of the constitutional right to private life, the Court found that, besides the positive obligation to regulate a type of *a posteriori* review, that the person concerned might access in order to verify the fulfilment of the conditions and, implicitly, the legality of the technical surveillance, the legislator is also bound to regulate the procedure applicable to the preservation and/or destruction of the data intercepted through the enforcement of the challenged measure, as well as the procedure for granting compensation for the intrusion suffered.

III. In conclusion, we consider that by raising the exception of unconstitutionality, as a means of defence during a trial pending before a court of law, the citizen has the possibility to start the constitutional review of law and Government ordinance provisions – the main power of the Constitutional Court of Romania –, thus being the beneficiary of a jurisdictional guarantee aimed at ensuring the observance of the fundamental rights and freedoms enshrined by the Constitution. Therefore, the citizen acquires an essential role in the process of removing all flaws of unconstitutionality from the legislation and, implicitly, in the development of Romanian constitutional law.

SPEECH

by

H.E. Nurak Marpraneet

President of the Constitutional Court of the Kingdom of Thailand
on occasion for the Meeting of Secretary-Generals, the Meeting of the Board of Members of AACC, and the International Symposium on the Session of
"Constitutional Court and Principles of Democracy"
7 – 12 August 2017
Solo, Republic of Indonesia

Honourable Presidents of the Constitutional Courts and Equivalent Institutions in Asia;

Distinguished Participants;

Ladies and Gentlemen;

On behalf of the Constitutional Court of the Kingdom of Thailand, my delegation and I would like to express sincere thanks to the Constitutional Court of the Republic of Indonesia for kind invitation to the Meeting of Secretary-Generals, the Meeting of the Board of Members of AACC, and this International Symposium.

Ladies and Gentlemen;

I may start to give my presentation under the theme of this session on "**Constitutional Court and Principles of Democracy**," which can be divided into 3 parts as follows.

First : 'The Constitution and Principles of Democracy.'

Second : 'The Powers and Duties of the Constitutional Court and Principles of Democracy.'

Finally : 'The Roles of the Constitutional Court and its Guardian of Democracy.'

First of all, please let me talk about "**the Constitution and Principles of Democracy**." I am going to address about the principles of democracy under the Constitution of the Kingdom of Thailand, which currently paves various dimensions of democracy. That is to say, (1) Democratic form of government with the King as Head of State; (2) Sovereignty of the people; (3) Principle of social contract; (4) Rights, liberties and participation of the People; (5) Principle of the Constitution as the supreme law of the land; (6) Principle of the rule of law; (7) Principle of the separation of powers; and (8) Principle of exercise of the constitutional conventions of democratic regime with the King as Head of State in which the act or ruling regardless of any provisions of the Constitution.

Secondly, "the Powers and Duties of the Constitutional Court and Principles of Democracy,"

Please let me talk about significant powers and duties of the Constitutional Court relating to the principles of democracy as follows. (1) Powers and duties on the control of constitutionality of the legislative branch; for example, rulings on the constitutionality of its action, membership, problems related to powers and duties, laws and draft laws, and draft rules of the National Assembly sitting, as well as draft amended constitution. (2) Powers and duties on the control of constitutionality of the executive branch; for instance, rulings on the constitutionality of its action, enactment of emergency decree, membership of the ministers, treaties, and problems related to powers and duties of the Council of Ministers. (3) Powers and duties on the control of constitutionality of the judicial branch's action. And (4) Powers and duties on the control of constitutionality of individuals' actions in terms of exercising their rights or liberties to overthrow democratic regime of government with the King as Head of State.

Finally, with regard to "**the Roles of the Constitutional Court and its Guardian of Democracy**," I will address its important roles which are benevolent to guard democracy as follows. (1) Guardian of the Constitution as the supreme law; (2) Guardian of people's rights and liberties under the Constitution; (3) Guardian of government under the rule of law; (4) Guardian of democracy under the social contract, separation of powers, and the constitutional conventions of democratic regime with the King as Head of State.

Ladies and Gentlemen;

As I spoke of earlier about the Constitution, powers and duties, and the roles of the Constitutional Court as guardian of democracy, it can be seen that the Constitutional Court is judicial organisation mainly exercising powers in control of constitutionality. This is said to be a great crucible to pave any norms relating to enforcement of the constitution as the supreme law of the land, especially in conformation with constitutionality. Such roles concerning democracy, the Constitutional Court, hence, play both direct and indirect roles in the country's democratic protection in terms of both ideological and practical approaches as can be concluded as follows.

(1) To pave norms for enactment of laws not to be inconsistent with democratic principles respecting rights and participation of minorities in the National assembly; for example, revocation of opponent parties who desire to exercise their discussion rights relating to non-joint discussion on draft amended constitution.

(2) To pave norms for contents of laws and draft laws concerning rights and liberties protection and equality; for example, public assembly, occupation, anti-discrimination towards married women to choose their surnames, different tax ratio calculation resulting to unfairness for single women, and rights of the disabled to work in the judicial organisation.

(3) To pave norms regarding the rule of law, separation of powers, and social contract for draft amended constitution in terms of the procedures having an impact on a change of democratic regime, which was inconsistent with the Constitution. At this point, the legislative branch did not proceed such procedures under the rule of law by means in which voting cards of members were used by the others. This broke the respect of the principles of majority rule of card owners' intentions and people's representative. In addition, a structural change in power relations of the Senate was the key composition of the principles of the separation powers and parliamentary check-and-balance. More importantly, the amendment of draft constitution attributed from the public referendum, which did not reach at public referendum once again, was inconsistent with the principle of social contract.

(4) To pave norms regarding the principles of people's sovereignty, separation of powers and balances between the legislative and executive branches. In this connection, inconsistent with the Constitution, the latter made a treaty which needed to be approved by the National Assembly.

(5) To pave norms regarding exercise of the constitutional conventions of democratic regime with the King as Head of State in which the act or ruling regardless of any provisions of the Constitution. Having ruled on the law on election providing that each individual had a duty on election, the Constitutional Court was of opinion that the Election Commission revoked such a law in relation to the King since His Majesty stands on position above any political matters and is politically impartial.

Ladies and Gentlemen;

In the end, on behalf of the Constitutional Court of the Kingdom of Thailand, the delegation and I firmly hope that your attention and time spent receiving my presentation will be beneficial to your institutions, countries, and people as a whole. I would like to take this opportunity to express sincere thanks and gratitude once again.

International Symposium on the Constitutional Court as the Guardian of Ideology and Democracy in a Pluralistic Society

In the celebration of the 14th Anniversary of the Constitutional Court of the Republic of Indonesia

Date 10th of August 2017

Topic: Constitutional Court and Principles of Democracy

TIMOR-LESTE'S PRESENTATION

THE CONSTITUTIONAL COURT AND THE PRINCIPLES OF DEMOCRACY

The Constitution of the Democratic Republic of Timor-Leste (CDRTL) on the paragraph 1 of its article 1.º consecrates the democratic principle by establishing that *"the Democratic Republic of Timor-Leste is a democratic State based on the rule of law, a sovereign State, independent and unitary, based on people's will and on the respect for the dignity of the human being"*.

It stands out in this juridical-constitutional precept, two important aspects of the democratic principle, which are part of the essence of the Timorese State and of all modern states, for the fact of being a democratic State based on the rule of law and based on people's will and on the respect for the dignity of the human being.

The constitution of the State, which is based on people's will expressed through universal suffrage, under the terms of article 7.º of the Constitution, will be represented by a parliament, and, the respect for the dignity of the human being and their fundamental rights, liberties and guarantees, constitutes the foundations of the democratic State based on the rule of law and on the full establishment of the democratic principles[1].

On the other hand, the democratic State based on the rule of law, cannot be understood without subordination of the State to the law, being the law understood as a system of

[1] Ver nesse sentido NETO, Luísa, *O Estado de Direito Democrático e as Leis de Valor Reforçado*, Homenagem ao Professor Doutor Jorge Ribeiro de Faria, pp. 482-487.

rulings of laws placed in an hierarchy and formed from the concept of the fundamental law, which on its turn, emanates from the people's will expressed across their representatives elected for the effect.

In this sense, the constitutionality principle consecrated on the article 2.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) affirm the supremacy of the Constitution above the rest of the laws in force, in both of its paragraphs 2 and 3.

In accordance with the paragraph 2 of article 2.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), the State has to be subordinated to the Constitution and to the laws, as a parameter and limit for its acts and for the acts of its organs.

The acts of the State and of its organs are exerted on several areas which are made up with the different functions consecrated in the Constitution, as the functions of the public office, of the legislative power, of the administrative power and of the judicial power.

In performing its legislative function, the State practices legislative acts, that is to say, making laws and issuing several other acts as regulations and other executive acts which will only be valid if these conforms with the Constitution, according to what is established on the precept of paragraph 3 of article 2.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

Also, on the performance of its political function and of its administrative function, the State and the local authorities find themselves that their actions have a parameter, a limit under the fundamental law, as such actions are only valid if they conform with the Constitution, as result from the same paragraph 3 of article 2.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

The judicial function of the State is subordinated itself to the Constitution and to the rest of the laws in force, and yet, this function, which is exerted by the courts, does not limit itself to the strict compliance with the law, under the terms of article 119.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), which establishes that *"the courts are independent and subjected only to the Constitution and to the law"*.

The judicial function, in the administration of justice is expressed also in the name of the people, - (under the terms of paragraph 1 of article 118.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL)-, and, on the inspection of law enforcement, in the scope of the principle of separation and interdependence of powers, - as consecrated on article 69.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -, is the materialization of the democratic principles.

This inspection of the law enforcement, includes the assessment of constitutionality, seeing that *"the Courts cannot apply rules contrary to the Constitution and to the principles in it consecrated"*, - according to article 120.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

The assessment of the constitutionality, contains in its essence one other scope, the one of the jurisdictional control of legislative acts, whether laws from the National Parliament, decree-laws from the Government or any other executive acts emanated from these organs or from other organs of the State, and the verification of its conformity in relation to the Constitution.

The assessment of constitutionality, as well as the jurisdictional control of legislative and executive acts, is exerted by a specialized court, by a constitutional court or other superior court with the competence consecrated in the constitution for this effect. In the Democratic Republic of Timor-Leste, the constitutional legislator have opted clearly for this second model, in which the functions of the Constitutional Court are exerted by a superior court with the competence consecrated in the constitution for the assessment of constitutionality.

On the Timorese judicial system, the Supreme Court of Justice is the highest organ of the hierarchy of judicial courts, - as established on the first (1.ª) part of paragraph 1 of the article 124.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

Taking into account that this constitutional control hasn't been yet realized in practice, and until installation of the Supreme Court of Justice (SCJ) and start functioning, all the powers constitutionally conferred to the Supreme Court of Justice are exerted by the Court of Appeal[2], which is the Highest Judicial Instance of the judicial system of the Democratic Republic of Timor-Leste (DRTL), - under the terms of paragraph 2 of article 164.º of the Constitution -.

For that reason, one can understand that, all the references from the Constitution to the Supreme Court of Justice are conferred to the Court of Appeal, which, in practice, exerts this competence until the Supreme Court of Justice is installed.

Like this, the Court of Appeal, besides being the guarantor of the uniform law enforcement, with jurisdiction over the whole of national territory - *(second (2.ª) part of paragraph 1 of article 124º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL)*-, and have also competence to administer justice in matters of juridical-constitutional and electoral nature *(paragraph 2 of article 124.º of the Constitution of the Democratic Republic of Timor-Leste)*.

In this sense, the Supreme Court of Justice/Court of Appeal, as the guarantor of the Constitution, can make an assessment of constitutionality in judicial proceedings, for examination of constitutionality of the rules of law, - which are consecrated from articles 149.º to 153.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

The Constitution establishes four types of judicial proceedings in the venue of examination of constitutionality of the rules of law for legislative and executive acts.

[2] Cfr. AA VV, *Constituição Anotada da República Democrática de Timor*-Leste, Direitos Humanos – Centro de Investigação Interdisciplinar, Escola de Direito da Universidade do Minho, Braga, Anotação n.º 1 ao Artigo 124.º, p. 396.

The first three types of proceedings focus on the abstract examination of constitutionality of the rules of law and of its omission, at the same time as realization of the Constitution itself, and, these are consecrated on articles 149.º to 151.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), respectively.

The first type of proceedings is described in the different paragraphs of the article 149.º and in the sub-section b) of paragraph 1 of article 126.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

This are proceedings for preventive and abstract examination of the rules of law in any by-law (statute) before its promulgation, in other words, this proceedings starts before this by-law (statute) becomes effectively law of the Republic, having as objective to prevent the entry into force the rules of law within such by-laws (statutes) which are contrary to the Constitution.

The active legitimacy to request to the Supreme Court of Justice/Court of Appeal, for examination of constitutionality of any by-law (statute) sent for promulgation, is of the President of the Republic.

The President of the Republic is the organ of sovereignty with competence to promulgate laws and to order the publishing of the resolutions of the National Parliament, which approves agreements and ratifies international treaties and conventions, under the terms of the sub-section a) of article 85.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), and, therefore, it is the only organ that can initiate a proceedings of preventive and abstract examination of constitutionality of the rules of law in such by-laws (statutes).

This faculty is exercised only, if doubt is raised about the constitutionality of the rules of law within the by-laws (statutes) sent for promulgation, and it has to be proceeded in time, respecting the requirements established in the Constitution and the procedural steps for the proceedings in question.

The term (deadline) for the submission of the request, with which initiates this proceedings of examination of the constitutionality, to the Supreme Court of Justice/ Court of Appeal, is twenty days, counting from the date of reception of the by-law (statute) for promulgation, - as established on the first (1.ª) part of paragraph 2 of article 149.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

The decision from the Supreme Court of Justice/Court of Appeal shall be pronounced in twenty five days' time, under the terms of the second (2.ª) part of paragraph 2 of article 149.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), however, this deadline can be reduced by the President of the Republic, by invoking reasons of urgency.

In case the decision of the Supreme Court of Justice/Court of Appeal pronounces unconstitutionality of the rules of law in the by-laws (statutes) sent for promulgation, the President of the Republic, obligatorily, exert the veto out of unconstitutionality, seeing that the decision of the Supreme Court of Justice/Court of Appeal has general obligatory force, as results from the clause of article 153.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), and it is compulsory, therefore, the Head of State cannot decide otherwise.

After the veto out of unconstitutionality, the President of the Republic send copy of the decision from the Supreme Court of Justice/Court of Appeal to the Government or to the National Parliament, accordingly, if the referred by-law (statute) came from one or from other organ, -under the terms of paragraph 3 of the article 149.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

With the sending of the copy in question, the President of the Republic requests for the reformulation of the by-law (statute) of which the rules of law were object of the decision of unconstitutionality, in accordance with the decision of the Supreme Court of Justice/Court of Appeal, - according to the final part of the paragraph 3 of article 149.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

The second type of the proceedings for examination of constitutionality focus on the abstract and successive examination of the regulations of legislative and normative acts from the organs of the State, which could be unconstitutional or illegal and have already entered into force, - under the terms of article 150.º and of the sub-section a) of paragraph 1 of article 126.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL) -.

The active legitimacy, to initiate this proceedings of assessment and declaration of unconstitutionality and illegality of legislative and normative acts from the organs of the State, is of the persons enunciated on the article 150.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), which are the following: the President of the Republic, the President of the National Parliament, the Prosecutor General of the Republic *(Attorney General)*, based on the removal by the courts, in three concrete cases, of by-law (statute) judged as unconstitutional, the Prime Minister, one fifth (□) of the Members of Parliament and the Provedor of Human Rights and Justice *(Ombudsman)*.

This active legitimacy is conceived as a faculty (power) that shall only be exerted when there is doubt if the by-laws (statutes) of such legislative and normative acts violate the Constitution.

The aforementioned rule comprises an exception that makes obligatory the starting of this proceeding of examination of constitutionality, in case of removal by the courts, in three concrete cases, of a by-law (statute) judged as unconstitutional, to the Prosecutor General of the Republic *(Attorney General)*.

The third type of proceedings of examination of constitutionality, is the one of unconstitutionality by omission of legislative measures necessary for the fulfillment of constitutional clauses, under the terms of the article 151.° of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), with the objective for complete fulfillment of the Constitution, and without which this (the Constitution) doesn't meet correspondence in the concept of fundamental law emanated from the people's will.

The proceedings of examination of unconstitutionality by omission is foreseen for situations of violation of the constitutional duty to legislate, having this duty to be found in a clause of the Constitution, and the State and its organs not having adopted legislative measures necessary to materialize constitutional clauses when they were obliged to do so by express prevision of these clauses.

In this case, the active legitimacy to start this proceeding is of the President of the Republic, of the President of the National Parliament, of the Prosecutor General of the Republic *(Attorney General)* and of the Provedor of Human Rights and Justice *(Ombudsman),* as organs that don't have competence and, for this reason, they don't incur in the omission of legislative measures necessary for the materialization of constitutional clauses.

The decision form the Supreme Court of Justice/Court of Appeal can only determine that the organs which incur in the omission of such legislative measures are obliged to legislate but without indicating the way and form to comply with that obligation, being at risk of violation of the principle of separation of powers inserted on article 69.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

The fourth and last type of proceedings is related to the examination of constitutionality of rules of law, and focus upon the concrete examination of constitutionality of article 152.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), which establish an appeal for examination of rules of law enforced or not enforced by the courts on performing its judicial power, that is to say, are examined the rules of law explicitly enforced or not enforced in the decisions pronounced by the inferior courts, having as reason its unconstitutionality raised during the judicial proceedings.

This proceeding for examination of the rules of law is at the responsibility of all of the courts and also of the Supreme Court of Justice/Court of Appeal, as results from the fact that there are decisions from the courts on two specific cases.

On the first case, the proceeding could have been roused when the decisions of the courts refuse the enforcement of any rule on grounds of its unconstitutionality, according to sub-section a) of paragraph 1 of article 152.º of the Democratic Republic of Timor-Leste (CDRTL).

On the second case, the proceeding could have taken place when the decisions of the courts enforce rules which unconstitutionality has been roused during the proceedings,

according to sub-section b) of paragraph 1 of article 52.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

Being the matter of a proceeding which have been already "*transit in rem judicatam"*, then the proceeding can only be reopened through *'jurisdictional appeal"*.

The active legitimacy to lodge the appeal, on good grounds, on the refusal of enforcement of a rule for reason of its unconstitutionality from the part of the courts, or for reason of enforcement of rules which unconstitutionality has been roused during the proceedings, these are the parts, more specifically, the part that roused the question of unconstitutionality on the jurisdictional proceedings when it was still pending at the court, under the terms of paragraph 2 of article 152.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), or by the Public Prosecution in the case of sub-section a) of paragraph 1 of this same article.

The paragraph 3 of article 152.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), when says that *"the law regulates the regime of admissibility of appeals"*, refers to the procedure law regarding the type of the proceeding in question, whether to the civil procedural law, to the criminal procedural law, to the administrative procedural law or to the fiscal procedural law, to which provides about the regime on appeals.

As already mentioned, the judgments pronounced in the venue of the proceedings for the examination of constitutionality by the Supreme Court of Justice/Court of Appeal have its effects set on the article 153.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

These judgments are not passible for appeal and are published on the official newspaper.

When the aforementioned judgments pronounce findings of unconstitutionality on the proceedings of abstract and concrete examination, these judgments do have general obligatory force, what means that, these judgments are valid, with force similar to the force of law, and eliminates from the legal system the rule or regulations declared unconstitutional[3].

In case the aforementioned judgments do not pronounce any unconstitutionality, then these are the final decisions on the matter, and, as such, are not susceptible to appeal on that case.

However, such rules or regulations can become object of other proceedings for examination of constitutionality later on.

[3] Cfr. AA VV, *Constituição Anotada da República Democrática de Timor*-Leste, Direitos Humanos – Centro de Investigação Interdisciplinar, Escola de Direito da Universidade do Minho, Braga, Anotação n.º 4 ao Artigo 153.º, p. 481.

In case of decisions from inferior courts, which remove any rule on grounds of its unconstitutionality, its effects are restricted to that concrete case, therefore, this rule can be applied again in another case.

However, after occurring the removal by the courts, of any rule for the reason of its unconstitutionality in three concrete cases, the Prosecutor General of the Republic *(Attorney General)* is obliged, by rule from sub-section c) of article 150.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL), to request the declaration of unconstitutionality, with general obligatory force of that rule in venue of abstract examination of the constitutionality, under the terms of paragraph 5 of article 133.º of the Constitution of the Democratic Republic of Timor-Leste (CDRTL).

As a note, relating to these proceedings of examination of constitutionality, to the role of the Court of Appeal as Constitutional Court and to the principles of democracy, and, we can still add up that large part of these proceedings focus on rules regarding fundamental rights of the Timorese citizens, whether their rights, liberties and guarantees, or their economic, social and cultural rights, on the context of legal protection for the dignity of the human being.

The Court of Appeal, as Constitutional Court, plays an important role in the fulfillment of the fundamental rights of the Timorese citizens, since that, the sense of the juridical-constitutional interpretation given to their decisions, from the assessment of constitutionality of the rules, in relation to such rights, allowed the valuing and full realization of the principle of dignity of the human being.

On its action, for examination of the compliance with the Constitution on the part of other organs of the State, the respect for the principle of separation and interdependence of powers, for the democratic principle, and for the principle of the dignity of the human being, the Court of Appeal leave an indelible mark in the history of the building of a democratic State based on the rule of law.

Thank you all very much

SESSION III

"CONSTITUTIONAL COURT'S ROLE IN PLURAL SOCIETY"

CHAIRPERSON: KAZAKHSTAN

Dr Hashimzai
CHAIRMAN OF THE INDEPENDENT COMMISSION FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION

Ladies and gentlemen,

I am glad to be here among distinguished personalities of the constitutional courts. As Chairman of the Independent Commission for overseeing the implementation of the Constitution ICOIC which is somehow equivalent to constitutional court of other countries, I am proud to be here and speak on behalf of ICOIC.

My country has been suffering from a prolong war Which has disrupted practically every aspect of the state affairs including the function of the judiciary.

Our Commission despite unrest in the country continues to function in accordance with it's law.

This Commission which has been formed in accordance with article 157 of the constitution is an independent commission for overseeing the implementation of the constitution . Members of the commission have been appointed by the President with the endorsement of the House of. People . This commission has its own Law.

According to this Law the commission which is composed of seven members including the Chairman, has four years term of office. The commission has deputy head and secretary that can be replaceable each year only the President hold its office for the full term of four years.

The ICOIC draft law before it becomes law went through difficult stages. The draft law, though went through parliamentary stages, had not received the President signature. The President,in accordance to the constitution, sent the draft law to the

Supreme Court to consider the constitutionality of its provisions. The Supreme Court considered four articles of this law to be unconstitutional. One of them was article seven of the draft Law.

The said article had given the members of the ICOIC the right to remove from office any member of the commission by majority vote.

The Supreme Court considered the above article of the draft law including with another three articles to be unconstitutional and thus these articles were removed from the text and subsequently the President signed it and the text became law.

As a guardian of the constitution the ICOIC Law gives the commission the power to see that the President of the country, the Parliament, the judiciary, government departments, institutions as well as government and non-government organisations are following and implementing the constitution.

This commission can also give legal advice to the President and Parliament on issues relevant to the implementation of the constitution. Moreover, this commission can submit specific proposals to the President and Parliament to take necessary measures for the purpose to up-grade legislative activities to meet the requirements of the constitution.

As guardian of the constitution and democracy in the Afghan society this commission can report to the President when finding any violation of any article of the constitution.

The commission law only gives the President, both houses of the Parliament, Supreme Court, Independent Human Rights Commission, Independent Election Commission and Independent Administrative Reform Commission to remit cases relevant to the constitution for expression of opinion regarding their constitutionality.

In one of the recent case where the Attorney General was recalled by the Upper House of the Parliament for questioning, the government referred the case to the ICOIC asking for the constitutionality of this demand.

The ICOIC as guardian of the constitution in a democratic society considered the case independently and in view of the provisions of the constitution.

The constitution provides and makes only the government responsible and answerable to the Parliament. While another article of the constitution defines the government to be only cabinet ministers.

Meanwhile the law on the duties and functions of the Attorney General office contains a provision which makes the members of this office responsible for reporting to the Parliament when called upon.

The ICOIC in considering the case stated that as the constitution is the supreme law its provisions must prevail on all other laws and as the members of the Attorney General office are discharging quasi judicial functions they should not be recalled to the Parliament for questioning , similar to the Supreme Court judges who cannot be recalled by the Parliament for questioning.

Logically if such a practice to allow the Attorney General to be questioned about the execution of their professional duties, interference in the judicial or quasi judicial functions can be possible.

During the past year many similar important cases were referred to the ICOIC. The ICOIC expressed opinion independently and for the benefit of democracy in the society without deviation from the provisions of the constitution.

Ladies and Gentlemen,

As a guardian of the constitution the functions discharged by the above ICOIC in Afghanistan are also discharged by all other constitutional courts around the world and they have been part and parcel of their functions too.

We also should keep in mind that many modern constitutions reflect ambitious programmes for transforming existing social, economic and political interests through political engineering. In some countries the underlying Ideal of the Constitution is the creation of new society.

This desire for social engineering through constitutionalism is a characteristic of ideological constitution found in many developing countries.

Irrespective of the above when speaking of guardian of constitution it requires the creation of institution such as constitutional court that serve to preserve and to control the constitutionality of the laws. In other words constitutional courts are called to purify the legal system from unconstitutional norms that may be created by other powers of the state.

Constitutional courts also play a function among different levels of contemporary constitutionalism, facilitating the dialogue between courts, particularly for the elaboration and protection of human rights .

Atop the end I want to thank the Constitutional Court of Indonesia for their hospitality especially for the perfect organisation of the event here in Solo.

RESULTAT DE RECHERCHES SUR

LA COUR CONTITUONNELLE EN TANT QUE GARDIENNE DE I'IDEOLOGIE ET DE LA DEMOCRATIE DANS UNE SOCIETE PLURALISTE

Monsieur le President, suite a vos instructions, j'ai fait les recherches don't les resultats sont presents dans ce rapport. Convaincu qu'a l'etat brut, les informations recueilles ne seront pas d'une grande utilite pour vous lors de la redaction de votre communication, je me suis permis de vous les ordonner par sous-theme. Vous trouverez dans ce rapport des informations relatives a l'instrauration de la democratie pluraliste au Benin, les dispositions pertinentes de la constitution du 11 decembre 1990 sur le sujet et les decisions de la Cour constitutionnelle qui rensignent sur sa contribution a la construction de l'Etat de droit en general et plus particulierement a la garantie d'elections regulieres et sinceres, a la garantie de la conformite de l'exercice du pouvoir a la Constitution et a la protection des droits et libertes fondamentaux de la personne. J'ai pris oin de mettre ces information en gras pour qu'elles soient bien visibles.

Deux documents accompagnent ce rapport:

- Un article du Professeur Slobodan Milacic;

- L'annuaire beninois de justice constitutionnelle avec indication des pages contenant les decisions interessantes commentees.

L'instauration de l'Etat de droit, democratique et pluraliste au Benin

La democratie et le pluralism sont deux sous-systemes du systeme global d'Etat de droit (**cette idee se trouve dans Slobodan Milacic, Le juge constitutionnel dans le systeme de l'Etat de droit, liberal et democratique**). Autrement dit, l'Etat de droit se manifeste par le pluralime et la democratie, qui se restrouvent aux antipodes du systeme marxite-leniniste que le Benin a pratique de 1974 a 1990. Apres plus de dix-sept ans de regime militaro-marxiste, suite auxe pressions nationales et internationals, le Benin a change de philisophie de gouvernement a la faveur de la conference nationale qui s'est tenue du 19 au 28 fevrier 1990. Dans le **preambule de la Constitution du 11 decembre 1990,** qui marque le debut de l'ere du renouveau democratique, le people beninois, apres aovir reaffrime son opposition a tout regime dictatorial, affirme « solennellement sa determination de creer un Etat de droit et de democratic pluraliste, dans lequel les droits

fondamentaux de l'Homme, les libertes publiques, la dignite de la personne humaine et la justice sont garantis, proteges et promus comme le condition necessaire au development veritable et harmonieux de chaque Beninois tant dans sa dimension temprelle, culturelle que spirituelle ».

Ainsi, la constitution consacre la creation d'un Etat de droit, qui couple democratie et pluralism. La democratie n'a pas de definition universellement arretee. Mais, la reference a la definition d'Abraham Lincoln, selon qui, il s'agit du gouvernement du people par le people pour le people, couplee avec celle de Montesquieu, qui la concoit comme le regime politique garantissant la separation des pouvoirs executifs et legislatifs, permet de dire que c'est le regime dans lequel tous le citoyens possedent a l'egard du pouvoir un droit de participation (vote) et un droit de contestation (liberte d'opposition). C'est probablement la raison pour laquelle Georges Gurvitch a pu ecrire que « la democratie ce n'est pas le regne du nombre, c'est le regne du droit ». L'auteur ne nie certainement pas que sans l'association entre le nombre et le droit, on ne saurait parler de democratie. La democratie, c'est donc le regne du nombre sous le controle du droit. Elle suppose l'election transparente et sincere des gouvernants et l'exercice du pouvoir conformement au droit. A cet effet, la constitution encadre la devolution et l'exercice du pouvoir. Le pluralisme, quant a lui, est la doctrine qui se fonde, en regle generale, sur l'existence d'une pluralite de partis et de groupments et la possibilite de leur alternance au pouvoir. Il suppose la revonnaissance des droits de l'homme et des libertes publiques. Par consequent, la constitution consacre **les droits et devoirs de la personne humaine en son titre II.** Le Benin a done opte pour une democratie respectueuse des droits de l'homme et des libertes publiques. En tant que statut de l'Etat, la constitution n'est pas simplement un canal par lequel le people souverain organize la devolution et l'exercice du pouvoir dans l'Etat. Sa finalite supreme est de garantir la dignite des homes vivant en societe. **(Cette observation est tiree de votre contribution aux Melanges en l'honneur de Maurice Ahanhanzo-Glele).**

A cet effet, **la constitution cree une Cour constitutionnelle** dont elle fait, aux termes de son **article 114, la plus haute jurisdiction de l'Etat en matiere constitutionnelle**. Par consequent, elle est **juge de la constitutionnalite des lois, garante des droits fondamentaux de la personne humaine et des libertes publiques, l'organe regulateur du fonctionnement des institutions et de l'activite des pouvoirs publics**. Detaillant ces attributions, l'article 117 dispose qu'elle statue obligatoirement sur la constitutionnalite des lois organiques et des lois en general avant leur promulgation; les reglement interieurs de l'Assemblee nationale, de la Haute Autorite de l'Audiovisuel et de la Communication et du Conseil Economique et Social avant leur mise en application, quant a leur conformite a la constitution; la constituionnalite des lois et des actes reglementaires censes porter atteinte aux droits fondamentaux de la personne humaine et aux libertes publiques en general, sur la violation des droits de la personne humaine; les conflits d'attributions entre les institutions de l'Etat. Aux termes de ce meme article, elle veille a la regularite de l'election du President de la Republique et statue, en cas de contestation, sur la regularite de elections legislatives. En outre, la constitution fait d'elle, juge de la vacance de la presidence de la Republique (**article 50**) et du droit d'amendement des deputes (**article**

104). Ainsi, la loi fondamentale fait de la Cour constitutionnelle, la gardienne des droits et libertes fondamentaux des citoyens ainsi que de la constitutionnalite de la devolution et de l'exercice du pouvoir. Elle lui confie un role de premier plan dans la construction de l'Etat de droit, en fait une hyper Cour constitutionnelle dans le concert des juridictions constitotuionnelle en Afrique (**Cette appreciation est tiree de Stephane Bolle, La constitution Glele en Afrique: modele ou contre-modele, reflexion publiee dans les Melanges en l'honneur de Maurice Ahanhanzo-Glele)**.

Questions

Quel bilan peut-on faire sur l'exercice, par la Cour constitutionnelle, de sa function de juge de la devolution et de l'exercice du pouvoir et de protecteur des droits et liberters fondamentaux de la personne?

Response aux questions

Pour repondre a cette question majeure, il faut etudier la jurisprudence de la Haute jurisdiction. C'est pourquoi nous avons procede au depouillement et a l'analyse des decisions. Ces travaux revelent que la Cour constitutionnelle assure incontestablement la conformite de la devolution et de l'exercice du pouvoir a la constitution (I) aussi bien que la protection des droits et libertes fondamentaux de la personne (II).

I- Le controle de la devolution et de l'exercice du pouvoir a la constitution

A- Le controle de la devolution du pouvoir

Le premier indicateur de la democratie est l'election des gouvernants par les gouvernes. Mais n'importe quelle election ne fait pas la democratie pluraliste. Celle-ci exige des elections transparentes et sinceres (**Votre article institule « Emergence de la justive constitutionnelle », Pouvoirs, nº129).** Ce sont d'abord des lois electroles conformes a la constitution, des operations electorales regulieres et des resultats sinceres.

1-Le controle de la constitutionnalite des lois electorales

La Cour controle la constitutionnalite des lois electorales afin que les elections se deroulent conformement aux principes constitutionnels (par exemple **DCC 10-117 du 8 septembre 2010 sur la constitutionnalite de la loi portant regle particuliere pour l'election des membres de l'Assemblee nationale**).

2-Le controle de la regularite et de la sincerite des elections

Ce controle touche l'establissement de la liste electorale (**Decision EP 11-037 du 9 mars 2011.** Par cette decision, la Cour rompt avec le passe en rendant obligatoire l'utilisation d'une liste electorale permanente informatisee pour les elections). Mais les elections regulieres supposent aussi des candidatures qui respectent les lois electorales. C'est pour quoi, par sa decision **EL 07-015 du 20 mars 2007,** la Haute jurisdiction ordonne la radiation de la liste des electeurs et de la liste des candidats et le retrait de la carte d'electeur du citoyen qui s'est porte candidat alors que contrairement aux disposition

electorales il etait sous le coup d'une condemnation judiciarie. La decision **EL 11-005 du 13 avril 2011** est aussi interessante a ce sujet. Elle a asussi apllique plusieurs fois le principe de l'influence determinate, pour valider ou invalider les resultats d'elections (exemples: decision **EL 00-008 du 9 mars 2000; EL 00-014 du 30 aout 2000; EL 03-047 du 21 mai 2003).**

B-Le controle de l'exercice du pouvoir

Le controle de l'exercice du pouvoir vise essentiellement la constitutionnalite des norms. Mais il ne se limite pas au controle de la constittutionnalite des normes. Il a aussi pour objet, la regulation du fonctionnement des institutions et de l'acitivite des pouvoirs publics et le reglement des litiges resultant des rapports entre le gouvernement et le parlement.

1-Le controle de la constitutionnalite de normes

La Cour constitutionnelle du Benin se positionne aujourd'hui comme ur acteur fundamental du processus de fabrication des lois. Apress s'etre contentee des declarations d'inconstitutionnalite des lois qui violent, par leur forme ou leur contenu, des dispositions constitutionnelles, elle s'est inscrite dans la posture d'un legislateur cadre positif en indiquant quelquefois au legislateur les corrections necessaires pour render les normes infra-constitutionnelles conformes a la constitution. Ce controle s'applique aux normes supra-legislatives, legislatives et infra-legislatives.

En effet, en plus des lois ordinaires (par exemple, **la DCC 10-049 du 5 avril 2010 sur la loi d'abrogation de la loi sur le RENA et la LEPI),** la Cour constitutionnelle du Benin controle la constitutionnalite des lois constitutionnelles (**Decision DCC 06-074 du 8 juillet 2006, sur la loi constitutionnelle de prorogation du mandate des deputes),** des lois organique (**Decision DCC 11-067 du 20 octobre 2011, sur la loi organique portant condition de recours au referendum),** des traits (**DCC 19-94 du 30 juin 1994, sur le traite OHADA).** En ce qui concerne le controle de la constitutionnalite des normes infra-legislatives et des autres actes censes porter atteinte aux droits de l'homme, on peut citer la **DCC 27-94 du 24 aout 1994 sur les ordonnances du President de la REpublique relatives aux mesures exceptionnelles,** la **DCC 95-011 du 2 mars 1995 dans laquelle la Cour ordonne le sursis a l'execution du decret portant nomination des magistrats, la DCC 01-005 du 11 janvier 2001 qui porte sur le controle de la constitiutionnalite du Communique du Minitre de la Fonction Publique, du Travail et de la Reforme Administrative et qui a permis a la Haute jurisdiction de clarifier la notion d'acte reglementaire.** On peut egalelment citer la **DCC 03-052 du 14 mars 2003 qui fait de la Cour, le juge de l'ordre public.**

2-La regulation de l'activite de pouvoirs publics

La Cour a surtout regule le fonctionnement et les activites du parlement. Elle a fixe la procedure de designation et les cles de repartition des representants du parlement dans d'autres institutions de la Republique. A titre illustrative, on peut citer la **DCC 01-012**

du 22 janvier 2001 relative a la designation des representants du parlmenet a la CENA, la **DCC 09-002 du 8 janvier 2009 concernant la designation des membres du parlement a la Haute Cour de Justice,** la **DCC 11-047 du 21 juillet 2011 sur la designation des membres du parlement dans les organs parlementaires.**

3-Le reglement des litiges entre le gouvernement et le parlement

Les rapports entre le gouvernement et le parlement ne fonctionnent pas toujour sans conflits. Quelquels-uns de ces differends se sont retrouves dans le pretoire de la Cour constitutionnelle. Ils portent sur le pouvoir d'iniatitive et l'autonomie financiere du parlement, d'une part, et les pouvoirs exceptionnels du president de la Republique, d'autre part.

En effet, la creation de la Commission Electorale nationale Autonome (CENA) a donne lieu a un litige entre le gouvernement et le parlement qui s'est solde par la delimitation, par la Cour constitutionnelle, du domaine de competence de l'Assemblee nationale (**Decision DCC 34-94 du 23 decembre 1994).** De meme, par la decision **DCC 30-94 du 1er octobre 1994,** elle a empeache, au benefice de la clarification du droit d'amendement des deputes, l'incursion du parlement dans le domaine d'action du gouvernement. Par ailleurs, par la **decision DCC 10-117 du 8 septembre 2010,** la Haute jurisdiction a clarifie le sens de l'autonomie financiere du parlement. Elle ne s'est pas contentee de clarifier le pouvoir d'initiative du parlement. Elle a aussi endique son pouvoir de vote. A ce sujet, la **decision DCC 10-144 du 14 decembre 2010** par laquelle elle sanctionne l'inertie parlementaire et interessante. En revanche, en adoptant les explications classiques de l'immunite juristictionnelle des actes de gouvernement (**Decision DCC 30-94 du 1er octobre 1994),** elle a contribute a la banalisation et au detournement des pouvoirs exceptionnels par le President de la Republique, voire a la dictature du chef de l'Etat.

II-La protection des droits et libertes fondamentaux de la personne

On Remarque un effort constant de la Haute jurisdiction dans la protection des droits que la constitutution a proclames. Non seulement cette protection est complete, elle se fait de facon audacieuse, grace a une interpretation a la fois systematique et sociologique de la constitution.

A-Une protection complete

Tous les droits fondamentaux et toutes les libertes fondamentales de la personne beneficient de la protection de la Cour constitutionnelle.

1-La protection des droits fondamentaux de la personne

La Cour protégé l'egalite des citoyens et la non-discrimination (**DCC 02-144 du 23 decembre 2002 sur la loi portant code des personnes et de la famille; DCC 10-117 du 8 septembre 2010 sur la loi nº2010-35 portant regles particulieres pour l'election des membres de l'Assemblee nationale; DCC 11-042 du 21 juin 2011 sur le decret nº2011-335 du 29 avril 2011 portant institution d'un coefficient de revalorization**

des traitements indiciaires des agents de l'Etat du ministere de l'economie et des finances; DCC 01-005 du 11 janvier 2001 sur la discrimination dans l'acces a la function publique; DCC 06-099 du 11 aout 2006 sur la discrimination dans la carrier d'enseignant).

Elle garantit aussi le droit du citoyen a un process equitable. En effet, elle sanctionne le non-respect du delai non raisonnable (**DCC 03-144 du 16 octobre 2006**), le non-respect des droits de la defense (**DCC 00-024 du 10 mars 2000**), la violation du principe du contradictoire (**DCC 98-005 du 8 janvier 1998**) par les juges ordinaires et veille a l'independence de la justice (**DCC 97-033 du 10 juin 1997**).

2-La protection des libertes fondamentales de la personne

Dans le prolongement de la protection des droits de l'homme, la Cour lute contre les violations des libertes publiques. Elle sanctionne les restrictions a la liberte d'aller et de venir (**DCC 96-60 du 26 septembre 1996**), protégé la liberte de culte ou de religion (**DCC 03-140 du 25 septembre 2003**), la liberte d'association (**DCC 16-94 du 27 mai 1994**), la liberte de reunion (**DCC 00-03 du 20 janvier 2000**), la liberte de manifestation (**DCC 03-134 du 21 aout 2003**), la liberte syndicale (**DCC 98-043 du 14 mai 1998**), le droit de greve (**DCC 11-065 du 30 septembre 2011**).

B-Une protection audacieuse

Deux evenemtents revelent l'audace de la Cour constitutionnelle en matiere de protection des droit fondamentaux de la personne et des libertes publiques. Il s'agit de l'ouverture des voix de reparation des prejudices subis par les vistimes des violations des droits et libertes fondamentaux de la personne et l'extension du pouvoir de controle de la Cour aux decisions de justice.

1-La reparation des prejudices subis par les victimes de traitement cruel, inhumains et degradants

Apres s'etre contetee de traiter les traitemnet cruel, inhumains et degradants subis par les citoyens comme de simples violation de la constitution, la Cour decide depuis 2002 que ces violations ouvrent droit a la reparation de prejudices (**DCC 02-052 du 31 mai 2002, Affaire Fanou; DCC 02-058 du 4 juin 2002, Affaire Dame Adele Favi, etc**.).

2-L'extension du pouvoir de la Cour constitutionnelle aux decision de justice

De meme, apres avoir prepare l'opinio publique, la Cour a fini par elargir son controle aux decisions de justice (**DCC 95-001 du 06 janvier 1995; DCC 09-087 du 13 aout 2009**).

Tel est, Monsieur le President, le resultat de mes recherches. Je reste entierement a votre dispotition pour toutes recherches ou travaux complementaires.

THE CONSTITUTIONAL COUNCIL: A GUARDIAN OF DEMOCRACY IN CAMBODIA

A synopsis for International Symposium on "Constitutional Court as the Guardian of Ideology and Democracy in a Pluralistic Society" In Celebration of 14th Anniversary of the Constitutional Court of the Republic of Indonesia Solo, 8-11 August 2017

By IM Chhun Lim[1]*

ABSTRACT

This paper produced aims at providing fundamental understanding of the Constitutional Council of the Kingdom of Cambodia and the respective roles in promoting democracy in Cambodia. Thus, the readers of this paper will earn knowledge (i) The Constitutional Council in brief (ii) Respective decisions to promote Democracy in Cambodia, and (iii) Value and Way Toward. This paper will share first hand from the Cambodian context on the constitutional review and also humbly welcome all comments from respective colleagues of relevant institutions.

I - THE CONSTITUTIONAL COUNCIL IN BRIEF

The Constitutional Council is a supreme, neutral, and independent institution created by the 1993 Cambodian Constitution. This Council has been effectively functioning since June 15, 1998, which is noticed the first time in Cambodian history. The Constitutional Council consists one President and eight Members. The President is elected by 9 Members of the Council at the absolute majority vote. The election of the President shall be conducted every three years after the three new members come into office. The President has rank and prerogatives equal to those of the National Assembly. Members have rank and prerogatives equal to those of

1 * *Im Chhun Lim* (H.E Mr.) is the current President of the Constitutional Council of the Kingdom of Cambodia, who is elected by the Supreme Council of Magistracy for 9 years term, and comes to the office in June 2016. He is the former Minster of Ministry of Education, former Member of the National Assembly for first legislature (1993-1998), former Secretary of State of Ministry of Interior for the first mandate of the Royal Government; and the former Senior Minister of Ministry of Land Management, Urban Planning, and Construction. *Chhun Lim* was also the member of Supreme National Council (SNC), and one of *key signatories* of *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict* (Paris Peace Accord) in 1991, and other international instruments ratified by Cambodia, which are the core documents in producing the Constitution of Cambodia of 1993.

the Vice-President of the National Assembly. The normal term of the members of the Council shall be 9 years. Every 3 years, three members of this Council shall be replaced. Exceptionally, for the first mandate, some members are appointed and elected for a term of 3, 6, and 9 years.

Three members are appointed by His Majesty the King, while the National Assembly and the Supreme Council of Magistracy elect 3 members each. The Members of the Constitutional Council shall be selected among the high personalities, Khmer national by birth, aged at least 45 years old, graduated from higher education in the fields of law, administration, diplomacy, or economy; and having at least 15 years of professional experiences in the aforesaid fields of work.

According to the Constitution and the Law on the Organization and the functioning of the Constitutional Council, this Council shall have tree noticed competences:

(i) *To guarantee the respect of the Constitution*[2]: By this mean, the Constitutional Council interprets the Constitution and the laws adopted by the National Assembly and completely reviewed by the Senate, and to examine the constitutionality of laws.

(ii) *To examine and rule on electoral litigations*[3]: Those elections are the election of the Members of the National Assembly and the election of the Senators.

(iii) *To notify His Majesty the King*[4]: The King consults the Constitutional Council on all proposals to amend the Constitution. The initiative to review or to amend the Constitution shall be the prerogative of the King, the Prime Minister, and the President of the National Assembly, at the proposal of one fourth of all its members.

As a principle, the Constitutional Council cannot examine any matter on its own initiative. The Constitutional Council can examine the constitutionality of law *before (A pririori)* or *after (A posteriori)* its promulgation. Article 140 (new) of the Constitution states that The King, the Prime Minister, the President of the National Assembly or one-tenth of the National Assembly's Members, the President of the Senate or one-fourth of the Senators, may send the laws adopted by the National Assembly to the Constitutional Council for examination before their promulgation.

The rules of procedure of the National Assembly, the rules of procedure of the Senate and the organic laws must be submitted to the Constitutional Council for examination before their promulgation. The Constitutional Council shall

2 Paragraph 1, Article 136 (New) of the Constitution: ' *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.*'

3 Paragraph 2, Article 136 (New) of the Constitution:' *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.'*

4 Article 143 new (former Article 124) of the Constitution:' *The King consults the Constitutional Council on any proposal aiming at amending the Constitution.'*

pronounce within the time frame of thirty (30) days at the latest, whether the laws, the rules of procedure of the National Assembly and those of the Senate are or not in conformity with the Constitution. According to the provision of Article 141 (new) of the Constitution, the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one-fourth of the Senators, one-tenth of the National Assembly's Members, or the Courts can request the Council to examine the constitutionality of a law after its promulgation. Any citizen has the right to raise the unconstitutionality of the laws through the National Assembly's Members or that of the President of the National Assembly or of the Senators or of the President of the Senate.

II - RESPECTIVE DECISIONS TO PROMOTE DEMOCRACY

Article 51 (New) of the Constitution provides that the Kingdom of Cambodia implement the policy of liberal-multi party democracy. This provision becomes a very crucial principle for Cambodian people to enjoy their full rights and freedom, which are recognized by Article 31 (New) of the Constitution[5]. Democracy becomes a big hope for Cambodian people as a whole; hence all concerned actors shall be well aware of democracy's meaning. The implantation of democracy shall be consistent with the social value, culture, and political history of one state otherwise democracy may cause political conflict and social capital breaking. Whatever, the performance of democracy is, but the impact from implementing democracy shall be taken into account.

Cambodia is carefully walking on the way of democracy and does desires to reach in which is called real rule of law state. Thus, all the involved state's organs have been committing to effectively fulfil their roles. The Constitutional Council is among them, which has kept her own value in promoting the respect of principles of democracy by enriching high standard of ruling on constitutional cases. Here are some notable decisions made by the Council and have been seen key principles to safeguard Democracy in Cambodia.

(i) Key decisions to promote democracy and fundamental rights:

(a) The Constitutional Council guarantees the respect of equal rights by determining that Khmer citizen of both sexes is equal before the law[6].

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5 '*The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and all the treaties and conventions related to human rights, women's rights and children's rights.*
Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and liberties shall be in accordance with the law.'

6 Decision N.09 dated on May 28, 1999; examining the constitutionality of law on the organization and the functioning of ministry of woman's affairs and Veterans. Article 3 of this draft law stated that '*The Ministry of Woman's affairs and Veterans shall be led by a female Minister […]*' The Council found that this draft violates the basic rights of Khmer citizen as stipulated in Article 31 and Article 45 of the Constitution. Thus, the Council declares that the provision of aforesaid law to be unconstitutional.

(b) The Constitutional Council denied the death penalty by guaranteeing the respect the provision of Article 32 of the Constitution[7].

(c) The Constitutional Council prohibits Khmer citizens from depriving Khmer nationality, exiling, or arresting and extraditing to other foreign countries[8].

(d) The Constitutional Council protects human rights and public order by examining the law on demonstration[9].

(ii) Key decisions to protect the rights of the child:

(a) The Constitutional Council determines that the judicial judges shall consider other international instruments that are beneficial to the rights of the child once they rule cases concerning to minors[10].

(iii) Key decisions to protect human rights:

(a) The Constitutional Council defined the freedom to believe and rights to worship by guiding all citizens, who are belonged to different religions to respect the principles of human rights11.

Beyond the aforesaid decisions, the Constitutional Council ruled many cases concerning to electoral litigation occurred during the election of the members of the National Assembly and the election of the Senators; which is an effective measurement to protect the rights to election for Khmer citizen and to promote Rule of Law in Cambodia. Losing their names from the voting list or other basic rights to election of them were violated, concerned citizen or interested person can file complaint to the Council for seeking helps.

The Constitutional Council also help to promote the principles of the separation of power by stating that no parts of the executive organ can fulfil judicial power and

7 Decision N.040/002/2001 CC.D dated on February 12, 2001; examining the constitutionality of law on the establishment of Extra Ordinary Chamber in Cambodian Court (ECCC). Article 3 of this draft law refers to Article 209, Article 500, Article 506, Article 507 of the Criminal Code of 1957; which accept *the dead penalty*. The Constitutional Council declared that this provision drafted to be unconstitutional, not consistent with the provision of Article 32 of 1993 Constitution, which prohibits the dead penalty.

8 Decision N.03/1999 CC.D dated on April 28, 1999; interpreting Article 33 of the Constitution. The Council interprets that '*Khmer citizen shall not be deprived of his/her nationality, exiled, or arrested to be extradited to a foreign country, except in case of mutual agreement'* is the crucial principle to protect the rights and advantages of all Khmer citizens […].

9 Decision N.062/2004 CC.D dated on October 2004; examining the Law on Demonstration. The Council in this decision recognized the rights and freedom to peaceful demonstration of citizens, who wish to organize demonstration, complied with existing laws, and will not effect to other personal rights […].

10 Decision N.092/003/2007 CC.D dated on July 10, 2007; examining the constitutionality of law of Article 8 of the Law on Criminal Aggregation. The Council determined the term *'Law'* in this context shall be included the national laws (the Constitution is first counted) and all international laws that were ratified by the Kingdom of Cambodia, especially Convention on the Rights of the Childs (CRC).

11 Decision N.107/003/2009 CC.D dated on December 23, 2009; interpreting Article 4 and Article 43 of the Constitution, which are related to the national motto and also rights to believe. The Council interprets […] the Khmer citizens of both sexes have the full freedom of belief or of the practice of their belief and religion in accordance with their conscience, at all times and circumstances […]

this judicial power is a sole power invested in courts of all levels[12]. The Council also determines that Judiciary shall be invested the power to rule on all litigations including administrative litigation[13]. Thus, the Constitutional Council is playing crucial roles in guaranteeing the adherence of provision of Article 51 (New) of the Constitution and other Articles of Chapter 11 (New) on the Judiciary; in aiming at promoting the principles of democracy in Cambodia.

III- VALAUE AND WAY TOWARD

The Constitutional Council have, for more than 19 years, fulfilled the functions in conformity with the existing Constitution and Laws of the Kingdom and also guaranteed the adherence of the Constitution of 1993 that is the core value created to rehabilitate the Rule of Law and Democracy in Cambodia. The Constitutional Council has fulfilled the functions in accordance with the high level of an acceptable standard of neutrality, independence, and impartiality. Furthermore, The Constitutional Council has committed to move toward to the point of nationally and internationally recognition at larger scale. Thus, the Core Value of the Council: ***Respect Rule of Law, Protect Independence, Fulfil Neutrality*** is formed, and is followed by other three main pillars of conception to be implemented:

(i) To promote *perfectionism* in fulfillment of the constitutional council's mandate, which shall come with three main ideas (a) to promote quality of investigation in cases concerning electoral litigations (b) to promote quality of decision making, and (c) to promote the capacity building of officials.

(ii) To strengthen *trust* and *confidence* in public, which shall come with other two main ideas (a) to strengthen the independence of the Council (b) to strengthen neutrality in functioning mandates.

(iii) To infiltrate the principles of *constitutionalism* and *constitutionalization* into public awareness, which shall come with two main ideas (a) to infiltrate into publication, and (b) to infiltrate into the youths.

In short, the Constitutional Council of the Kingdom of Cambodia has still kept walking toward in playing crucial roles along with all concerned stakeholders, to promote Rule of Law and Democracy in Cambodia. The Council also wishes to share experiences with and also earns new knowledge from other Constitutional Councils/ Constitutional Courts/ Constitutional Tribunals or other relevant institutions of other respective countries in order to promote global partnership and harmony.

12 Decision N.159/001/2016 CC.D dated on March 03, 2016; examining the constitutionality of Law on Accounting and Auditing. The Council declared that point 4 of Article 7 of the aforesaid law that states '[…] Review and rule on litigations concerning accounting and auditing' is not consistent with provision of paragraph 3 of Article 128 (New) of the Constitution, which is '*The Judicial power covers all litigations, including administrative litigation*'.

13 Decision N.160/002/2016 CC.D dated on March 03, 2016; examining the constitutionality of Law on Trade Union. The Council determines that the administrative measurement and provisions of punishment of this law is consistent with the provisions […] of Article 37 of the Constitution, which states '*The rights to strike and to organize peaceful demonstrations shall be exercised within the framework of law'* and […] paragraph 3 of Article 128 (New).

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SPEECH OF THE DEPUTY CHAIRMAN OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF THE KYRGYZ REPUBLIC KUANBEK KIRGIZBAEV AT THE INTERNATIONAL SYMPOSIUM "THE CONSTITUTIONAL COURT AS THE GUARDIAN OF IDEOLOGY AND DEMOCRACY IN A PLURALISTIC SOCIETY" ON THE THEME: "THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT IS THE DEFENDER OF DEMOCRACY AND PLURALISM IN THE KYRGYZ REPUBLIC"

Solo (Indonesia) 9-10 August 2017

Dear participants of the international symposium, dear ladies and gentlemen!

Allow me to greet all participants of the International Symposium and on behalf of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic to congratulate the Constitutional Court of the Republic of Indonesia on its 14th anniversary. I want to express gratitude to the organizers for the invitation to participate and the opportunity to speak at such a significant event, which is an important platform for the exchange of experience between the bodies of constitutional control.

I would like to take this opportunity to express my confidence that the Association of Asian Constitutional Courts and Equivalent Institutions will allow us to quickly exchange information, identify the range of problems and challenges faced by members of the Association (AACC).

I would like to emphasize that the themes of the International Symposium are very relevant, since the Constitutional Courts and their equivalents are, by their appointment, the main defenders of democracy in a society where there are a variety of opinions, views, political directions, since pluralism is one of the main principles of the democratic structure of society.

I would like to briefly dwell on the pluralism of opinions and political trends in Kyrgyz Republic, as well as the role of the Constitutional Chamber in preserving democratic values and the development of pluralism in Kyrgyzstan.

Kyrgyzstan has made significant progress towards democratic development since its independence in 1991. Kyrgyzstan has a diverse and strong civil society and independent media. The community of non-governmental organizations (NGOs) and individual civic activists are actively involved in the political process, voicing issues of concern to the general public that supported democratic reforms. In addition, the role of the Constitutional Chamber of Kyrgyzstan in strengthening the sovereign democratic state and the formation of a single legal space, preserving the unity of the people of Kyrgyzstan, preserving democratic values and principles, the development of pluralism in society is very significant and undeniable.

The Constitutional Chamber of the Kyrgyz Republic is the guarantor of the protection of the rights and freedoms of citizens and the democratic foundations of the state, while it solves issues exclusively of law, acting independently and no one has the right to interfere in its activities, the decisions of the Constitutional Chamber are compulsory, its legal positions are an obligatory prescription as for legislators, and for those who challange the law.

The above powers impose on the Constitutional Chamber greater responsibility for the decisions made, since there are no instances that could correct the possible error of the body of constitutional control of Kyrgyzstan.

In accordance with Article 97 of the Constitution of the Kyrgyz Republic, «everyone has the right to challenge the constitutionality of the law and other normative legal act if he or she considers that it violates the rights and freedoms recognized by the Constitution», which means that practically everyone can apply to the Constitutional Chamber.

Since its inception in 2013, the Constitutional Chamber has adopted more than 70 decisions that are directly or indirectly related to the protection of human and civil rights and freedoms, democratic values recognized by the Constitution of Kyrgyzstan. These decisions are related to freedom of speech, thought, conscience and religion, the right to work, education, etc.

I would like to draw your attention to the fact that if the Constitutional Chamber holds that certain provisions of the law are unconstitutional, their actions that violate the constitutional rights and freedoms of citizens cease, which entails the protection of the rights and freedoms not only of concrete applicants, but also of the constitutional order as a whole.

The Constitutional Chamber of Kyrgyzstan is the guarantor, the decisive influence on the state system. Its activities are connected with the implementation of democratic reforms in the Kyrgyz Republic. This body protects constitutional control and faith in rights and legality. Experience shows that the body of constitutional control plays an important role in the separation of powers and in the effective functioning of a system

of checks and balances between the branches of state power and personal interests. As history shows, the usurpation of state power inflicts irreparable damage to democratic values and the desire of peoples to build a state of law.

In my opinion, the uniqueness of the mission of the Constitutional Court as a whole is that it is the only body of state power in any state which direct duty is to subordinate politics to law, political actions and decisions to constitutional and legal requirements and forms. The Constitutional Court is called upon not to allow the usurpation of state power, to constantly maintain a state in which only limited power is possible. Probably, this is the main mission of the body of constitutional control as the custodian of democracy and pluralism in a democratic society. Strict adherence to democratic norms and principles laid down in the basic law of the state is the guarantee of a stable political situation in the country.

In conclusion, I would like to note that the activities of the Constitutional Chamber to ensure the supremacy of the Constitution and its direct action are aimed at achieving the main goal - building a democratic social lawful state in the Kyrgyz Republic, one of the highest values of which is a person, his rights and freedoms.

Allow me to wish everyone success and fruitful work at today's symposium.

Thank you for attention!

CONSTITUTIONAL COURT AS THE GUARDIAN OF IDEOLOGY AND DEMOCRACY IN A PLURALISTIC SOCIETY: Malaysia's Experience

By:

The Right Honourable

Tan Sri Dato' Seri Md Raus Bin Sharif

Chief Justice Of Malaysia

Mr. Chairperson,

Fellow Participants,

Distinguished delegates,

Ladies and gentlemen.

1. I am privileged and indeed honoured to be able to participate in this Symposium to share, with all those present, the Malaysian Judiciary's Experience in today's theme, the "**Constitutional Court's Role in a Plural Society**".

2. Let me begin with a brief note on Malaysian history.

3. Malaysia, originally known as Malaya, attained independence from the British on 31st August 1957. The British, upon departing our shores, left behind a wealth of legacies which are very much alive and strong today.

4. We have adopted, albeit with local modifications, a bicameral Westminster styled legislature, a common law based judicial system, and a democratically appointed cabinet, all governed and subject to, a written Constitution known as the Federal Constitution.

5. Malaysia today is a peaceful country and home to over 30 million people scattered

over thirteen (13) States which form the Federation of Malaysia. We are headed by a Constitutional Monarch, His Majesty the Yang di-Pertuan Agong, appointed every five (5) years on a rotational basis amongst the nine (9) Malay Rulers of each State within the Federation.

6. Out of 31 million of the population in Malaysia, 69% are Malays, 23% are Chinese, 7% Indians, and 1% of the population is made up of other minor racial groups.

7. Thus, with such racial composition, Malaysia is a melting pot of cultures, traditions, races and religions.

8. In 1963, to add to our already rich melting pot, Singapore, Sabah and Sarawak decided to join Malaya to create what we know today as Malaysia. However, Singapore left the federation in 1965 to become an independent State.

9. The people of Sabah and Sarawak are themselves culturally diverse in their own right. The indigenous locals comprising of the Kadazan, Dusun, Bajau, Murut and Iban, as well as other indigenous ethnic groups, have varied sets of traditions, beliefs and practices.

10. Malaysia being a country diverse in race, ethnicity and religion was thought to be prone to major conflict due to the obvious dissimilarities amongst its people. However by the 31st of this Month, i.e. 31st August, we will be celebrating our 60th year as an independent nation.

Honourable members of the floor,

11. I believe the continued existence of a democratic Malaysian Society is fundamentally due to the framework enshrined under the Federal Constitution.

12. The Federal Constitution has stood the test of time, and has proven its worth as the roadmap for the nation at times of peace as well as conflict.

13. As a result, a democratic pluralistic society is very much alive in Malaysia. Equal representation is accorded to all races and minority groups at Parliament, be it in the upper house "**Senate**" or the lower house, the "**Dewan Rakyat**".

14. Article 45 of the Federal Constitution provides that the Senate shall consist of two (2) members elected from each State of the Federation, and the Federal Territories of Malaysia. While His Majesty the King shall appoint forty (40) individuals who in His Majesty's opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or <u>are representative of racial minorities or are capable of representing the interests of aborigines.</u>

15. While Article 46 of the Federal Constitution states that the Dewan Rakyat shall

consist of two-hundred and nine (209) members elected from each State as well as the Federal Territories of Malaysia.

16. On the Executive level, Article 43 of the Federal Constitution prescribes that, His Majesty the King shall appoint the Prime Minister from a member of the Dewan Rakyat who in His Majesty's judgment is likely to command the confidence of the majority of the members of that House. His Majesty shall then appoint Ministers on the advice of the Prime Minister, which shall then form a Cabinet which is the executive arm of government, answerable to Parliament.

17. The members of the Malaysian Cabinet today consist of representatives from each member of the Ruling Coalition known as the Barisan Nasional or National Front. Barisan Nasional is a coalition of major political parties representing the major racial groups in Malaysia. This translates into a diverse cabinet, with a balanced representation of all the major racial and indigenous groups of Malaysia.

18. On the judicial level, the courts are well aware of its role as guardians and protectors of the Federal Constitution. With regard to the continued preservation of the unique balance of diversity we have in Malaysia, it is apt to repeat and reiterate the 1988 Bangalore Principles which was the outcome of a high level judicial colloquium on the Domestic Application of International Human Rights Norms.

19. The Principles set out values and principles that judges should follow and take note in carrying out their duties and of particular relevance here is on **Equality**. It states that:

> "5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds').
>
> 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
>
> 5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties."

20. The Malaysian Judiciary upholds these principles of Equality and will continue to promote and protect the provisions of the Federal Constitution. To borrow the words of my predecessor Tun Zaki Azmi in one of his judgments concerning the customary rights of the natives of Sarawak. He said this:

> *"... a piece of legislation passed by Parliament or State Assembly may be the will*

of the majority but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there the acclamation: 'All persons are equal before the law and entitled to the equal protection of the law' (art. 8 of FC) when it is illusory. If 'an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it.' (See: Educational Company of Ireland Ltd v. Fitzpatrick (No 2) [1961] IR 345 per Budd J at p. 368)."[1]

Ladies and Gentleman,

21. The success and continued existence of any pluralistic society requires tolerance, perseverance and patience. The Judiciary plays an extremely important role in protecting the fundamental liberties of each member of the pluralistic society.

22. The rule of law must at the end of the day reign supreme in any democratic society. As long as the courts understand that all Man, Woman and Child are equal before the law, by God's grace that society will flourish in the face of adversity and against the odds.

23. Before I end, I would like to thank Chief Justice Arief Hidayat and his team at the Constitutional Court of the Republic of Indonesia for having organised this International Symposium and also for the hospitality given throughout our stay here in Solo.

Thank you and God bless.

Justice Raus Sharif

Chief Justice of Malaysia

10 August 2017

1 Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766

- Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia
- **Excellencies**

It is my great pleasure and honor to have this opportunity of presenting in this symposium, on behalf of the Constitutional Tribunal of the Union of Myanmar.

First of all, I would like to focus briefly on the facts of the Constitutional Tribunal of the Union of Myanmar.

The existing Constitution of the Union of Myanmar was promulgated in 2008, which has the provisions to establish the Constitutional Tribunal of the Union. According to the constitution, the general election was held in 2010 and new government organizations including the Constitutional Tribunal of the Union of Myanmar were formed in 2011. In this way, the Constitutional Tribunal came into being for the first time in the history of Myanmar.

It has the powers to interpret the provisions of the Constitution, to vet the laws passed by parliaments, to scrutinize the acts of administrative bodies, to decide the constitutional disputes of the Union, Regions, States and Self-Administered Areas. These are the main elements of the functions and duties of the Constitutional Tribunal of Myanmar.

It cannot acts initiatively (cannot act *motu proprio*) but only on the application. However, general public has no right to make the constitutional complaint to the Constitutional Tribunal of Myanmar.

In addition, the Constitution of Myanmar set out the list of six persons entitled to submit directly the constitutional matters to the Constitutional Tribunal. They are the President of the Union, the Speakers of three Parliaments, the Chief Justice of the Union and the Chairperson of the Union Election Commission.

Moreover, other four kinds of persons are designated to make the submissions the constitutional matters to the Constitutional Tribunal in accord with the specific procedure. They are Chief Ministers of the Regions or States, Speakers of the Regions or States Parliaments, the Chairperson of the Self-Administered Areas Leading Bodies and Representatives numbering at least ten percent of all representatives of the Pyithu Hluttaw (House of Representative) and Amyotha Hluttaw (Senate). They cannot submit their petition directly to the Tribunal and need to send it through authorized persons.

Again, the Constitution of Myanmar empowers the Supreme Court of the Union (not Constitutional Tribunal) to issue the Writ of Habeas Corpus, the Writ of Mandamus, the Writ of Prohibition, the Writ of Quo Warranto and the Writ of Certiorari. The issue of a Writ is in fact the remedy for violation of the constitutional rights of a citizen. In other words, it is the matter of constitutionality of the act or omission of an authority. However, these tasks of judicial review are not within the jurisdiction of the Constitutional Tribunal of Myanmar.

Similarly, the Union Election Commission of Myanmar has the power to form the election tribunals for trials of disputes relating to the election. The election tribunals adjudicate the electoral matters most of which are in a way the questioning of the constitutionality of the acts of concerning persons. Therefore, these sorts of constitutional review are also out of the preview of the Constitutional Tribunal.

It can be viewed that the jurisdiction of the Constitutional Tribunal of Myanmar is not extensive enough and only 6 years experience in the field of the constitutional review system is an early stage of development. However, as the main role of the Constitutional Courts is to interpret and apply the Constitution to test the constitutionality of statutes and thus preserve the Constitution's supremacy, Constitutional Tribunal of Myanmar is in some way able to play that role. Allow me to present an instance in brief.

Excellencies,

"All the powers should not be vested in the hands of one person or a group of persons" is the old ideology which existed long before the French great political philosopher "Montesquieu". (the pronunciation may be not proper.) But this ideology was enunciated in the middle of 18th century by "Montesquieu" in his book, the *Spirit of Laws*.

All of the democratic nations follow this ideology as the principle of "separation of powers" and enshrined in their constitutions. Myanmar is not exception. Section 11 of the Constitution of the Republic of the Union of Myanmar set out that "the three branches of sovereign power namely, legislative, executive and judicial are separated, to the extent possible and exert reciprocal control, check and balance among themselves".

Regardless of the above mentioned provision, the Ministry of Home Affairs sent a letter to the Supreme Court of the Union of Myanmar to confer the first- class Magistrate powers on 27 Sub-Township Administration officers. These officers were serving for the General Administration Department, under Ministry of Home Affairs. It is one of the Executive branch of the Union. The officers were supposed to conduct the duties of administrative officers as well as judges so that it will defeat the principle of separation of power.

The Chief Justice of the Union of Myanmar brought the case to the Constitutional Tribunal of the Union to obtain decision. It was entertained by the Constitutional Tribunal as Submission No. 1/2011 and held in 14 July 2011 that "if the sub-township administrative

officer of the General Administration Department of the Ministry of Home Affairs are conferred the judicial power, it will not be in conformity with the Constitution of the Republic of the Union of Myanmar."

This is the example that the Constitutional Tribunal of Myanmar definitely played the role of safeguarding the ideology or principle of democracy and preserving the supremacy of the constitution.

Excellencies,

I would like to pass the information of the Union Peace Conference of Myanmar. As a result of the great effort of Daw Aung San Suu Kyi and other leaders, 37 point of agreements were signed as part of the Union (Peace) Accord by stakeholders on 29 May 2017. One of the said agreements states that " Separate and independent tribunal on State Constitution must be set up for dealing with disputes on Constitution among Union and Regions and States or among Regions and States." It is noted that the concentrated system of constitutional review will continue to exist in the future constitution of Myanmar.

As the constitutional review is vital component of democracy, it is said that 38% of all constitutions had constitutional review systems and by 2011, 83 % of the world's constitutions have the systems of constitutional review. In democratic regimes, all judicial review methods have as their main purpose the guarantee of the supremacy of the constitution. Constitutional Courts/ Tribunals/ Councils or constitutional review system should be encouraged to develop because it preserve the supremacy of the constitutions, protect the constitutional value and fundamental rights of the people.

10 August, 2017 Thank You.

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Association of Asian Constitutional Courts and Equivalent Institutions

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		c. Mr. Aswanto	Justice
		d. Mr. I DewaGedePalguna	Justice
		e. Mrs. Maria Farida Indrati	Justice
		f. Mr. Manahan MP Sitompul	Justice
		g. Mr. Suhartoyo	Justice
		h. Mr. Wahiduddin Adams	Justice
		i. Mr. M. Guntur Hamzah	Secretary General
		j. Mr. KasianurSidauruk	Registrar
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