THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

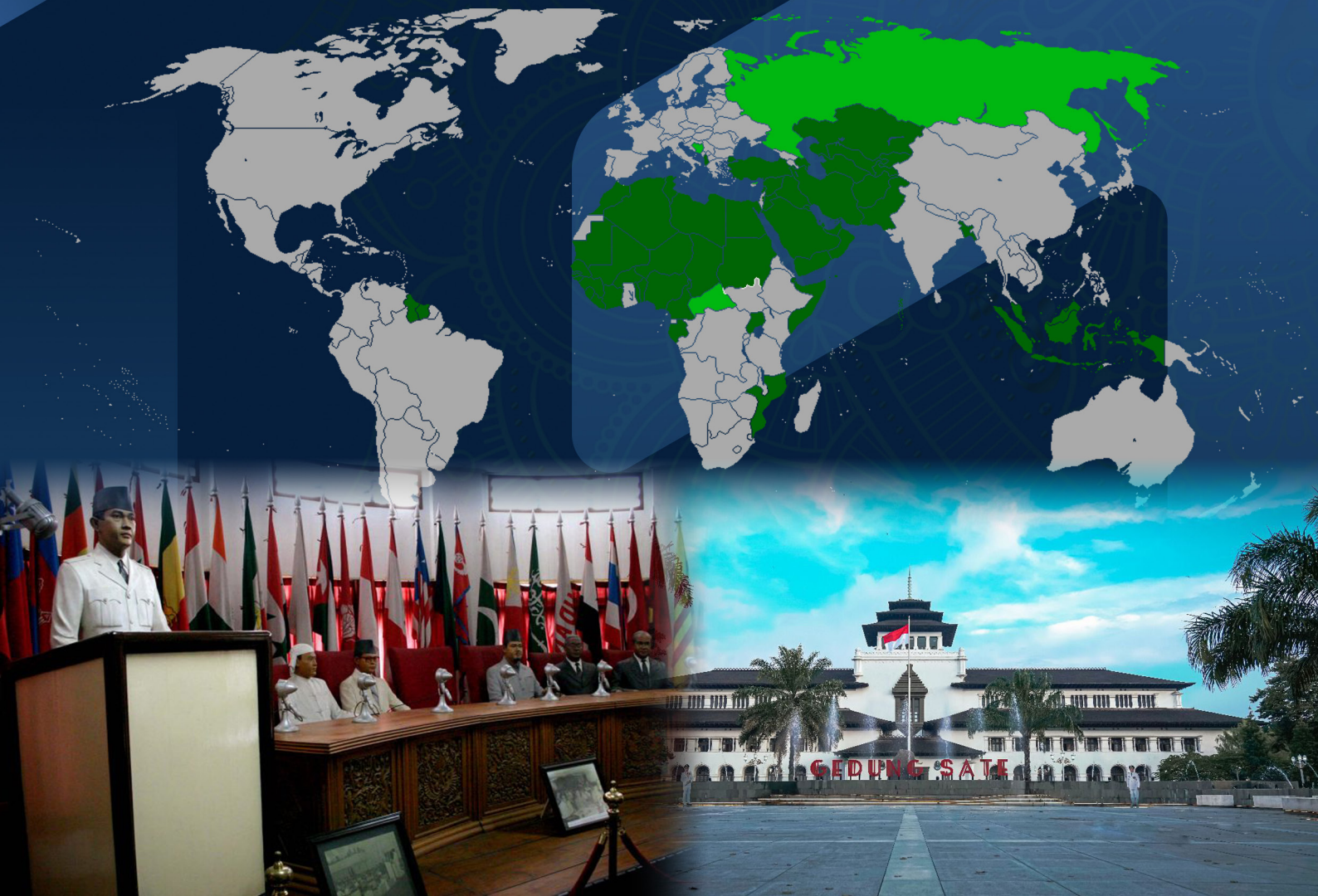
J-OIC
Judicial Conference of Constitutional
and Supreme Courts/ Councils of
the OIC Members States/ Observer States

PROCEEDING

THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

**"Human Rights and Constitutionalism:
The Contribution of the Judiciary in Muslim Countries."**

Bandung, September 16—17, 2021



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Bandung, September 16—17, 2021

Prepared by:

Diplomacy, Communication, and Material Assessment Team

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
Gedung 2 MKRI Jalan Medan Merdeka Barat No.7 Jakarta Pusat 10110
Office: +62 21 23529000; Fax: +62 21 3520177
humas@mkri.id

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THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

"Human Rights and Constitutionalism:
The Contribution of the Judiciary in Muslim Countries."

Bandung, 14-17 SEPTEMBER 2021

Agenda

DATES	TIME	JOIC	
Tuesday, 14 Sep 2021	15:40	Pakistan delegates arrival at Soekarno-Hatta International Airport	
	17.35	Turkey delegates arrival at Soekarno-Hatta International Airport	
Wednesday, 15 Sep 2021	15.00 - 17.00	Preliminary Meetings (Bilateral Meetings with Turkey and Pakistan)	
	17.00 - 19.00	J-OIC Working Committee Meeting (Indonesia, Turkey, Algeria, Pakistan, and Gambia)	
	19.00 - 21.00	Dinner at Pullman Hotel	
Thursday, 16 Sep 2021	07.00 - 09.00	Breakfast	
	11.30 – 12.30	Lunch	
	12.30 - 13.00	Conference Preparation	
	13.00 - 13.50	Opening Ceremony	
		13.00 - 13.05	National anthem of Indonesia: Indonesia Raya
		13.05 - 13.15	Speech from Deputy Governor of West Java Province H. Uu Ruzhanul Ulum
		13.15 - 13.20	VT Presentation
		13.20 - 13.35	Speech from Chief Justice of the Constitutional Court of the Republic of Indonesia Dr. Anwar Usman, S.H., M.H.
		13.35 - 13.50	Officially opened by President of The Republic of Indonesia (virtual) Ir. H. Joko Widodo
		13.50	Closing

Thursday, 16 Sep 2021	14.00 – 14.15	Report from the J-OIC Working Committees to the Plenary Chairman : Indonesia
		Delivering Bandung Declaration Concept, including:
		· The form of the organizarion
		· The name of the organization
		· Upcoming Host
		· Additional mandate (if any)
J-OIC Conference		
Thursday, 16 Sept 2021	14.15 – 15.00	J-OIC Conference (Session I) 45’
		Chairman: Algeria
		Speaker 1: Turkey H.E. Prof. Dr. Zühtü Arslan President of the Constitutional Court of Turkey
		Speaker 2: Kazakhstan H.E. Victor Malinovskiy Member of the Constitutional Council of the Republic of Kazakhstan
		Speaker 3: Malaysia H.E. Justice Dato’ Suraya binti Othman Judge of the Court of Appeal of Malaysia
	15.00 - 15.15	QnA
	15.15 - 15.30	Coffee Break
	15.30 - 16.30	J-OIC Conference (Session II) 60’
		Chairman: Turkey
		Speaker 4: Indonesia H.E. Dr. Wahiduddin Adams, S.H., M.A. Justice of the Constitutional Court of the Republic of Indonesia
		Speaker 5: Azerbaijan H.E. R. Ismaylov Judge of the Constitutional Court of the Republic of Azerbaijan
		Speaker 6: Jordan H.E. Taghreed Hikemt Judge of the Constitutional Court of Hashemite Kingdom of Jordan
		Speaker 7: Iraq H.E. Jasim Al-Omairi Head of the Federal Supreme Cout of Iraq
	16.30 - 16.45	QnA

	16.45—17.00	Preparation for Session III
Thursday, 16 Sept 2021	17.00 – 18.00	J-OIC Conference (Session III) 60’
		Chairman: Pakistan
		Speaker 8: Algeria H.E. Kamel Fenniche Chairman of the Constitutional Council of Algeria
		Speaker 9: Egypt H.E. Saeed MAREY AMR Chief Justice of the Supreme Constitutional Court of Egypt
		Speaker 10: Thailand H.E. Noppadon Theppitak Justice of the Constitutional Court of Kingdom of Thailand
		Speaker 11: Mozambique H.E. Albano Macie Judge of the Constitutional Council of Mozambique
	18.00 – 18.15	QnA
	19.00 - 21.00	Dinner Reception
	21.00 - 22.00	PCR Test for Delegates
Friday, 17 Sep 2021	07.00—08.30	Breakfast
	08.30—09.00	Preparation for Cultural Program
	09.00—11.30	Cultural Program - Museum Asia Afrika - Bandung Tour on Bus (BANDROS) - Gedung Sate
	11.30—12.30	Friday Prayer at Masjid Al- Mutaqien (Gedung Sate)
	12.30—14.00	Lunch at Pullman Hotel
	14.00—15.15	J-OIC Conference (Session IV) 75’
		Chairman: Indonesia
		Speaker 12: Pakistan H.E. Gulzar Ahmed Chief Justice of the Supreme Court of Pakistan
		Speaker 13: Russia H.E. Gadis Gadzhiev Justice of the Constitutional Court of Russian Federation
		Speaker 14: Bangladesh H.E. Syed Mahmud Hossain Chief Justice of the Supreme Court of Bangladesh

		Speaker 15: Cameroon H.E. Marie Louise ABOMO Justice of the Supreme Court of Cameroon	
		Speaker 16: Palestine H.E. Mohammed El Haj Kacem President of the Supreme Constitutional Court of Palestine	
	15.15—15.30	QnA	
Friday, 17 Sep 2021	15.30—15.45	Coffee Break	
	15.45—15.55	Preparation for Plenary Meeting	
	15.55—16.55	Plenary Meeting and Discussion on Bandung Declaration with All Participants Chairman: Turkey	
	16.55—17.10	Preparation for Closing	
	17.10—17.50	Closing	
		16.55—17.00	Highlights of the 2nd J-OIC Conference
		17.00—17.10	Pronouncement of Bandung Declaration
		17.10- 17.20	Remarks from President of Venice Commission, Mr. Gianni Buquicchio
		17.20 - 17.35	Remarks from Deputy Chief Justice, Prof. Dr. Aswanto, S.H., M.Si., DFM
Saturday, 18 Sep 2021	Full day	Delegates departure	

List of Participating Countries and Institutions

The 2nd Conference of the Judicial Conferencece of Constitutional and Supreme Courts/Councils of the OIC Member States/Observer States (J-OIC) Bandung, 15-17 September 2021

Country	Institution
Albania	Constitutional Court of Albania
Algeria	Constitutional Council of Algeria
Angola	Tribunal Constitucional de Angola
Azerbaijan	Constitutional Court of the Republic of Azerbaijan
Bangladesh	Supreme Court of Bangladesh
Burkina Faso	Assemble Nationale
Cameroon	Cour Suprme du Cameroun
Chad	Supreme Court of Chad
Egypt	Supreme Constitutional Court of Egypt
Indonesia	Constitutional Court of the Republic of Indonesia
Iraq	Federal Supreme Court of Iraq
Jordan	Constitutional Court of Jordan
Republic of Korea	Constitutional Court of Korea
Kazakhstan	Constitutional Council of the Republic of Kazakh-stan
Kyrgyzstan	Constitutional Court of Kyrgyzstan
Lebanon	Lebanese Constitutional Council
Libya	Supreme Court of Libya
Malaysia	Federal Court of Malaysia
Maldives	Supreme Court of the Maldives
Mauritania	Constitutional Council of Mauritania
Morocco	Constitutional Court of Morocco
Mozambique	Constitutional Council of Mozambique
Oman	Supreme Court of the Sultanate of Oman
Pakistan	Supreme Court of Pakistan
Palestine	Supreme Constitutional Court of Palestine
Somalia	Supreme Court of Somalia
Russia	Constitutional Court of the Russian Federation
Thailand	Constitutional Court of the Kingdom of Thailand
The Philippines	Supreme Court of the Philippines
Turkey	Constitutional Court of the Republic of Turkey
Uganda	Supreme Court of Uganda
Uzbekistan	Constitutional Court of the Republic of Uzbekistan

Gubernur Jawa Barat

SAMBUTAN WAKIL GUBERNUR JAWA BARAT

PADA ACARA "KONFERENSI KEDUA MAHKAMAH KONSTITUSI, MAHKAMAH AGUNG DAN DEWAN KONSTITUSI DARI NEGARA NEGARA ANGGOTA ORGANISASI KERJASAMA ISLAM"

HARI/TANGGAL	:	KAMIS, 16 SEPTEMBER 2021
PUKUL	:	13.00 WIB
TEMPAT	:	HOTEL PULMAN BANDUNG

BISMILLAHIRRAHMANIRRAHIM.

ASSALAMU'ALAIKUM WR. WB.

SELAMAT SIANG DAN SALAM SEJAHTERA BAGI KITA SEMUA.

YM. PRESIDEN REPUBLIK INDONESIA, BAPAK IR. H. JOKO WIDODO (YANG HADIR SECARA DARING);

YM. KETUA MAHKAMAH KONSTITUSI REPUBLIK INDONESIA, BAPAK DR. ANWAR USMAN, S.H., M.H, BESERTA WAKIL KETUA DAN PARA HAKIM KONSTITUSI.

YM. PRESIDEN DEWAN KONSTITUSI ALJAZAIR, MR. KAMEL FENNICHE BESERTA DELEGASI

KETUA MAHKAMAH AGUNG PAKISTAN, MR. AHMED GULZAR BESERTA DELEGASI

YM. PRESIDEN MAHKAMAH KONSTITUSI TURKI, DR. ZÜHTÜ ARSLAN BESERTA DELEGASI;

YM. PARA KETUA MAHKAMAH KONSTITUSI, MAHKAMAH AGUNG DAN DEWAN KONSTITUSI DARI NEGARA-NEGARA ANGGOTA ORGANISASI KERJASAMA ISLAM YANG HADIR SECARA DARING

PADA KESEMPATAN YANG MULIA INI, MARILAH KITA BERSAMA-SAMA PERSEMBAHKAN RASA SYUKUR KEHADIRAT ALLAH SWT ATAS LIMPAHAN KARUNIA, NIKMAT IMAN DAN ISLAM AL-HAMDULILLAH KITA MASIH BERADA DALAM KEADAAN SEHAT WAL'AFIAT, MESKI HARUS DENGAN MENERAPKAN PROTOKOL KESEHATAN GUNA MEMUTUS MATA RANTAI PENYEBARAN COVID-19.

- TERIRING KAMI SAMPAIKAN UCAPAN TERIMA KASIH YANG SEBESAR-BESARNYA KEPADA KETUA MAHKAMAH KONSTITUSI REPUBLIK INDONESIA YANG TELAH MEMPERCAYAKAN KEPADA KOTA BANDUNG PROVINSI JAWA BARAT SEBAGAI TUAN RUMAH PENYELENGGARA KONFERENSI KEDUA BAGI MAHKAMAH KONSTITUSI, MAHKAMAH AGUNG DAN DEWAN KONSTITUSI DARI NEGARA NEGARA ANGGOTA ORGANISASI KERJASAMA ISLAM.

HADIRIN YANG KAMI HORMATI

- SEPERTI YANG KITA KETAHUI BERSAMA, KONFERENSI INI DILAKUKAN BERDASARKAN DEKLARASI ISTANBUL YANG TELAH DISELENGGARAKAN PADA TANGGAL 14 DAN 15 DESEMBER 2018 DI TURKI. HASIL DEKLARASI TERSEBUT MEMBERI MANDAT KEPADA MAHKAMAH KONSTITUSI UNTUK MENYELENGGARAKAN OKI ATAU JOC YANG DILAKSANAKAN DI INDONESIA. DAN MEMPERCAYAKAN KONEFERENSI INI DILAKSANAKAN DI KOTA BANDUNG JAWA BARAT.
- KONFERENSI INI DIIKUTI OLEH 32 NEGARA NEGARA ORGANISASI KERJASAMA ISLAM (OKI). SELAIN NEGARA NEGARA ANGGOTA OKI, KEGIATAN BERSKALA INTERNASIONAL INI JUGA DIIKUTI OLEH MITRA KERJASAMA DALAM NEGERI. NAMUN HANYA DELEGASI DARI TURKI DAN PAKISTAN YANG HADIR LANGSUNG.
- KAMI BERHARAP KONFERENSI INI SEBAGAI FORUM KERJASAMA UNTUK MEMPROMOSIKAN, MENGUATKAN, MEMAJUKAN KONSTITUSI

DAN KONSTITUALISME DI MASING MASING NEGARA, SERTA PENGUATAN DEMOKRASI, HAK ASASI MANUSIA DAN RULE OF LAW. KONFERENSI INI MENJADI SALAH SATU FORUM PENTING UNTUK MENINGKATKAN KUALITAS PUTUSAN MAHKAMAH KONSTITUSI, DI MANA PARA DELEGASI DAPAT BERTUKAR PIKIRAN ATAU PENGALAMAN DENGAN INSTITUSI SEJENIS DARI MANCANEGARA.

- SELAIN ITU, KONFERENSI INI MERUPAKAN KESEMPATAN BAGI INDONESIA UNTUK MENEGUHKAN KEDUDUKANNYA SEBAGAI NEGARA HUKUM DEMOKRATIS YANG MEMILIKI IDEOLOGI PANCASILA. SAYA BERHARAP MELALUI KONFERENSI INI DAPAT MENINGKATKAN PERAN MK DALAM MENEGAKKAN PERLINDUNGAN HAK ASASI MANUSIA SERTA MEMPERERAT HUBUNGAN KERJA SAMA ANTAR LEMBAGA PERADILAN NEGARA-NEGARA ANGGOTA OKI.

HADIRIN YANG KAMI HORMATI

- DEMIKIAN KIRANYA BEBERAPA HAL YANG DAPAT SAYA SAMPAIKAN PADA KESEMPATAN KALI INI SELAMAT BERKEGIATAN. SEMOGA SELURUH RANGKAIAN ACARA BISA BERJALAN DENGAN SUKSES. TERIMA KASIH ATAS PERHATIANNYA.

WALLAHUL MUWAFIQ ILAA AQWAMITTHORIIQ

WASSALAMU'ALAIKUM WR, WB.

WAKIL GUBERNUR JAWA BARAT

UU RUZHANUL ULUM

MAHKAMAH KONSTITUSI

REPUBLIK INDONESIA

BAHAN KONFERENSI KE-2

LEMBAGA PERADILAN ANGGOTA OKI

DENGAN TEMA

KONSTITUSIONALISME DAN HAK ASASI MANUSIA: KONTRIBUSI PENGADILAN NEGARA-NEGARA MUSLIM

Bandung, 16 September 2021

Bismillahirahmanirahim,

Assalamu'alaikum wa rahmatullahi wa barakatuh,

Salam sejahtera bagi kita semua.

- Yang kami muliakan, Presiden Republik Indonesia, Bapak Ir. Joko Widodo;
- Yang saya muliakan, Wakil Ketua Mahkamah Konstitusi beserta Bapak dan Ibu Hakim Konstitusi Republik Indonesia;
- Yang saya muliakan, para Ketua Delegasi, Bapak/Ibu Hakim Konstitusi, dan lembaga sederajat dari negara sahabat;
- Hadirin, para peserta konferensi, yang juga, saya muliakan.

Marilah kita senantiasa memanjatkan puji dan syukur kehadirat Allah

SWT, Tuhan Yang Maha Kuasa, karena hanya atas rahmat, taufik, dan hidayah-Nya, kita dapat mengikuti, dan melaksanakan Konferensi ke-2, dari Negara-Negara Anggota, dan Peninjau Organisasi Kerjasama Islam (JOIC), baik secara luring, maupun daring, dalam keadaan sehat wal afiat. Ucapan terima kasih, dan apresiasi yang setinggi-tingginya, bagi negara-negara sahabat, yang telah bergabung di dalam forum ini. Sehingga, berkat kerjasama dan koordinasi yang baik, kegiatan konferensi ini, dapat diselenggarakan. Secara khusus, kami menyampaikan apresiasi kepada Yang Mulia Ketua Mahkamah Konstitusi Turki dan Pakistan, yang telah berkenan hadir secara fisik, dalam pertemuan hari ini.

Bapak Presiden dan peserta konferensi yang saya muliakan,

Gagasan, untuk membentuk sebuah forum lembaga peradilan, bagi negara-negara yang tergabung di dalam OKI, sebenarnya, telah dimulai sejak tahun 2005 oleh Ketua Mahkamah Konstitusi, periode pertama, Bapak Prof. Dr. Jimly Asshidiqie, S.H., ketika hadir, di dalam perayaan ulang tahun MK Turki. Gagasan tersebut, juga pernah disampaikan kepada beberapa MK negara lainnya, namun, karena berbagai faktor, gagasan tersebut, belum sempat terwujud, hingga akhirnya, pada tahun 2018, gagasan itu dibicarakan kembali, dan berupaya untuk diwujudkan.

Sebagai lembaga peradilan konstitusi, dari negara-negara yang bergabung di dalam Organisasi Kerjasama Islam (OKI), yang berdiri pada 12 Rajab 1389 H, atau bertepatan dengan 25 September 1969, sudah seharusnya, menjadi pionir, dan memberikan tauladan, tentang, bagaimana membangun sistem peradilan dan ketatanegaraan yang baik, di tengah masyarakat internasional. Ikhtiar, untuk nenunjukan sistem peradilan, dan ketatanegaraan yang baik, kepada dunia internasional, merupakan tugas dan tanggung jawab kita, sebagai negara, dengan penduduk mayoritas muslim, agar tercipta, suatu sistem pemerintahan dan kehidupan

bernegara, yang melindungi hak-hak konstitusional warga negara.

Sebagaimana kita ketahui dan pahami, bahwa salah satu materi muatan yang terkandung di dalam konstitusi adalah, adanya jaminan perlindungan terhadap hak asasi manusia, dan tugas lembaga peradilan, atau Mahkamah Konstitusi adalah, untuk memastikan, bahwa hak asasi manusia, yang telah dijamin oleh konstitusi tersebut, dilaksanakan oleh lembaga-lembaga negara yang ada. Konsepsi, atau paham konstitusionalisme, dan hak asasi manusia demikan, adalah konsepsi, yang berlaku umum bagi setiap negara, yang menganut prinsip negara hukum.

Namun, jika konsepsi demikian, dikaitkan dengan kontribusi lembaga peradilan, dari negara-negara yang tergabung di dalam OKI, maka, disinilah letak pentingnya, untuk menunjukan, bahwa, negara-negara dengan penduduk mayoritas muslim, juga, memberikan atensi dan kontribusi yang signifikan, di dalam penegakan hukum dan HAM. Baik di negaranya masing-masing, maupun bagi kepentingan dunia internasional. Oleh karena itulah, di dalam konferensi ke-2 JOIC ini, tema yang diangkat adalah, mengenai kontribusi pengadilan negara-negara OKI, dalam konteks Konstitusionalisme, dan Hak Asasi Manusia.

Hal terpenting lainnya, yang juga dapat dilakukan dalam forum ini, adalah, meluruskan pandangan sebagian kecil orang, bahwa, penduduk muslim dengan keyakinannya, tidak sejalan dengan nilai-nilai demokrasi, dan HAM. Dengan berbagi pandangan, tentang praktik dan konsepsi yang berlaku di negara masing-masing, maka forum ini, dapat memberikan pemahaman yang utuh, tentang konsep dan praktik konstitusionalisme dan HAM, serta penerapannya, oleh lembaga peradilan di negara-negara anggota OKI. Untuk itu, saya ucapkan terima kasih yang tiada terhingga, atas partisipasi seluruh anggota delegasi baik secara luring, maupun secara daring, di dalam kegiatan ini.

Bapak Presiden dan peserta konferensi yang saya muliakan,

Dalam kesempatan yang mulia ini, izinkanlah saya, sedikit berbagi, tentang pengalaman dan praktik di Indonesia, sesuai dengan tema konferensi kita hari ini. Konstitusi Indonesia, lahir sejak 18 Agustus 1945, tepat satu hari, setelah proklamasi kemerdekaan Indonesia, pada tanggal 17 Agustus 1945. Konstitusi Indonesia, sejak kelahirannya, telah menetapkan, bahwa Indonesia, adalah negara yang berdasarkan atas hukum, menerapkan sistem demokrasi, dan memberikan jaminan perlindungan terhadap HAM. Kendati demikian, konstitusi Indonesia, tidak lahir secara serta merta.

Konstitusi Indonesia, pada hakikatnya, merupakan penjabaran dari nilai-nilai dasar negara Indonesia, yang disebut dengan Pancasila. Kata Pancasila, berasal dari bahasa Sansekerta, yaitu bahasa kuno Asia Selatan, yang memiliki arti “lima prinsip”, atau lima nilai dasar bernegara. Nilai pertama yang terkandung di dalam Pancasila adalah, “Ketuhanan Yang Maha Esa”. Prinsip pertama ini, mengandung makna, bahwa, setiap warga negara Indonesia, diberikan kebebasan, untuk memeluk agama dan kepercayaannya masing-masing. Artinya, prinsip pertama ini, memberikan jaminan kemerdekaan, untuk memeluk agama, sebagaimana dijamin di dalam terminologi HAM, yaitu “fredoom of religion”.

Dalam konteks ini, negara, hanya bertugas, untuk memfasilitasi setiap warga negara, yang hendak memeluk dan melaksanakan ajaran agamanya masing-masing, tanpa unsur paksaan dan tekanan, dari siapapun. Meskipun penduduk Indonesia, mayoritas beragama Islam, sejak kecil, umat muslim di Indonesia, telah ditanamkan nilai toleransi, dan tidak boleh memaksakan agama, dan keyakinan kita, kepada umat beragama lain. Hal ini, sejalan dengan firman Allah dalam QS. Al-Baqarah ayat 256, yang berbunyi: “La ikraha fid din”, yang berarti, tidak ada paksaan dalam agama.

Prinsip kedua di dalam Pancasila berbunyi, “Kemanusiaan yang adil dan beradab”. Dalam prinsip kedua ini, terkandung tiga nilai sekaligus, yaitu nilai kemanusiaan (humanity), keadilan (justice), dan keberadaban (civilize). Meski makna dari ketiga nilai tersebut, dapat diterjemahkan secara parsial, namun, masing-masing dari nilai tersebut, memiliki hubungan interdependensi, yang sangat kuat. Sebagai contoh misalnya, nilai kemanusiaan, tidak mungkin dapat diwujudkan, manakala keadilan tidak ditegakan. Begitu pula halnya, keberadaban tidak mungkin dapat tercipta, jika nilai kemanusiaan dan keadilan, tidak dilaksanakan.

Selanjutnya, prinsip ketiga di dalam Pancasila, berbunyi, “Persatuan Indonesia”. Prinsip ketiga ini, tidak dapat dilepaskan dari kondisi geografis serta heterogenitas Indonesia, sebagai sebuah bangsa. Secara geografis, hamparan kepulauan Indonesia, yang terdiri dari 17.504 ribu gugusan pulau, dengan populasi mencapai 270 juta jiwa lebih penduduk, 1.340 suku, dan 700 bahasa daerah aktif, maka Indonesia, dapat dikatakan sebagai lumbung budaya, yang merupakan akulturasi, dari berbagai etnik dan ras, di dunia. Meski dengan keberagaman dan perbedaan tersebut, masyarakat Indonesia, dapat hidup berdampingan secara harmoni dan damai. Dengan kata lain, prinsip ketiga dari Pancasila, menjadi simbol pemersatu bangsa Indonesia, yang begitu heterogen.

Prinsip keempat di dalam Pancasila berbunyi, “Kerakyatan yang dipimpin oleh khidmat kebijaksanaan dalam permusyarawatan/perwakilan”. Prinsip ini, berkaitan erat dengan sistem demokrasi, yang diterapkan di Indonesia. Secara umum, demokrasi, senantiasa dikaitkan dengan jumlah perolehan suara yang diraih, oleh pemenang pemilu. Artinya, pemenang pemilu, dapat secara leluasa, mengambil berbagai kebijakan yang dikehendakinya, selama mereka menjabat. Penerapan demokrasi di Indonesia, jika merujuk kepada prinsip keempat ini, tidaklah demikian. Berbagai kebijakan yang hendak dikeluarkan, haruslah

dimusyawarahkan terlebih dahulu, secara arif dan bijaksana. Hanya, jika dalam kondisi tertentu, keputusan diambil berdasarkan suara mayoritas. Oleh karena itu, penerapan politik, dengan pendekatan mayoritarian, tidak mendapatkan hati di tengah masyarakat Indonesia, dan, tidak menjadi budaya politik, yang mengakar hingga saat ini.

Terakhir, prinsip kelima Pancasila berbunyi, "Keadilan sosial, bagi seluruh rakyat Indonesia". Prinsip terakhir ini berkehendak, bahwa, negara, memiliki kewajiban untuk menciptakan keadilan sosial, bagi seluruh warga negaranya, tanpa terkecuali. Keadilan sosial dimaksud, dapat diterjemahkan dalam pendekatan, untuk membangun masyarakat yang adil, makmur, dan sejahtera, baik secara lahir, maupun bathin.

Bapak Presiden dan peserta konferensi yang berbahagia,

Jika Pancasila, ditinjau dari sudut, atau pandangan agama Islam, maka sesungguhnya, nilai-nilai yang terkandung di dalam setiap sila dari Pancasila, sejalan dengan nilai-nilai yang terkandung di dalam ajaran agama Islam. Sila pertama, tentang "Ketuhanan Yang Maha Esa", sejalan dengan ajaran Tauhid, sebagaimana firman Allah SWT., di dalam Quran, Surat Al Ikhlas: "Qul huwallahu, Ahad" . Sila kedua, yang berbunyi, "Kemanusiaan yang adil dan beradab", sejalan dengan firman Allah SWT., di dalam Quran, Surat An-Nisa ayat 135: "Ya ayyuhalladina amanu, Kunu Qowwamiina bilqisti...", yang artinya "Wahai orang-orang yang beriman, jadilah kamu, orang yang benar-benar penegak keadilan,..".

Sila ketiga, yang berbunyi, "Persatuan Indonesia", sejalan dengan firman Allah SWT., di dalam Quran Surat Al Hujurat, ayat 13: "Ya ayyuhannas, innaa Kholaqnakum mingdakariwwaungsa, wajaalnakum su'uban, waqoba ila, lita'aropuu.." yang artinya, "Hai manusia, kami menjadikan kamu berbangsa-bangsa, dan bersuku-suku, supaya kamu saling mengenal". Sila keempat,

yang berbunyi, “Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan”, sejalan dengan firman Allah SWT., di dalam Quran, Surat Ash-Shuraa, ayat 38:..Wa amruhum, shuro bainahum..,“ yang artinya:..sedangkan urusan mereka, (diputuskan) dengan cara musyawarah, diantara sesama mereka..”. Sila kelima, yang berbunyi, “Keadilan sosial, bagi seluruh rakyat Indonesia”, sejalan dengan firman Allah SWT., di dalam Quran, Surat An Nahl, ayat 90: Innallaha ya’muru bil adli wal ihsan..” yang artinya: “Sesungguhnya Allah menyuruhmu berlaku adil dan berbuat kebajikan..”. Bahwa selain ayat-ayat yang dikutip tersebut diatas, sesungguhnya masih banyak ayat-ayat lain dalam Alquran, yang sangat relevan dengan keberadaan Pancasila.

Dengan demikian, maka kita dapat menyimpulkan, bahwa, nilai-nilai Islam dan konstitusi, adalah dua nilai yang dapat berjalan beriringan. Bahkan, dapat pula dikatakan, bahwa nilai-nilai yang terkandung di dalam konstitusi Indonesia, diilhami oleh nilai-nilai yang terkandung di dalam ajaran agama Islam.

Bagi Mahkamah Konstitusi RI, tugas dan amanah mengawal konstitusi, merupakan tugas yang mulia. Namun secara etis, Mahkamah Konstitusi, juga memiliki kewajiban moral, untuk mengawal nilai-nilai yang terkandung di dalam Pancasila. Bahkan tidak jarang, di dalam beberapa putusannya, Mahkamah Konstitusi, mengutip penggalan ayat dalam kitab suci, sebagai pertimbangan hukumnya. Disanalah, letak kontribusi yang strategis, sekaligus konkrit, peran dari lembaga peradilan konstitusi, dalam mewujudkan dan menegakkan prinsip konstitusionalisme, dan penegakkan hak asasi manusia.

Saya yakin dan percaya, bahwa semua negara, utamanya yang tergabung di dalam forum ini, juga memiliki nilai-nilai ideologi negara, yang tidak jauh berbeda dengan apa yang telah saya uraikan tadi. Untuk itu, dalam kesempatan konferensi ke-2 JOIC hari ini, para delegasi, dapat berbagi pengalamannya

masing-masing, untuk menambah wawasan, dan saling belajar satu sama lain, agar nilai-nilai Islam, yang rahmatan lil alamin, dapat diterapkan, demi terwujudnya masyarakat global yang damai, adil dan sejahtera.

Sebelum mengakhiri sambutan ini, dari lubuk hati yang amat dalam, saya mengucapkan terima kasih yang tiada terhingga, kepada Yang Mulia Presiden Republik Indonesia, Bapak Ir. Joko Widodo, yang telah berkenan hadir secara virtual dalam kegiatan ini, dan telah memberikan dukungan pada berbagai event Internasional, yang diselenggarakan oleh Mahkamah Konstitusi.

Insya Allah, pada tahun 2022 mendatang, sesuai dengan amanah yang telah diberikan kepada Mahkamah Konstitusi RI, penyelenggaraan the 5th World Conference on Constitutional Justice (WCCJ), akan diadakan di Indonesia. Jika pandemi covid-19 telah berlalu, kegiatan ini, akan diselenggarakan di Bali, dan akan dihadiri oleh tidak kurang dari 117 negara. Semoga pandemi Covid-19 segera berlalu, sehingga kita dapat menikmati pulau Bali yang sangat indah. Apabila, Pandemi Covid-19 belum juga berakhir, kami telah menyiapkan alternatif lain. Untuk itu, dukungan dari Yang Mulia Presiden Republik Indonesia, Bapak Ir. Joko Widodo dalam kegiatan tersebut, senantiasa kami harapkan, demi suksesnya, dan lancaranya acara dimaksud.

Kiranya demikian sambutan saya, terima kasih atas segala perhatian, dan mohon maaf atas segala kekurangannya.

Billahi Taufik wal hidayah,

Wassalamu‘alaikum warahmatullahi wabarakatuh,

Salam sejahtera untuk kita semua.

CHAIR'S SUMMARY

WORKING COMMITTEE OF THE 2ND CONFERENCE OF JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/ COUNCILS OF THE ORGANIZATION OF ISLAMIC COOPERATION MEMBER STATES/OBSERVER STATES

Bandung, 15 September 2021

I. INTRODUCTION

1. The Meeting of the Working Committee [the Meeting] of the 2nd Conference of Judicial Conference of Constitutional and Supreme Courts/Councils of the Organization of Islamic Cooperation Member States/Observer States that consist of representatives from the Constitutional Court of the Republic of Turkey, the Constitutional Court of the Republic of Indonesia, the Algerian Constitutional Council, the Supreme Court of Pakistan, and the Supreme Court of Gambia was held in Bandung, West Java on the 15th of September 2021.
2. The Meeting was conducted in a hybrid manner. Representatives from Turkey, Indonesia, and Pakistan were present in Bandung while the representative from Algeria was present online through video conference. Representatives from Gambia were not able to attend the Meeting. The list of delegates appears as Annex 1.
3. The Meeting was chaired by the Chief of Justice of the Constitutional Court of the Republic of Indonesia. The Agenda of the Meeting is attached as Annex 2.
4. The Meeting noted that the idea to establish a Conference of Judicial

Conference of Constitutional and Supreme Courts/Councils of the Organization of Islamic Cooperation Member States/Observer States was initially proposed by the First Chief of Justice of the Indonesian Constitutional Court during the anniversary of Turkish Constitutional Court in 2007. The idea was further discussed in the 2nd Indonesian Constitutional Court International Symposium 2018 in Yogyakarta, Indonesia.

II. DISCUSSION ON THE PREAMBLE OF BANDUNG DECLARATION

5. The Meeting discussed and agreed on the Bandung Declaration on Human Rights and Constitutionalism: The Contribution of Judiciary of Muslim Countries."
6. The Bandung Declaration is attached as Annex 3.

III. DISCUSSION ON THE POINTS OF DECLARATION

7. The Meeting discussed the name of forum, place, and time for the next Conference.
8. The meeting agreed to established a formal platform under the name: "Conference of Constitutional Jurisdictions of OIC Member States" with the abbreviation "CCJ-OIC", as an independent forum to exchange experiences and information on mutual concern of constitutional cases and jurisprudence for the promotion of rule of law, democracy, and human rights.
9. The Meeting agreed to have the next meeting as the first Inaugural Congress of CCJ-OIC Member States. The Inaugural Congress will be held in Istanbul in 2022.
10. The Meeting expressed readiness for the Working Committee to prepare the Statute of the CCJ-OIC. The Working Committee will meet to discuss the draft statute of the CCJ-OIC in the next Working Com-

mittee meeting which will be held in Pakistan in late 2021 and in Algeria consecutively, pending further confirmation by the two respective countries.

11. The Meeting intended for the Statute of the CCJ-OIC to be presented during the first Inaugural Congress of the CCJ-OIC Member States.
12. With regard to the extension of the membership and mandate of the Working Committee, the Meeting agreed to keep the membership (Indonesia, Turkey, Pakistan, Algeria, Gambia) and mandate as it is.
13. On the membership of the CCJ-OIC, the Meeting agreed that the matter will be discussed once the Statute of the CCJOIC has been finalized. The Meeting further agreed that the statute will include the objectives of the CCJOIC and the qualification to become a member of the CCJOIC. Membership of the CCJOIC will comprise of member states and observers of the Organization of Islamic Conference.

IV. OTHER MATTERS

14. The Meeting discussed the proposal from Algeria on the location of a secretariat of the organization of CCJ-OIC. The Meeting agreed that the location of secretariat of the CCJ-OIC will be discussed in a later meeting.
15. The Meeting welcomed the proposal that each member of the Working Committee prepare a draft statute of the CCJ-OIC to be presented in the next Working Committee meeting.
16. The Meeting discussed about the possibility of the members of Working Committee to automatically become the declarators of CCJ-OIC and will be considered to be discussed at a later stage.

PAPERS
SESSION I

PROCEEDING
THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

"Human Rights and Constitutionalism:
The Contribution of the Judiciary
in Muslim Countries."

Bandung, September 16—17, 2021

TURKEY

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

The Role of the Turkish Constitutional Court in Promoting Pluralist Democracy

Zühtü Arslan

Dear colleagues,

It is a great pleasure to be here and address such distinguished participants.

I would like to thank my friend and colleague Mr Anwar Usman, the Chief Justice of the Indonesian Constitutional Court for hosting and organising this meeting.

I hope next time we will be able to meet in person with all the participants without having to wear masks.

Ladies and gentlemen,

In my brief speech, I would like to say a few words about the contribution of the Turkish Constitutional Court to pluralist understanding of democracy. Before explaining the approaches and decisions of the TCC, I want to elaborate that modern democracy is not merely the rule of majority.

Let me begin with a very simple and general observation as to the main task of the constitutional/supreme courts. Charged with the constitutionality review of the legislative and executive acts, constitutional courts exist first and foremost to protect the basic values, principles and provisions enshrined in the constitutions.

As we all know from the ancient times up until today democracy has been defined as the rule of majority. Thucydides says that" *The word we use to describe our political system is democracy because, in its administration, it relates not to the few but to the majority*".

However, in a plural society, understanding and practice of democracy cannot rely on the absolute rule of majority. It is true that democracy is inconceivable without elections which determine those who shall govern. On the other hand, democracy also requires the constitutional restraints to be imposed on ruling majority to protect individual rights and liberties.

Late Alija Izetbegović emphasized this aspect of democracy long before the establishment of Bosnia-Herzegovina. On 27 March 1990 he defined democracy "*not as the rule of majority, but as the rule of law*". He justified this definition by declaring that "*Majority rule without the mediation of law inevitably transforms itself into the tyranny of the majority, and the tyranny of the majority is as much a tyranny as any other*".

It wouldn't be therefore wrong to say that modern democracy has been oriented on the rule of law in order to protect and promote human rights. The term "constitutional" turned out to be the indispensable adjective of "democracy" subjecting the rule of majority to the rule of law with a view to protecting rights and liberties of individuals.

Democracy is the primary value to be protected by the constitutions. Indeed today almost all constitutions contain provisions to promote democracy, rule of law and human rights, albeit in different terminology. For instance, Article 2 of the Turkish Constitution describes the Republic of Turkey as "*a democratic state governed by the rule of law*".

Likewise, the Preamble of the Turkish Constitution states that those who are empowered to exercise sovereignty in the name of the nation shall not deviate from "*the liberal democracy indicated in the Constitution*". In a nutshell, like many other constitutions, the Constitution of Turkey entrenches constitutional democracy with its basic concepts such as rule of law, human rights, separation of powers and judicial/constitutional review.

Distinguished participants,
Ladies and Gentlemen,

At this part of my speech, I must first state that the introduction of constitutional complaint system in 2012 has significantly affected the way the Turkish Constitutional Court has interpreted and applied these concepts and conceptions of constitutional democracy. It wouldn't be exaggeration to say that constitutional complaint revolutionized the legal system in general and constitutional justice in particular.

I would like to mention a few judgments to give you a slight idea about how the TCC has contributed to the protection and promotion of constitutional democracy. The Court has interpreted democracy as a concept which is interconnected with the rule of law and basic rights.

According to the TCC the protection of fundamental rights and liberties is a must for democratic society. Therefore the primary task of a democratic state is to protect and promote these rights and liberties. The obligation incumbent on democratic states is both negative and positive. In other words, the state should refrain from arbitrary intervention in enjoyment of the rights and liberties, and must also take necessary measures for the effective use of these rights including certain measures to protect individuals against the encroachments of others.

The Court's role in promoting democracy can be traced through its judgments concerning the right to stand for election and right to engage in political activities. For the Court, these political rights are among the indispensable elements of pluralist and participatory democracy.

In most cases these political rights have been taken up alongside with freedom of expression. The TCC has continuously emphasised that freedom of expression is the main instrument to maintain the pluralistic nature of democracy. For the Court, social and political pluralism thrives on free and peaceful expression of every kind of opinions with the exceptions of racism, hate speech, and incitement to terror. Therefore, democracy is impossible without duly protection of freedom of expression.

I must note that the Court has been more vigilant and diligent in protecting the freedom of expression when it is exercised by the parliamentarians. The Court has pointed out that since the parliamentarians represent the thoughts, demands and interests of the electorates in political sphere, the Constitution provides more protection under the institution of legislative immunity.

The Constitutional Court declared unconstitutional the provision of the standing orders (by-law) of the Turkish Parliament, which had envisaged the imposition of the disciplinary sanctions on MPs when their speeches were contrary to the administrative structure of the Republic defined in the Constitution. The Court made it clear that in a democratic state, especially parliamentarians must have the freedom to defend all sort of views in a peaceful manner even if they are contrary to the opinions of majority.

More recently, the Court delivered two crucial judgments about the significant role of parliamentary immunity for the MPs in ensuring their right to stand for elections and engage in political activities. The both cases involved the detention and imprisonment of the MPs despite the fact they had parliamentary immunity.

As a matter of fact, the judicial debate revolved around whether they had legislative immunity under Article 83 of the Constitution to prevent their detentions and trials. The inferior courts and the Court of Cassation ruled that they couldn't benefit from the parliamentary immunity guaranteed by the Constitution.

The MPs lodged constitutional complaints separately before the TCC on the basis that their rights to stand for election as well as freedoms of expression were violated. Having emphasised the importance of legislative immunity for the MPs to express their views without any

fear and interruption, the TCC reached the conclusion that denials of parliamentary immunity by judicial authorities were contrary to the Constitution.

In its most recent judgment, which was delivered on 1 July 2021, the TCC has pointed out that although the parliamentary immunity was not absolute, exceptions must be regulated by the law in a clear and foreseeable language. The lack of such law and the inconsistent practice of courts may lead to arbitrary decisions which are not compatible with the parliamentary immunity. For the Court, the inferior courts failed to provide any convincing argument for the decision that constitutional exception to immunity was applicable to the activities of the applicant.

The Constitutional Court also found a violation of the freedom of expression of the applicant who was convicted of disseminating propaganda on behalf of a terrorist organisation for having shared news on his social media account. The TCC examined the content and context of the news and reached the conclusion that the impugned expressions did not incite terror or violence.

Dear participants,

Let me conclude that the constitutional courts turned out to be an indispensable part of liberal or constitutional democracies, even though the legitimacy of constitutional review has long been questioned on the basis of majoritarian arguments.

This is also the case in Turkey where, as I mentioned, the mechanism of constitutional complaint provided the necessary leverage to adopt a rights-based approach to the protection and promotion of three foundational values of the State, namely democracy, rule of law and human rights.

Thank you for your attention.

KAZAKHSTAN

PAPERS

Malinovskiy Victor-
Member of the Constitutional Council
Of the Republic of Kazakhstan,
Doctor of Law,
Nur-Sultan

Constitutional Court of the Republic of Indonesia,
Second Judicial Conference of the Constitutional and Supreme Courts,
September 15-17, 2021

Republic of Kazakhstan: constitutional review and the judiciary in the division of the highest values of a person, his life, rights and freedoms

Dear colleagues, ladies and gentlemen!

On December 16, 1991, the Constitutional Law "On the State Independence of the Republic of Kazakhstan" was adopted. That day marked the beginning of the country's official entry into a new era - the era of state and society building based on the rule of law, the priority of human and civil rights and freedoms, the separation of State power into branches and other universally recognized values.

The first article of the current Constitution of 1995 sets out the beginning of the new state and social structure as follows "The Republic of Kazakhstan proclaims itself as a democratic, secular, legal and social state whose highest values are a person, his life, rights, and freedoms."

Much has been done in the past thirty years of independence to transfer this constitutional provision into everyday life.

An example of this is the **establishment, functioning and improvement of the institution of constitutional control, as well as the fundamental change in the purpose and organization of the administration of the judiciary**. They constitute the supporting

structures, institutional pillars and mechanisms of law enforcement and human rights activities of the state.

The Constitutional Control Institute was first established in 1991-1992. At that stage, the *then-Soviet courts* were undergoing a thorough reform *with a consistent transformation of the socialist justice system into a judicial branch.*

For the first time in the history of Kazakhstan, the established constitutional review body in the form of the Constitutional Court, in Article 10 of the Constitutional Law "On the State Independence of the Republic of Kazakhstan" was defined as "the highest body of judicial protection of the Constitution." The laws on the Constitutional Court and on the constitutional proceedings confirmed the status of the Constitutional Court precisely "as a body of judicial power". This is evidenced by many norms, including its competence, the legal status of judges, the procedure for proceedings and guarantees for the exercise of powers. Article 24 enshrines "symbols of the judicial power of the Constitutional Court", constitutional proceedings are defined as "a form of exercising judicial power", Article 32 gives the Constitutional Court the right to impose fines and apply other procedural protection measures ...

Later, Article 95 of the first Constitution of Kazakhstan 1993 proclaimed that the judicial power in the Republic of Kazakhstan belongs to the Constitutional Court, the Supreme Court, the Supreme Arbitration Court and lower courts established by law. The Constitutional Court is the highest body of judicial power for the protection of the Constitution of the Republic of Kazakhstan.

In section IV "Guarantees of Compliance with the Constitution", Chapter 21 "Ensuring the Stability of the Constitution and Protection of its Provisions", there were three articles regulating the mission of the Constitutional Court - judicial protection of the Constitution and ensuring its supremacy (Article 130), legal force and consequences of a decision on unconstitutionality (Articles 131 and 132).

Let me draw your attention to the fundamentally important provisions of the status of the Constitutional Court (in 1995 they were not transferred to the Constitutional Council). The court was granted the right to consider claims on compliance with the Constitution of

normative acts adopted by the Prosecutor General of Kazakhstan, guiding clarifications of the Supreme Court and the Supreme Arbitration Court,

as well as cases on the constitutionality of law enforcement practice affecting the constitutional rights of citizens (Article 10 of the Law on the Constitutional Court).

A wide range of subjects of appeal was identified, including the courts and the Attorney General. This right was also granted to citizens - on issues directly affecting their constitutional rights, if they are not subject to other courts (Article 18 of the Law on Constitutional Judicial Proceedings).

It was during this period that the initial steps were taken to form the judiciary as one of the branches of state power. And this was one of the main tasks and goals in building of a new Kazakhstan.

Already on November 23, 1990, the law "On the Judicial System of the Kazakh SSR" was adopted. It took the first steps to eliminate the direct dependence of courts and judges on representative and executive bodies, and the term of office of all judges was increased. However, the establishment and functioning of the courts remained under the jurisdiction of the respective Councils of People's Deputies, and the provision of the activities of the courts was entrusted to the Ministry of Justice of the Kazakh SSR.

Real measures to transfer the "Soviet justice system" to the quality of the "judicial power" independent from the state were carried out by constitutional acts - the Declaration on State Sovereignty of the Kazakh SSR and the Constitutional Law on State Independence. For the first time, the affiliation of the judicial branch of power on issues of its competence to the Supreme Court and the Supreme Arbitration Court of the Republic of Kazakhstan was established. A number of provisions were confirmed and specified in the first Basic Law - the 1993 Constitution of Kazakhstan.

The strategy of concrete actions is embodied in the "State program of legal reform in the Republic of Kazakhstan", approved by the President of the Republic in February 1994.

As we can see, *at the most critical, acute and emotional moment of the deep transformation of the social and state system, for the first time, a powerful institution of*

constitutional review, which had no experience of its own, was introduced into the judicial system at the highest level, which had just embarked on the path of deep reform.

In the practice of that time, such administration of judicial constitutional review and justice did not add constructivism to the common cause of ensuring the supremacy and direct action of the Constitution.

In addition, in 1992, in the Kazakhstan's concept of purely judicial constitutional review, the absolute of a posteriori constitutional review triumphed.

Nevertheless, the Constitutional Court worked from the summer of 1992 to the autumn of 1995, and its decisions had contributed significantly to the strengthening of constitutionalism.

The Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995, changed the model of the institution of constitutional review. It was the Constitutional Council of the Republic of Kazakhstan.

In December 1995, the President of the Republic signed decrees having the force of a constitutional law, "On courts and the status of judges in the Republic of Kazakhstan" (December 20) and "On the Constitutional Council of the Republic of Kazakhstan" (December 29).

The function of constitutional review, as we can see, was separated from justice and assigned to a quasi-judicial body. This made it possible to develop both institutions substantively in accordance with their missions in civil society and in a state with a presidential form of government.

Let me emphasize a few important points.

The stay of the Constitutional Council outside the classical trinity of power created the preconditions for the development of the doctrine of state power and its branches, in particular, constituent, constitutional, control, and, possibly, others.

Due to the extremely clear formation of competence, determination of the circle of subjects of appeal, exclude its interference in the activities of other government agencies.

Concentrate the resource of constitutional review precisely on ensuring human and civil rights and freedoms, while paying due attention to other areas of constitutionalism.

Combine the benefits of a priori and posteriori, abstract and concrete, proactive and mandatory types of constitutional review, as well as the general obligation of its final decisions with the possibility of determining the mechanism for their implementation.

Today, the Constitutional Council has established itself in society as an instrument of a firm and authoritative defender of the Basic Law's provisions, its accurate modernization through the official interpretation of the norms, upon the requests of the subjects established in the Constitution, verification for compliance with its values of the laws adopted by the Parliament, as well as current legal acts on the submissions of the courts.

In Kazakhstan, not being a supervising agency over other law enforcement agencies of the state, developing jointly with the expert community and publishing legal positions, making recommendations for improving the legislative guarantees of the rights and freedoms of Kazakhstan's people, the Council occupies a clear niche in the state mechanism. At the same time, it interacts with traditional and first-established government agencies (for example, ombudsmen for human rights, children's rights, the rights of entrepreneurs, etc.).

The competence of the Constitutional Council is gradually being expanded with the development of the powers enshrined in the 1995 Constitution and the accumulation of relevant experience in the human rights activity of the entire state, the development of civil society and the state.

For example, in 2017, during the third large-scale constitutional reform, *firstly*, the list of constitutional values requiring enhanced protection was expanded; *secondly*, mandatory a priori constitutional review over amendments to the Constitution has been introduced; *thirdly*, a posteriori constitutional review over the law in force has been expanded. This is done "in the interests of protecting human and civil rights and freedoms, ensuring national security, sovereignty and integrity of the state" (subparagraph 10-1) of Article 44 of the Constitution); *fourthly*, the independence and responsibility of the Constitutional Council has been strengthened.

A number of measures aimed at strengthening constitutional review have been introduced in the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan", as well as in ordinary laws and by-laws.

In order to implement the fundamentally new provisions and norms of **Section VII of the Constitution "Courts and Justice", a large-scale judicial reform is being carried out in the country.**

In connection with the limited time for the speech, I will highlight only some of its most important substantive directions.

This is the consolidation and implementation of fundamental novels of justice as a direct form of the implementation of state power by the courts, provided they are independent from the bodies of the legislative and executive branches.

More than twenty years ago, *the functions of ensuring the operation of the courts* were removed from the jurisdiction of the Ministry of Justice (i.e., the executive branch) and transferred to the newly formed authorized body - the Committee for Judicial Administration under the Supreme Court (later - the Department for Supporting the Activities of Courts under the Supreme Court).

Ensuring the *independence and immunity of judges and high-quality selection of personnel* are carried out by the High Judicial Council - an autonomous state institution that is in the coordinates of the presidential power and operates in accordance with the law. It works closely with the Supreme Court, which also excludes the influence of the executive branch.

The unity of the judicial system was established by abolishing arbitration courts with the transfer of their functions to ordinary courts.

At the same time, specialized courts are gradually being established: specialized inter-district economic courts with competence to consider disputes in the sphere of business activities (February 2002); specialized inter-district juvenile courts, established in all regional centers and some large cities (2012); specialized inter-district criminal courts have been established in all regions of the country, the jurisdiction of which includes criminal cases on especially grave crimes, including jury trials (since the introduction of the

institution of criminal trial by jury in the Constitution in 2007). The scope of their cases is expanding.

In September 2004, specialized administrative courts were established to deal with cases arising from the administrative powers of state bodies. However, the real revolution in this area took place quite recently. On July 1 of this year, Administrative Procedural and Process-Related Code was put into effect, adopted on June 29, 2020. Administrative procedure, together with criminal and civil procedure, is now becoming a full-fledged form of administration of justice and the protection of citizens' rights and legitimate interests against unlawful acts and decisions by the executive authorities.

Consideration of disputes related to investment activities is entrusted to the court of the capital Nur-Sultan according to the rules of the court of first instance, and investment disputes involving large investors - to a specialized collegium of the Supreme Court.

As we can see, *the introduction of specialized courts provides additional protection to the growing number of constitutional rights and freedoms of citizens and their especially vulnerable groups.*

Along with the above measures, the following is carried out:

gradual expansion of the court's authorization of investigative actions affecting constitutional human rights and freedoms, the introduction of pre-trial (mediation) and alternative (arbitration courts) forms of dispute resolution;

tightening of qualification requirements for the professional qualities of a judge and mechanisms for selecting candidates for judicial positions, the new Code of Judicial Ethics is in force, training is being improved, at the same time the social and material conditions of the activity and life of judges are being strengthened, life-long maintenance of retired judges has been introduced;

ensuring accessibility and openness of justice, simplifying judicial procedures, implemented a transition to a three-tier justice system, abandoning the institution of judicial supervision;

the widespread use of modern electronic and information communication technologies, virtually all courtrooms are equipped with audio and video recording systems, official Internet resources of courts have been activated.

Large-scale projects are being carried out with international organizations to introduce the best practices of the world into the work of Kazakhstan's courts. There is an International Council of respected lawyers at the Supreme Court. A separate jurisdiction has been established in the Astana International Financial Centre Court, providing for the participation of foreign judges and the application of procedural principles and rules of common law of England and Wales. The International Arbitration Centre (IAC) contributes to improving the resolution of commercial disputes.

Since the adoption of the 1995 Constitution in October 2020, the VIII Congress of Judges, the main body of the "Union of Judges of the Republic of Kazakhstan", has been held. As a rule, the President of the Republic takes part in them. Each congress summarizes the results of the previous period and identifies specific measures to promote judicial reform.

The Chairman of the Constitutional Council of Kazakhstan, Ex-Chairman of the Supreme Court Kairat Mami believes that as a result of the implementation of State policy, the judiciary has today acquired all the necessary essential characteristics, mechanisms for the implementation of State power, which turns it into a stabilizing force in the country, capable of effectively protecting the rights and freedoms of citizens, to protect society from social conflicts, ensuring the interests of the progressive and safe development of the State.[1]

The current legislation creates the preconditions for **a constructive combination of the activities of the Constitutional Council and courts, while allowing the use of the possibilities of the constitutional review institution to strengthen the judiciary and vice versa.**

The Constitutional Council has several decisions (regulatory decisions and provisions of annual addresses) on the rights of citizens, the concept of the judiciary, the judicial

[1] Mami K.A. Independent and responsible government in sovereign Kazakhstan. In the book: Formation and development of modern Kazakhstan's statehood (first-hand). - Nur-Sultan, 2019 .- P. 250-273.

system, guarantees of courts' independence and responsibility, substantive and procedural law and others.[2]

At the same time, the courts are called upon to play a primary role in ensuring the constitutionality of the working law, human and civil rights. According to Article 78 of the Constitution, "The courts are not entitled to apply laws and other regulatory legal acts that infringe the rights and freedoms of a person and citizen enshrined in the Constitution. If the court finds that the law or other regulatory legal act to be applied infringes upon the rights and freedoms of a person and citizen enshrined in the Constitution, it is obliged to suspend the proceedings and apply to the Constitutional Council with a view to declare this act unconstitutional." Thus, the judiciary is endowed with this exclusive duty precisely in terms of protecting of human and civil rights and freedoms. This institution is of particular importance in the absence of citizens' right to appeal to the Council.

However, if earlier every third case in the Council was initiated by the courts, then in recent years their number has sharply decreased and, now with rare exceptions, has practically ceased. Thus, the level of protection of citizens has decreased, and, of course, the guarantee of paragraph 1 of Article 1 of the Constitution.

A special law has been drafted by the Constitutional Council to remedy this situation. It provides additional opportunities for the participants in the proceedings to request ordinary courts to introduce a referral to the Constitutional Council. And for the court - a more attentive attitude to such requests and their maximum satisfaction.

The draft law was approved by the Venice Commission, with its support, the Council held several special seminars with the participation of foreign experts. We hope that our initiative will receive a final positive decision.

I would like to thank the participants for their attention and wish them health and success.

[2] Mami K.A. The Constitutional Council's interaction with the courts. - In the book: Constitutional review in Kazakhstan: doctrine and practice of establishing constitutionalism. - Almaty, 2015 .- P. 328-337.

MALAYSIA

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

SPEECH BY

JUSTICE DATO' SURAYA BINTI OTHMAN

JUDGE OF THE COURT OF APPEAL OF MALAYSIA

THE 2ND JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS / COUNCILS OF THE OIC MEMBER STATES / OBSERVER STATES (J-OIC)

HELD FROM

15-17 SEPTEMBER 2021 IN BANDUNG, INDONESIA.

Bismillahirrahmanirrahim and Assalamualaikum.

Mr. Chairman, Distinguished Delegates, Ladies and Gentlemen.

[1] On behalf of the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat, and the Malaysian Judiciary, I would like to join others in congratulating the Indonesian Presidency and the Constitutional Court of the Republic of Indonesia in organizing the **2nd Judicial Conference of Constitutional and Supreme Courts / Councils of the OIC Member States / Observer States (J-OIC)**.

[2] This year's Judicial Conference is a testament to our unblinking devotion to the rule of law and universal law principles. Even with the unprecedented global pandemic, we remain unshaken in our resolve to

honour the terms of the **Istanbul Declaration**[1] adopted by the member states during the first Judicial Conference in 2018 in seeing this year's Judicial Conference a success. It lends credence and stature to the importance of our regional network in stimulating cross-border dialogue and catalyzing the exchange of idea for the promotion of democracy and the protection of human rights.

[3] The Malaysian Judiciary welcomes the theme of this year's Conference, that is **"Human Rights and Constitutionalism: The Contribution of Judiciary in Moslem Countries"** complemented by two sub-themes: **(1) the Role of the Judiciary to Promote Humanity and Democracy** and **(2) The Protection of the Social, Economics, and Cultural Rights in Pluralistic Society**. We certainly hope that this Conference will enable participants to discuss and provide an essential framework and guidance in so far as the role of the judiciary is concerned and to deliberate on various issues that need to be addressed on the theme of the Conference.

[4] Malaysia is a country that practices democracy based on the federation system. The executive government, comprising the Prime Minister and his Cabinet is drawn from Members of Parliament and responsible to the Parliament. Members of Lower House *(Dewan Rakyat)* are elected from

[1] See "The First Judicial Conference of Constitutional and Supreme Courts/Councils of the OIC Member/Observer States Ended". Available online via https://www.anayasa.gov.tr/en/news/news-and-events/the-first-judicial-conference-of-constitutional-and-supreme-courtscouncils-of-the-oic-memberobserver-states-ended/. For the terms of the Declaration, see https://www.anayasa.gov.tr/media/4266/istanbul-declaration.pdf.

single-member constituencies drawn based on population in a general election. A general election is usually held every five years.

[5] As the ultimate legislative body in Malaysia, Parliament is responsible for passing, amending and repealing laws. In Malaysia, Parliament is not supreme. Article 4 of the Federal Constitution provides that the Constitution is the supreme law of the Federation of Malaysia. The branches of Government, namely, the Legislature, the Executive and the Judiciary execute their duties according to principle of constitutional supremacy. This principle connotes that any law, whether federal or state is to be tested its constitutionality or validity by reference to the provisions of the Federal Constitution.

[6] The Judiciary plays an important role to protect the supremacy of the Constitution. The Judiciary is entrusted with the responsibility to interpret the Constitution; to determine whether any law passed by Parliament or any act of the Executive is within the parameter provided by the law. In this respect, the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat observed in the case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 (FC):

> *"Integral to any written constitution, which proclaims itself to be supreme either expressly or by design, there must exist an instrument by which its provisions may be protected and enforced. That instrument is the judicial branch of Government."*

[7] In Malaysia, Islam is the official religion and other religion can be peacefully practiced in any territory of Malaysia (Article 3(1)).

[8] Muslims in Malaysia are subject to a dual legal system. It has been the intentions of the drafters of the Federal Constitution to allow Muslims to be subjected to both general laws enacted by Parliament and Islamic laws enacted by the State Legislative Assemblies.[2] This culminates from the fact that the Federal Constitution allows the Legislature of a State to legislate and enact offences against the precepts of Islam.[3] The Islamic law does not, however, apply to non-Muslim citizens. When deciding legal matters involving Muslims citizens, the Syariah Courts do not apply Islamic law in an unbounded fashion but only to the extent permitted by the Federal Constitution and existing laws. As observed by the Right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat in the case of *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323:

> *"[86] For the avoidance of doubt, the State Legislatures throughout Malaysia have the power to enact offences against the precepts of Islam. As decided by this court in Sulaiman Takrib and other related judgments, the definition of 'precepts of Islam' is wide and is not merely limited to the five pillars of Islam. Thus, the range of offences that may be enacted are wide. Having said that, the power to enact such range of offences is subject to a constitutional limit.".*

[2] Jabatan Pendaftaran Negara & 2 Ors v Seorang Kanak-Kanak & 2 Ors (Majlis Agama Islam Negeri Johor – Intervener) [2020] 2 AMR 725 (FC) at [53]

[3] ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153 (FC)

The Role of the Judiciary to Promote Humanity and Democracy

[9] The Malaysian Judiciary believes that in its endeavor to promote humanity and democracy effectively, interpretation should be based on rights and principles. The provisions of the Constitution should be viewed holistically in the context of the entire system of laws and with regard to the moral principle, doctrine, standards and framework assumption that is implicit in the Constitution. Its fundamental purpose should be to safeguard not only the textual rights, but also the rights that are implicit in the Constitution scheme of thing.

[10] In this regard, the Malaysian Federal Court in the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 CLJ 631 held that constitutional rights must be read prismatically and generously, not literally. The Court said—

> *"On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as "life" and "personal liberty" in art. 5(1).".*

[11] The Malaysian Judiciary also believes that judicial review is an important tool to promote humanity and democracy. In a constitutional democracy, the courts play the role of arbitrator and final protector of rights. In addition, they advance the democratic culture by ensuring that no one is above the law, and a forum is provided where abuse of power can be challenged. As Courts are given the mandate to interpret and enforce law, they can determine the validity of executive and legislative actions to ensure that these organs of Government do not only operate within the contours of their constitutional mandate, but also contribute to the furtherance of democratic ideals, aspiration and humanity values stipulated in the Constitution.

[12] In the case of *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 5 CLJ 526, the Federal Court of Malaysia asserted that the Federal Constitution continue to vest a distinct and independent judicial power in the judiciary notwithstanding earlier amendment to Article 121(1) of the Federal Constitution to the effect that the jurisdiction of the Courts is subject to law provided by Parliament (federal law). The amendment was intended to effectively neuter the Judiciary and rendering it subservient to Legislature. The main thrust of the Semenyih Jaya judgment is encapsulated in the following paragraph:

> *"The judiciary is entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of independence of the judiciary is the foundation of the principle of separation of powers. This is essentially the basis upon which the edifice of judicial power.".*

[13] The Court further held that judicial power constitutes basic structure of the Constitution and any alterations made to remove judicial power would tantamount to a grave and deliberate incursion in the judicial sphere.

Mr. Chairman, Distinguished Delegates, Ladies and Gentlemen.

[14] The Malaysian Judiciary believes that in promoting humanity and democracy, the United Nation's Universal Declaration of Human Rights (UDHR) should not be the sole benchmark. In the context of Malaysia, the promotion of humanity and democracy, especially those involving the role of religion, ethnics and culture must be considered mainly in accordance with the provisions of the Federal Constitution. Apart from that, the Court may also consider the provisions of the Cairo Declaration on Human Rights in Islam 1990 so long as it is not contrary to the Federal Constitution and the relevant laws of Malaysia. Malaysia notes that in the early 2010s, the OIC began revising the instrument and introduced the OIC Declaration on Human Rights (ODHR). The document was scheduled to be approved at the Organisation's Council of Foreign Minister (FM) Meeting in April 2020. However, this Meeting was cancelled due to the COVID-19 pandemic. OHDR articulates the OIC's vision of universal freedom and reassert the OIC's commitment to human rights.

<u>The Protection of the Social, Economic, Cultural Rights in a Pluralistic Society</u>

[15] The democratic role of the Judiciary is further magnified in a pluralistic society such as Malaysia - bearing different religion, cultures, customs and

beliefs. At the moment, Malaysia is not yet a party to the International Covenant on Economic, Social and Cultural Rights. Under the Federal Constitution, the decision to ratify or not to ratify any international treaties belongs, exclusively, in the realm of the Executive.[4]

[16] Although Malaysia has yet to ratify the International Covenant on Economic, Social and Cultural Rights, this does not mean that we do not respect the basic value of the social, economic, and cultural rights of the citizens in Malaysia. Those values are consonant with cultural pluralism in Malaysia that allows Malaysians to be identified as citizens without sacrificing their pride in their religion and ethnic identity. Therefore, cultural respect and tolerance remain the important ingredient in achieving racial unity and harmony in Malaysia.

[17] In the context of protection of rights accorded under the Malaysian Federal Constitution, it makes no distinction between the social, economic or cultural rights as all rights are broadly guaranteed under the umbrella of Part II of the Federal Constitution. Those rights entail, among others, on the right to life, freedom of speech, freedom of religion, and rights to property. They are collectively referred to as “Fundamental Liberties”. For instance, section 2 of the Human Rights Commission of Malaysia Act 1999 defines “human rights” to refer to the fundamental liberties enshrined in Part II of the Federal Constitution.

[4] Federal Constitution, Ninth Schedule, Federal List, Item 1 – External affairs.

(a) The Protection of the Social Rights

[18] In terms of the protection of the social rights, the first provision of the Federal Constitution falling for consideration is Article 5. It guarantees the right to life and personal liberty. The Malaysian Court has accorded Article 5 a broad construction in the context of preserving social rights. This is evident from the case of *Tan Tek Seng*[5] where the notion that the right to life should be read broadly so as to include "quality of life". The Court of Appeal held that:

> *"… '[L]ife' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.".*

[19] This creative judicial pronouncement has also since become the cornerstone of environmental justice movement in Malaysia. The right to life was also interpreted to include right to reputation and right to livelihood[6].

[5] Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (CA).
[6] Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi A/L K Perumal [2000] 3 MLJ 281 (CA).

(b) The Protection of the Economic Rights

[20] In terms of economic rights, the Courts had given effect to Article 13 of the Federal Constitution which guarantees the right to property. The law through the Land Acquisition Act 1960 allows for compulsory acquisition of land by the State Authority if the land is needed *inter alia* for public purpose and the law requires the owner of the land to be compensated for the deprivation of his property. In *Jais bin Chee & Ors. v Superintendent of Land & Surveys Kuching Division* [2014] 6 MLJ 439, it was held by the Court of Appeal that in order not to infringe Article 13 of the Federal Constitution, adequate compensation should be construed to mean fair and adequate compensation.

[21] The Malaysian Court had also recognised the proprietary interest of the aboriginal people in their customary and ancestral lands as an interest in the land.[7] According to the Court, the Aboriginal Peoples Act 1954 was to provide socio-economic upliftment of the aborigines. Bearing in mind that land being a very valuable socio-economic commodity, it was the intention of the legislature not to deprive the aborigines of their customary title existing at common law.

[22] The Courts continue to safeguard the special position of the aborigines and the indigenous people in Malaysia and to provide an avenue for legal

7 *Kerajaan Negeri Selangor & Ors v. Sagong bin Tasi & Ors* [2005] 6 MLJ 289.

recourse to protect their rights and interests.[8] In the case of *Adong Kuwau,*[9] the apex court said:

> *"in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.".*

[23] It is also pertinent to note that Malaysia treats its working population with complete fairness, dignity and equality irrespective of race, gender, religion and citizenship. In the case of *Ahmad Zahri Mirza*,[10] the Federal Court, had reiterated Malaysia's position as a member country to the International Labour Organisation (ILO). The Federal Court referred to Article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 as a guiding principle to enforce and protect employment rights in Malaysia. Article 10 states that:

> *"Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons*

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8 Federal Constitution, Article 153.

43 Kerajaan Negeri Johor & Anor v Adong b Kuwau & 51 Ors [1998] 2 AMR 1233 (

10 Ahmed Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 3 MLRA (FC) [80]

who as migrant workers or as members of their families are lawfully within its territory.".

(c) The Protection of the Cultural Rights

[24] Further, the protection of the cultural rights amongst the community is also embedded in the Federal Constitution of Malaysia on the aspect of teaching or learning any other language, despite Malay language being the national language. In Malaysia, public primary schools are divided into two categories: National School and National – Type School (Vernacular schools). The former is a Malay medium school that uses Malay, our national language as the primary language of instruction, whereas the latter uses either Chinese and Tamil as the main instruction. Although Article 152 of the Federal Constitution provides that the Malay language is the national language, however, there is exception which is entrenched in Article 152(1*)(a)* which expressly provided "that no person shall be prohibited from using (otherwise than for official purposes), or from teaching or learning any other language". Article 152(1)*(b)* of the Federal Constitution also provides an additional bulwark for the constitution of vernacular school where it provides that "Nothing in this clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use of study of the language of any community in the Federation".

[25] Suffice to say, our Federal Constitution in its present form, appears to protect the use of minority languages and the continued existence of vernacular schools.

[26] Under our legislation, the local legal framework on economic, social and cultural governance is also well established and adequate guidance is available through federal and state legislation recognising the legitimate interest of ethnic minorities in Malaysia.

[27] For instance, preservation of precious cultural heritage in Malaysia is governed by the National Heritage Act 2005. The intellectual property and traditional knowledge of the indigenous or local community are protected under the Patent Act 1983, the Access to Biological Resources and Benefit Sharing Act 2017, the Sabah Biodiversity Enactment 2000[11], and the Sarawak Biodiversity Centre Ordinance 1997[12]. The special position of the aborigines and their rights on land matters are protected by the Federal Constitution and the Aboriginal Peoples Act 1954.

[28] Indeed, the main objective of those legislation is not to protect culture *per se*. Rather, the friendly conditions and climate which allow citizens to have access, participate, enjoy and contribute to cultural life in a sustainable and developing manner.

[29] Furthermore, the definition of law under Article 160(2) of the Federal Constitution states that law "includes written law, the common law..."[13] and "any custom or usage having the force of law in the Federation or any part thereof". In the case of *Director of Forrest, Sarawak & Anor:*[14], the Federal Court said:

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11 Section 9.

12 Section 23.

13 Federal Constitution, Article 160

14 Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals [2017] 3 CLJ 1 (FC) [167]

"This makes customary law an integral part of the legal system in Malaysia.. Customary law is a traditional common law rule or practice that has become an intrinsic part of the accepted and expected conduct in a community. Native customary rights to land are sui generis. The nature and kind of rights of the natives are embodied in their customary practices.".

[30] When presiding cases for example on aboriginal people's rights to land, the Malaysian Judiciary also recognises the importance to construe the Aboriginal Peoples Act 1954 Act "liberally in favour of the aborigines as enhancing their rights rather than curtailing them".[15] The Court further stressed that in these cases, it is important for judges to contextualise - to make proactive enquiries and contextual applications of customs in order to better understand the community's legal traditions.

Mr. Chairman, Distinguished Delegates, Ladies and Gentlemen.

Conclusion

[31] Access to justice is a core component of the rule of law, serving as a vehicle for citizens to have their voices heard, rights exercised and to hold an entity accountable to its decisions. This in itself conspicuous of the Court's role in protecting the social, economic and cultural rights of its citizens.

[15] Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors [2005] 4 CLJ 169 [CA]

[32] Citizens turn to the Courts to champion their fundamental rights and the Government turn to the Courts to interpret legislation. Embodying the values of judicial independence and the rule of law, the Judiciary then shoulders the task to carry out their responsibilities holistically in protecting the social, economic and cultural rights in their respective societies.

[33] Against the above backdrop and because of Malaysia's unique setting, the role of the Judges become more delicate. If I may borrow the words of the former Lord President of Malaysia, His Royal Higness, Sultan Azlan Shah, which reads:

> *"Judging in a diverse society is not an easy task. Judges in many parts of the world face similar difficulties… Judges in Malaysia must be ever mindful that they are appointed judges for all Malaysians. They must be sensitive to the feelings of all parties, irrespective of race, religion or creed, and be careful not to bring a predisposed mind to an issue before them that is capable of being misconstrued by the watching public or segments of them.".*[16]

[34] Malaysia has always subscribed to the concept of wasatiyya, or moderation, which espouses the value of mutual respect, understanding and tolerance. As a multi-ethnic and multi-religions nation, we hold on to these values dearly, as we have done throughout our journey of nationhood. We believe that wasatiyya can and should contribute to the promotion of

[16] Fifty Years of Constitutionalism and the Rule of Law, Opening Address delivered at the 14th Malaysian Law Conference, Kuala Lumpur Convention Centre, 29 October 2007

humanity, democracy and the protection of the Social, Economics and Cultural Right in Pluralistic Society.

[35] The Malaysian Courts will continue to progress towards the recognition and support of legitimate human rights for the foreseeable future. The general principles of international norms, Islamic values, and local customs will continue to inspire our courts in shaping the legal landscape of the Malaysian jurisprudence.

[36] Thank you for the invitation to speak and may Allah bless you. Wabillahi taufik wal hidayah, wassalamu alaikum warahmatullahi wabarakatuh.

Thank you.

Justice Dato' Suraya binti Othman
Judge of the Court of Appeal
Court of Appeal Malaysia

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(END)

PAPERS
SESSION II

PROCEEDING
THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

"Human Rights and Constitutionalism:
The Contribution of the Judiciary
in Muslim Countries."

Bandung, September 16—17, 2021

INDONESIA

J-OIC
Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

Assalamu'alaikum warahmatullahi wabarakatuh.

Ba'da tahmid wa tamhid.
Shalawat wassalamu 'ala rasulillah.

Yang saya hormati para hakim dari perwakilan negara-negara sahabat yang tergabung dalam forum kerja sama Islam.

Sebagai perwakilan tuan rumah dan atas nama lembaga, perkenankan saya untuk menyambut hangat kehadiran saudara-saudara dalam sebuah rintisan forum yang dimaksudkan untuk meningkatkan dan menguatkan hubungan kerja sama antara kita.

Saudara-saudaraku,

Masyarakat Indonesia merupakan pencerminan dari keberagaman dan keanekaragaman. Beragam orang dengan latar belakang etnis berbeda yang bersamanya ikut hadir dalam rupa kebudayaan yang berbeda bercampur baur dalam satu komunitas. Keberagaman yang ada dalam masyarakat Indonesia diakui dan dihormati sebagai bagian dari kehidupan masyarakat sehari-hari. Keberagaman dipahami sebagai bagian dari hukum kodrati yang telah digariskan. Masyarakat Indonesia pun sadar untuk hidup dalam keberagaman tanpa perlu berupaya untuk menjadi seragam.

Akan tetapi, tidak mudah mengelola keberagaman. Masyarakat memerlukan kesamaan nilai-nilai yang membuatnya merasa terikat dalam kebersamaan itu. Dalam konteks ini, berlomba-lombalah berbagai tawaran ideologis yang mencoba mengikat masyarakat dalam kesatuan jati diri sebagai sebuah komunitas bersama. Masyarakat Indonesia telah bersepakat untuk menjadikan Pancasila sebagai perekat dari keberagaman yang ada.

Saudara-saudaraku,

Izinkan saya berbicara sekelumit mengenai hal ini,

Pancasila merupakan prinsip yang diambil dari nilai yang hidup di masyarakat Indonesia. Ada 5 nilai yang dicerminkan dari Pancasila, yaitu (1) Nilai Ketuhanan (Yang Maha Esa); (2) Nilai Kemanusiaan; (3) Nilai Persatuan; (4) Nilai Kedaulatan Rakyat; dan (5) Nilai Keadilan Sosial. Berdasarkan kelima nilai tersebut, negara Indonesia dibentuk dan memiliki tujuan, visi dan misi bernegara untuk melindungi bangsa Indonesia, memajukan kesejahteraan umum, mencerdaskan kehidupan, dan ikut serta dalam menjaga ketertiban dunia. Hal ini secara jelas dan gamblang termaktub dalam alinea ke-empat Pembukaan UUD 1945.

Nilai Pancasila yang pertama adalah nilai Ketuhanan. Nilai ini menunjukkan bahwa negara harus dikelola berdasarkan atas prinsip Ketuhanan yang Maha Esa. Negara Indonesia tidak

dikelola berdasarkan prinsip sekuler yang memisahkan negara dan agama, dan bukan pula berlandaskan pada satu agama tertentu.

Keyakinan dan pengakuan bangsa Indonesia atas pengelolaan negara berdasarkan nilai Ketuhanan Yang Maha Esa merupakan nilai yang berlaku universal. Dalam kaitannya dengan ajaran agama Islam, nilai Ketuhanan Yang Maha Esa adalah pencerminan dari aksioma beriman kepada Allah SWT.

Nilai Ketuhanan yang dianut dalam Pancasila juga merefleksikan prinsip teokratis. Akan tetapi, prinsip teokratis dalam penerapannya tidak berdiri sendiri. Dalam Undang-Undang Dasar disebutkan Indonesia juga mengadopsi demokrasi konstitusional, bahwa "kedaulatan berada di tangan rakyat dan dilaksanakan menurut Undang-Undang Dasar". Selain itu, aturan konstitusional lainnya pun menegaskan bahwa "Negara Indonesia adalah negara hukum". Penegasan akan konsepsi "negara hukum" bermakna bahwa Indonesia pun menganut prinsip nomokrasi.

Ketiga prinsip tersebut, teokrasi; demokrasi konstitusional; dan nomokrasi, harus dibaca dalam satu tarikan nafas yang tidak dipisahkan. Dengan merangkum ketiga prinsip tersebut maka dapat dikatakan bahwa Indonesia adalah "negara demokrasi konstitusional yang ber-Ketuhanan" atau "negara hukum yang demokratis ber-Ketuhanan".

Cerminan atas keyakinan dan pengakuan bangsa Indonesia akan nilai Ketuhanan dapat dilihat dalam produk hukum yang dihasilkan oleh lembaga-lembaga negara. Di bidang legislasi, setiap peraturan perundang-undangan diawali dengan "irah-irah" (*heading*), "Dengan Rahmat Tuhan Yang Maha Esa". Sementara di bidang yudikatif (*judicial*), setiap pengadilan memulai putusan dengan pernyataan, "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa".

Saudara-Saudaraku,

Di Indonesia, negara dengan penduduk mayoritas Muslim, Islam memberikan warna dalam memaknai nilai Ketuhanan. Dengan kekuatan sebagai mayoritas tidak berarti bahwa pendekatan yang diambil adalah dominasi tetapi justru dengan moderasi. Muslim Indonesia sadar dan paham bahwa pendekatan yang tepat digunakan adalah untuk menjadi rahmat bagi semesta (*rahmatan lil'alamin*). Menjadi *rahmat* berarti bahwa muslim tidak hanya bergerak untuk kepentingan kelompok muslim semata. Akan tetapi, bagaimana segala tindak tanduk dan kegiatan yang dilakukan memiliki manfaat bagi yang lain dan berguna untuk semua.

Di Indonesia, persoalan perdata yang dialami Muslim, seperti dalam masalah keluarga (perceraian, waris dan wasiat) berada dalam kewenangan Peradilan Agama. Oleh karenanya, peradilan agama pun sering diasosiasikan sebagai *family court*. Dalam

perkembangannya, lingkup kewenangan peradilan agama pun diperluas hingga dalam hal-hal tertentu menangani permasalahan ekonomi syariah, seiring dengan berkembangnya lembaga keuangan syariah. Di Aceh, pemerintah pusat juga membuka kemungkinan berlakunya hukum *jinayat* yang berlaku khusus di Provinsi tersebut untuk mengakomodasi keinginan dari masyarakat setempat.

Dalam Putusan Mahkamah Konstitusi, terdapat beberapa perkara pengujian konstitusionalitas yang berkaitan dengan kebijakan Pemerintah perihal *fiqh syariah* dan lingkup kewenangan Peradilan Agama. Sebagai contoh, dalam Putusan pengujian UU Peradilan Agama. Pemohon meminta kepada MK untuk memperluas lingkup kewenangan Peradilan Agama dengan memasukkan perkara pidana sebagai bagian dari yurisdiksinya. MK menolak permintaan Pemohon dengan pendirian bahwa "… *Indonesia bukan negara agama yang hanya didasarkan pada satu agama tertentu, namun Indonesia juga bukan negara sekuler yang sama sekali tidak memperhatikan agama dan menyerahkan urusan agama sepenuhnya kepada individu dan masyarakat.*"

Tidak hanya dalam lingkup domestik, dalam kerangka meraih tujuan negara untuk ikut dalam menjaga ketertiban dunia, bangsa Indonesia secara aktif terlibat dalam berbagai kerja sama Internasional, salah satunya adalah Organisasi Kerjasama Islam (OKI). Bahkan, Indonesia tercatat sebagai pendiri organisasi ini yang berdiri sejak 1969.

OKI terbentuk dipicu oleh adanya pembakaran Mesjid Al Aqsa di Palestina. Sejak saat itu, hingga kini, semangat perjuangan bangsa Palestina tetap menjadi jiwa yang menyelimuti segala program-program yang dilakukan oleh OKI untuk menjadi perwakilan suara Ummat Islam secara keseluruhan. Sebagai organisasi Internasional dengan anggota terbesar kedua setelah PBB, OKI memiliki peran yang sangat strategis. Beragam program telah diupayakan mewakili OKI untuk ikut menyelesaikan permasalahan Palestina, memperjuangkan perdamaian abadi dan ketertiban global, mengentaskan kemiskinan, ketahanan pangan, urusan investasi dan keuangan, pengembangan ilmu pengetahuan dan teknologi, perubahan iklim, kebudayaan dan dan dialog antar agama, pemberdayaan perempuan, aksi-aksi kemanusiaan, dan termasuk juga perlindungan hak asasi manusia dan pemerintahan yang baik.

Awalnya, OKI merupakan organisasi konferensi (muktamar atau pertemuan). Tetapi, kini OKI merupakan organisasi kerjasama (*taawun*), saling membantu yang memiliki dampak lebih luas dibanding sebatas pengertian "konferensi". Ada pepatah dalam Bahasa Indonesia yang mengatakan "berat sama dipikul, ringan sama dijinjing". Kurang lebih itulah cerminan dari semangat kerjasama. Islam lebih spesifik mengajarkan bahwa semangat kerjasama dan membantu yang lain haruslah senantiasa dalam kerangka kebaikan dan perbuatan taqwa. Ini merupakan cerminan akhlaq islami, sebagaimana Allah ta'ala memerintahkan:

"*Tolong menolonglah kalian dalam kebajikan dan takwa, dan janganlah kalian tolong menolong dalam perbuatan dosa dan permusuhan*" (Qs. 5:2)

Saudara-saudaraku,

Salah satu tujuan pembentukan OKI, sebagaimana termaktub dalam Piagamnya, adalah "*to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems.*"

Langkah yang pernah diambil oleh OKI dalam mewujudkan tujuan tersebut adalah merumuskan "*The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights*" di tahun 1990 dalam Pertemuan Menteri-Menteri Luar Negeri negara-negara anggota OKI.

Diperlukan adanya tindak lanjut selepas deklarasi kairo, dan OKI merupakan organisasi besar yang paling tepat untuk membantu menyiarkan gagasan untuk menghormati dan melindungi hak asasi manusia dan menjaga konstitusinya dalam sistem hukum negara anggota masing2.

Di sisi lain, peran peradilan sebagai salah satu cabang pemegang kekuasaan mengalami perkembangan yang sangat signifikan dan banyak mendapat sorotan dan perhatian publik, termasuk juga dalam kajian-kajian akademik. Perkembangan mengenai konstitusionalisme, praktek perlindungan hak-hak konstitusional oleh peradilan domestik menjadi isu strategis dalam berbagai penelitian di bidang hukum, khususnya hukum tata negara. Namun demikian, fenomena perkembangan peradilan di negara-negara muslim belum mendapat perhatian yang sama.

Isu pembatasan kekuasaan dengan berdasarkan pada teks-teks dalam naskah Konstitusi merupakan cara agar kekuasaan bisa tunduk dan mencegah untuk tidak bersifat absolut dan sewenang-wenang. Cara pandang ini banyak diadopsi sebagai mekanisme konstitusional diberbagai sistem hukum yang berlaku di negara masing-masing. Alangkah baiknya bilamana kemudian kita sebagai negara anggota OKI saling bertukar pikiran mengenai praktek yang dilakukan di masing-masing negara anggota, khususnya dalam hal peran peradilan di masing-masing negara. Dengan bertukar pikiran kita dapat berbagi pengalaman dan mencari inspirasi atas kemungkinan jalan keluar dari permasalahan hukum yang dihadapi oleh pengadilan di masing-masing negara anggota.

Gagasan besar ini yang dirintis dan coba diwujudkan dalam pertemuan kita di kesempatan kali ini.

Saudara-saudaraku,

Saya meyakini, tiada waktu yang lebih tepat untuk memperkuat kerjasama selain saat ini;
Tiada forum yang lebih cocok untuk menjalin persatuan untuk mengatasi berbagai masalah selain dari forum kita kali ini;
Dan tiada kawan yang lebih pas untuk diajak bergerak bersama selain dari saudara-saudaraku yang tergabung di forum ini.

Beruntunglah kita yang telah dipersatukan hati-hati kita dalam ikatan agama Allah. Sebab dengan ikatan inilah kita menjalin kerjasama dalam semangat persaudaraan. Allah ta'ala telah mengingatkan

> *"Dan berpegang teguhlah kamu semuanya pada tali (agama) Allah, dan janganlah kamu bercerai berai, dan ingatlah nikmat Allah kepadamu ketika kamu dahulu bermusuhan, lalu Allah mempersatukan hatimu, sehingga dengan karunia-Nya kamu menjadi bersaudara* (Qs. 3:103)

Wallahu Muwafiq illa aqwamithoriq,
Wassalamu'alaikum warahmatullahi wabarakatuh

Assalamu'alaikum warahmatullahi wabarakatuh.

Ba'da tahmid wa tamhid.
Shalawat wassalamu 'ala rasulillah.

The Honorable judges and delegates of friendly countries and members of the Organization of Islamic Cooperation,

As a delegate of the host country and on behalf of my institution, please allow me to warmly welcome your presence in this pioneering forum intended to improve and strengthen the cooperative relationship between us.

My brothers and sisters,

The Indonesian people are a reflection of diversity. People of different ethnical and cultural backgrounds are gathered in a single community. The diversity of the Indonesian society is recognized and respected as part of everyday life. It is understood to be part of a predetermined natural law. The Indonesian people are aware of their diversity without any need for uniformity.

However, to coexist in such diversity is not easy. The people need shared values that gives them a sense of belonging in togetherness. In this context, ideologies competed with one another to form that bond in an identity as one community. The Indonesian people agreed to make Pancasila the glue that holds diversity together in inclusion.

My brothers and sisters,

Please allow me to speak about this a little more.

Pancasila is a principle that was born out of the values that lived in Indonesian society. It is reflected in four values: first, the belief in the One Supreme God; second, humanity; third, unity; fourth, people's sovereignty; and fifth, social justice. Based on those five values, the state of Indonesia was founded with the objective, vision, and mission to protect all the Indonesian people, to develop the welfare of the people, to develop the nation's intellectual life, and to participate in the world order based on freedom, eternal peace, and social justice. All of this is contained in the fourth paragraph of the Preamble to the 1945 Constitution.

The first value is the belief in the One Supreme God. This means that the state must be governed based on the belief in the One Supreme God, not a secular principle that refers to the separation of state and religion, and not a certain religion.

The Indonesian nation's faith and recognition of state government based on the belief in the One Supreme God is a universal value. In relation to Islamic teaching, it is the reflection and axiom of worship of Allah.

The belief in the One Supreme God within Pancasila also reflects theocracy. However, theocratic principles are not implemented standalone. The Constitution states that Indonesia also adopts constitutional democracy in which "the sovereignty shall be in the hand of the people and implemented according to the Constitution." Moreover, other constitutional provisions also stress that "Indonesia is a rule of law." The emphasis on the "rule of law" concept means that Indonesia also subscribes to nomocracy.

The three principles—theocracy, constitutional democracy, and nomocracy—must be one inseparable unity. It can then be said that Indonesia is "a constitutional democracy that believes in the One Supreme God" or "a democratic rule of law that believes in the One Supreme God."

The reflection of Indonesia's belief and recognition of this value can be seen in the legal products passed by state institutions. Every piece of legislation begins with the phrase "By the grace of God Almighty." Meanwhile, the courts begin each decision with the phrase, "For justice based on the belief in the One Supreme God."

My brothers and sisters,

Here in Indonesia, a Muslim-majority country, Islam has given a distinctive color to the interpretation of this first value. Indonesian Muslims do not approach their majority with domination, but with moderation. They are aware that the most appropriate approach is to become *rahmatan lil'alamin* (a mercy to all creation), which not only means working for the benefit of only Muslims, but also others.

In Indonesia, civil cases among Muslims, such as family affairs (divorce, inheritance, and will) are under the purview of the religious court, which is then often called the family court. The scope of the religious court has also been expanded to include sharia economy along with the development of sharia economic institutions. The central government has also allowed for the *jinayat* law to apply in the Aceh Province to accommodate local aspiration.

The Constitutional Court has issued several judicial review decisions on the government's policy on fiqh sharia and the scope of the religious court. For example, in a decision on the judicial review of the Religious Court Law, the petitioner requested that the Constitutional Court expand the authority of the religious court to include civil cases. The Constitutional Court refused on the basis that "*… Indonesia is not a state based on a certain religion, but is also not a secular one where the state leaves religious affairs completely to the individual and society.*"

Not only to realize the state's domestic goals but also to maintain the world order, Indonesia actively participates in various international cooperation, such as the Organisation of Islamic Cooperation (OIC). Not to mention, Indonesia is one of the founders of the organization, which has been around since 1969.

The OIC's foundation was motivated by the burning of the Al-Aqsa Mosque in Al-Quds. Until today, the Palestinians' fighting spirit has continued to inspire the OIC's programs as the representation of Muslims. As the second biggest international organizations after the United Nations, the OIC has a very strategic role. It has carried out various programs to mitigate the issue of the Palestine; to fight for eternal peace and world order, the eradication of poverty, food security, investment and financial affairs, the development of science and technology, climate change issues, culture and inter-religious dialogue, women's empowerment, humanitarian actions, the protection of human rights, and good governance.

In the beginning, the OIC was a conference organization (*muktamar* or meeting). However, today it is a cooperation organization (*ta'awun*) with a larger scope than a mere "conference." There is a saying in Indonesian, "light or heavy we carry it together," which reflect the spirit of cooperation. Islam more specifically teaches cooperation and helping one another in good and *taqwa*. This is a reflection of the Islamic character, as seen in Allah's order:

> "*And cooperate in righteousness and piety, but do not cooperate in sin and aggression.*" (5:2)

My brothers and sisters,

One of the objectives of the OIC's foundation, as stated in its Declaration, is "*to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems.*"

The step that the OIC has taken in order to reach that objective is to make "*The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights*" in 1990 at the Conference of Foreign Ministers of the OIC member states.

Follow-ups are needed after the Cairo Declaration, and the OIC is the best organization to help disseminate the idea of respect for and protection of human rights in the member states' constitutional and legal systems.

Meanwhile, the judiciary as one of the branches of state power has undergone significant developments and received a lot of public attention, including being the object of academic studies. Developments on constitutionalism and the protection of constitutional

rights by domestic judicial bodies have become strategic issues in various legal research, especially in constitutional law. however, the development of the judiciary in Muslim countries has not received as much attention.

Limitation of power based on the texts of the constitution is a way to prevent absolute and arbitrary power. It is adopted as a constitutional mechanism by many countries in their legal system. It would be great for us as the OIC member states to exchange ideas on its practices in our country so that we can exchange experiences and find inspirations for alternative solutions to the legal issues in our judiciary.

It is this great idea that we would like to initiate and realize at this meeting.

My brothers and sisters,

I believe there is no better time than now to strengthen our cooperation; there is no more suitable forum for forging unity to overcome various problems than our forum today; and there is no friend more suitable to urge to move together than the members of this forum.

We are lucky to have united our hearts in Allah's religion because it helps us establish cooperation in the spirit of brotherhood. Allah *ta'ala* reminds us:

> *"Hold fast, all together, to Allah's cord, and do not be divided [into sects]. And remember Allah's blessing upon you when you were enemies, then He brought your hearts together, so you became brothers with His blessing."* (3:103)

Wallahu Muwafiq illa aqwamithoriq,
Wassalamu'alaikum warahmatullahi wabarakatuh

السَّلَامُ عَلَيْكُمْ وَرَحْمَةُ اللَّهِ وَبَرَكَاتُهِ.

بَعْدَ تَحْمِيدٍ وَتَمْهِيدٍ.

الْحَمْدُ لِلَّهِ رَبِّ الْعَالَمِينَ والصَّلَاةِ وَ السَّلَامُ عَلَى رَسُولِ اللَّهِ.

أَصْحَابُ الْمَعَالِي وَ الْفَضِيلَةِ الْقُضَاةُ مِنْ مُمَثِّلِي الدُّوَلِ الصَّدِيقَةِ الْأَعْضَاءِ فِي مُنْتَدَى التَّعَاوُنِ الْإِسْلَامِيِّ.

بِصِفَتِي مُمَثِّلًا لِلْمُضِيفِ وَنِيَابَةً عَنْ الْمُؤَسَّسَةِ ، اسْمَحُوا لِي أَنْ أُرَحِّبَ تَرْحِيبًا حَارًّا بِحُضُورِكُمْ فِي مُنْتَدًى رَائِدٍ يَهْدِفُ إِلَى تَعْزِيزِ وَتَقْوِيَةِ الْعَلَاقَةِ التَّعَاوُنِيَّةِ بَيْنَنَا.

إِخْوَانِيْ الكِرَام،

الْمُجْتَمَعُ الْإِنْدُونِيسِيُّ هُوَ انْعِكَاسٌ لِلتَّنَوُّعِ. يَخْتَلِطُ الْعَدِيدُ مِنْ الْأَشْخَاصِ مِنْ خَلْفِيَّاتٍ عِرْقِيَّةٍ مُخْتَلِفَةٍ فِي أَشْكَالٍ ثَقَافِيَّةٍ مُخْتَلِفَةٍ وَيَخْتَلِطُونَ مَعًا فِي مُجْتَمَعٍ وَاحِدٍ. يَتِمُّ التَّعَرُّفُ عَلَى التَّنَوُّعِ الْمَوْجُودِ فِي الْمُجْتَمَعِ الْإِنْدُونِيسِيِّ وَاحْتِرَامِهِ كَجُزْءٍ مِنْ حَيَاةِ النَّاسِ الْيَوْمِيَّةِ.. يُفْهَمُ التَّنَوُّعُ عَلَى أَنَّهُ جُزْءٌ مِنْ قَانُونٍ طَبِيعِيٍّ مُقَدَّرٍ سَلَفًا. يُدْرِكُ الْإِنْدُونِيسِيُّونَ تَمَامًا الْعَيْشَ فِي تَنَوُّعٍ دُونَ الْحَاجَةِ إِلَى السَّعْيِ إِلَى أَنْ يَكُونُوا مُوَحِّدِينَ وَمُتَشَابِهِينَ.

وَمَعَ ذَلِكَ إِنَّ إِدَارَةَ التَّنَوُّعِ لَيْسَ مِنْ أَمْرٍ سَهْلٍ. يَحْتَاجُ الْمُجْتَمَعُ إِلَى قِيَمٍ مُشْتَرَكَةٍ تَجْعَلُهُ يَشْعُرُ بِالِالْتِزَامِ فِي هَذَا الْعَمَلِ الْجَمَاعِيِّ. فِي هَذَا السِّيَاقِ ، تَتَنَافَسُ الْأَيْدِيُولُوجِيَّاتُ الْمُخْتَلِفَةُ لِتَقْدِيمِ أَيِّ شَيْءٍ كَمُحَاوَلَةٍ لِرَبْطِ الْمُجْتَمَعِ بِهُوِيَّةٍ مُوَحَّدَةٍ كَمُجْتَمَعٍ مُشْتَرَكٍ. وَافَقَ الشَّعْبُ الْإِنْدُونِيسِيُّ عَلَى جَعْلِ بَنْجَاسِيلَا (مَبَادِئَ الْخَمْسَةِ Pancasila/)مَادَّةً لَاصِقَةً لِلتَّنَوُّعِ الْحَالِيِّ.

إِخْوَانِي الأَعِزَّء،

دَعُوْنِيْ أن أَتَحَدَّثُ قَلِيلًا عَنْ مَبَادِئَ الْخَمْسَةِ(Pancasila/

هذه المبادئ مَأْخُوذَةٌ مِنْ قِيَمِ الْمُجْتَمَعِ الْإِنْدُونِيسِيِّ. هُنَاكَ 5 قِيَمٍ تنقسم من المبادئ، وَهِيَ (1) قِيمَةُ الْأُلُوهِيَّةِ (تَعَالَى) ؛ (2) الْقِيَمُ الْإِنْسَانِيَّةُ ؛ (3) قِيمَةُ الْوَحْدَةِ ؛ (4) قِيمَةُ سِيَادَةِ الشَّعْبِ ؛ وَ (5) قِيمَةُ

الْعَدَالَةِ الِاجْتِمَاعِيَّةِ .بِنَاءً عَلَى هَذِهِ الْقِيَمِ الْخَمْسِ ، تَمَّ تَشْكِيلُ الدَّوْلَةِ الْإِنْدُونِيسِيَّةِ وَلَدَيْهَا رُؤْيَةٌ لِحِمَايَةِ الْأُمَّةِ الْإِنْدُونِيسِيَّةِ ، وَتَعْزِيزِ الرَّفَاهِيَةِ الْعَامَّةِ ، وَتَثْقِيفِ الْحَيَاةِ ، وَالْمُشَارَكَةَ فِي الْحِفَاظِ عَلَى النِّظَامِ الْعَالَمِيِّ.

بِنَاءً عَلَى هَذِهِ الْقِيَمِ الْخَمْسِ ، تَمَّتْ إِقَامَةُ دَوْلَةِ إِنْدُونِيسْيَا وَلَدَيْهَا هَدَفٌ وَرُؤْيَةٌ وَرِسَالَةٌ لِلدَّوْلَةِ لِحِمَايَةِ شَعْبِ إِنْدُونِيسْيَا، وَتَعْزِيزِ الرَّفَاهِيَةِ الْعَامَّةِ ، وَتَثْقِيفُ الْحَيَاةِ ، وَالْمُشَارَكَةَ فِي الْحِفَاظِ عَلَى النِّظَامِ الْعَالَمِيِّ. وَهَذَا مَذْكُورٌ بِشَكْلٍ وَاضِحٍ فِي الْفِقْرَةِ الرَّابِعَةِ مِنْ دِيبَاجَةِ دُسْتُورِ عَامِ 1945 (أَلْفٍ وَتِسْعِمِائَةٍ وَخَمْسَةٍ وَأَرْبَعِينَ)

الْقِيمَةُ الْأُولَى لِبَانْجَاسِيلَا هِيَ قِيمَةُ اللَّهِ (الإِلَه). تُشِيرُ هَذِهِ الْقِيمَةُ إِلَى أَنَّهُ يَجِبُ إِدَارَةُ الدَّوْلَةِ عَلَى أَسَاسِ مَبْدَأِ الْإِيمَانِ بِاللَّهِ الْأَحَد. لَا تُدَارُ دَوْلَةُ إِنْدُونِيسْيَا عَلَى أَسَاسِ الْمَبَادِئِ الْعَلْمَانِيَّةِ الَّتِي تَفْصِلُ بَيْنَ الدَّوْلَةِ وَالدِّينِ ، كَمَا أَنَّهَا أَيْضًا لَا تَسْتَنِدُ إِلَى دِينٍ مُعَيَّنٍ

إِنَّ إِيمَانَ شَعْبِ إِنْدُونِيسِيَا وَاعْتِرَافَهُمْ بِإِدَارَةِ الدَّوْلَةِ عَلَى أَسَاسِ قِيمَةِ اللَّهِ الأَحَدِ قِيمَةً قَابِلَةً لِلتَّطْبِيقِ عَالَمِيًا. فِيمَا يَتَعَلَّقُ بِتَعَالِيمِ الْإِسْلَامِ ، فَإِنَّ قِيمَةَ الْأُلُوهِيَّةِ الْوَاحِدَةِ هِيَ انْعِكَاسٌ لِبَدِيهِيَّةِ الْإِيمَانِ بِاللَّهِ الأَحَدِ.

إِنَّ قِيْمَةَ الْأُلُوهِيَّةِ الَّتِي يَتَبَنَّاهَا بَانْجَاسِيلَا تَعْكِسُ أَيْضًا إِلَى الْمَبَادِئِ الثِّيُوقْرَاطِيَّةِ. وَالثِّيُوقْرَاطِيَّةِ هِيَ شَكْلٌ مِنْ أَشْكَالِ الْحُكْمِ تَلْعَبُ فِيهِ الْمَبَادِئُ الْإِلَهِيَّةُ دَوْرًا مَرْكَزِيًا. وَلكِنَّ الثِّيُوقْرَاطِيَّةَ –مِنْ حَيْثُ الْمَبْدَإِ– فِي تَطْبِيقِهِ لَا يَقِفُ وَحْدَهُ. وَذُكِرَ فِيْ الدُّسْتُورِ عَلَى أَنَّ إِنْدُونِيسْيَا قَدْ تَبَنَّتْ أَيْضًا نِظَامًا دِيمُقْرَاطِيًا دُسْتُورِيًا حَيْثُ تَبَنَّتْ عَلَى أَنَّ "السِّيَادَةَ لِلشَّعْبِ وَتُنَفَّذُ وَفْقًا لِلدُّسْتُورِ". بِالْإِضَافَةِ إِلَى ذَلِكَ ، تُؤَكِّدُ قَوَاعِدُ دُسْتُورِيَّةٌ أُخْرَى أَنَّ "دَوْلَةَ إِنْدُونِيسْيَا هِيَ دَوْلَةُ قَانُونٍ". إِنَّ تَأْكِيدَ مَفْهُومِ "سِيَادَةِ الْقَانُونِ" يَعْنِي أَنَّ إِنْدُونِيسْيَا تَتَمَسَّكُ أَيْضًا بِمَبْدَأِ الدِّيمُقْرَاطِيَّةِ.

الْمَبَادِئُ الثَّلَاثَةُ : الثِّيُوقْرَاطِيَّةُ ؛ الدِّيمُقْرَاطِيَّةُ الدُّسْتُورِيَّةِ؛ وَالنُّوْمُوْقْرَاطِيَّة , يَجِبُ أَنْ يُفْهَمَ فِي وَحْدَةٍ لَاتَنْفَصِلَ عَنْ بَعْضِهَا الْبَعْضُ. لِذَلِكَ مَعَ هَذِهِ الْمَبَادِئِ الثَّلَاثَةِ, يُمْكِنُ اسْتِنْتَاجُ ذَلِكَ بِأَنَّ إِنْدُونِيسْيَا هِيَ "دِيمُقْرَاطِيَّةٌ دُسْتُورِيَّةٌ قَائِمَةٌ عَلَى الأُلُوْهِيَّةِ أَوْ حُكْمُ قَانُونٍ دِيمُقْرَاطِيٍّ قَائِمٍ عَلَى الإِلَه.

يُمْكِنُ رُؤْيَةُ انْعِكَاسِ إِيمَانِ شَعْبِ إِنْدُونِيسِيَا وَاعْتِرَافِهِمْ بِقِيمَةِ اللَّهِ فِي الْمُنْتَجَاتِ الْقَانُونِيَّةِ الَّتِي تُنْتِجُهَا مُؤَسَّسَاتُ الدَّوْلَةِ. فَفِي مَجَالِ التَّشْرِيعِ ، تَبْدَأُ كُلُّ لَائِحَةٍ تَشْرِيعِيَّةٍ بِ "إِيرَا إِيرَا "(الْعُنْوَانِ) ، "بِرَحْمَةِ الله تَعَالَى". وَأَمَّا بِالنِّسْبَةِ لِلْمَجَالِ الْقَضَائِيِّ فَتَبْدَأُ كُلُّ مَحْكَمَةٍ قَرَارَهَا بِعِبَارَةِ "مِنْ أَجْلِ الْعَدَالَةِ عَلَى أَسَاسِ الرُّبُوبِيَّةِ الْوَاحِدَةِ."

إِخْوَانِيْ الأَعِزَّاءِ

فِي إِنْدُونِيسْيَا ، وَهِيَ دَوْلَةٌ ذَاتُ أَغْلَبِيَّةٍ مِنَ الْمُسْلِمِينَ ، يُوَفِّرُ الْإِسْلَامُ اللَّوْنَ فِي تَفْسِيرِ قِيمَةِ اللَّهِ. عَلَى الرَّغْمِ مِنْ أَنَّ الْإِسْلَامَ هُوَ الدِّينُ السَّائِدُ لَا يَعْنِي أَنَّ النَّهْجَ الْمُتَّبَعَ هُوَ الْهَيْمَنَةُ بَلْ بِالِاعْتِدَالِ. يُدْرِكُ الْمُسْلِمُونَ الْإِنْدُونِيسِيُّونَ وَيَفْهَمُونَ أَنَّ النَّهْجَ الصَّحِيحَ لِلِاسْتِخْدَامِ هُوَ أَنْ تَكُونَ رَحْمَةً لِلْعَالَمِينَ .أَنْ تَكُونَ رَحْمَةً يَعْنِي أَنَّ الْمُسْلِمِينَ لَا يَتَحَرَّكُونَ فَقَطْ لِصَالِحِ الْجَمَاعَةِ الْإِسْلَامِيَّةِ. بَلْ إِنَّمَا كَيْفَ تَكُونُ جَمِيعُ الْإِجْرَاءَاتِ وَالْأَنْشِطَةِ الَّتِي يَتِمُّ تَنْفِيذُهَا مُفِيدَةً لِلْآخَرِينَ وَمُفِيدَةً لِلْجَمِيعِ.

أَمَّا بِالنِّسْبَةِ لِلْمُسْلِمِينَ الْإِنْدُونِيسِيِّينَ الَّذِينَ يُعَانُونَ مِنْ مَشَاكِلَ مَدَنِيَّةٍ مِثْلَ الْأُمُورِ الْأُسَرِيَّةِ (الطَّلَاقِ وَالْمِيرَاثِ وَالْوَصَايَا) فَهُمْ يَخْضَعُونَ لِسُلْطَةِ الْمَحَاكِمِ الدِّينِيَّةِ. لِذَلِكَ ، غَالِبًا مَا تَرْتَبِطُ الْمَحَاكِمُ الدِّينِيَّةُ بِمَحَاكِمِ الْأُسْرَةِ. فِي تَطَوُّرِهَا ، تَمَّ تَوْسِيعُ نِطَاقِ سُلْطَةِ الْمَحَاكِمِ الدِّينِيَّةِ لِلتَّعَامُلِ مَعَ بَعْضِ مَسَائِلِ الِاقْتِصَادِ الشَّرْعِيِّ ، إِلَى جَانِبِ تَطْوِيرِ الْمُؤَسَّسَاتِ الْمَالِيَّةِ الشَّرْعِيَّةِ. فِي أَتْشِيهْ (Aceh)، فَتَحَتْ الْحُكُومَةُ الْمَرْكَزِيَّةُ أَيْضًا إِمْكَانِيَّةَ تَطْبِيقِ قَانُونِ الْجِنَايَاتِ الْخَاصِّ فِي الْمُقَاطَعَةِ لِتَلْبِيَةِ رَغَبَاتِ الْمُجْتَمَعِ الْمَحَلِّيِّ.

فِي قَرَارِ الْمَحْكَمَةِ الدُّسْتُورِيَّةِ ، هُنَاكَ عِدَّةُ حَالَاتٍ لِاخْتِبَارِ دُسْتُورِيَّةٍ تَتَعَلَّقُ بِسِيَاسَاتِ الْحُكُومَةِ فِيمَا يَتَعَلَّقُ بِالْفِقْهِ الشَّرْعِيِّ وَنِطَاقِ سُلْطَةِ الْمَحَاكِمِ الدِّينِيَّةِ. عَلَى سَبِيلِ الْمِثَالِ ، فِي قَرَارِ مُرَاجَعَةِ قَانُونِ الْمَحَاكِمِ الدِّينِيَّةِ. يُطْلَبُ مُقَدِّمُ الِالْتِمَاسِ مِنْ الْمَحْكَمَةِ الدُّسْتُورِيَّةِ تَوْسِيعَ نِطَاقِ سُلْطَةِ الْمَحَاكِمِ الدِّينِيَّةِ بِإِدْرَاجِ الْقَضَايَا الْجِنَائِيَّةِ كَجُزْءٍ مِنْ اخْتِصَاصِهَا. رَفَضَتْ الْمَحْكَمَةُ الدُّسْتُورِيَّةُ طَلَبَ الْمُلْتَمِسِ مَعَ الْمَوْقِفِ بِأَنَّ " إِنْدُونِيسْيَا لَيْسَتْ دَوْلَةً دِينِيَّةً تَقُومُ عَلَى دِينٍ مُعَيَّنٍ فَقَطْ ، وَلَكِنَّ إِنْدُونِيسْيَا أَيْضًا لَيْسَتْ دَوْلَةً عَلْمَانِيَّةً لَا تَهْتَمُّ بِالدِّينِ عَلَى الْإِطْلَاقِ وَتَتْرُكُ الشُّؤُونَ الدِّينِيَّةَ تَمَامًا لِلْأَفْرَادِ وَالْمُجْتَمَعِ

لَيْسَ فَقَطْ فِي الْمَجَالِ الْمَحَلِّيِّ ، وَلَكِنْ أَيْضًا فِي الْمَجَالِ الْعَالَمِيِّ ، مِثْلَ تَحْقِيقِ هَدَفِ الدَّوْلَةِ فِي الْمُشَارَكَةِ فِي الْحِفَاظِ عَلَى النِّظَامِ الْعَالَمِيِّ يُشَارِكُ الشَّعْبَ الْإِنْدُونِيسِيَّ بِنَشَاطٍ أَيْضًا فِي الْعَدِيدِ مِنْ التَّعَاوُنِ الدَّوْلِيِّ ، مِنْ بَيْنِهَا مُنَظَّمَةُ التَّعَاوُنِ الْإِسْلَامِيِّ (OKI). فَفِي الْوَاقِعِ ، تَمَّ إِدْرَاجُ إِنْدُونِيسْيَا كَمُؤَسِّسٍ لِهَذِهِ الْمُنَظَّمَةِ الَّتِي تَأَسَّسَتْ عَامَ 1969.

مِنْ الْمَعْرُوفِ أَنَّ مُنَظَّمَةَ الْمُؤْتَمَرِ الْإِسْلَامِيِّ أُسِّسَتْ لِأَنَّهَا انْطَلَقَتْ مِنْ حَرْقِ الْمَسْجِدِ الْأَقْصَى فِي الْقُدْسِ. مُنْذُ ذَلِكَ الْحِينِ وَحَتَّى الْآنَ ، ظَلَّتْ رُوحُ كِفَاحِ الشَّعْبِ الْفِلَسْطِينِيِّ هِيَ الرُّوحَ الَّتِي تُحِيطُ بِجَمِيعِ الْبَرَامِجِ الَّتِي تُنَفِّذُهَا مُنَظَّمَةُ الْمُؤْتَمَرِ الْإِسْلَامِيِّ لِتُصْبِحَ الصَّوْتَ الْمُمَثِّلَ لِلْأُمَّةِ الْإِسْلَامِيَّةِ كَكُلٍّ. كَمُنَظَّمَةٍ دَوْلِيَّةٍ مَعَ ثَانِي أَكْبَرِ عُضْوٍ بَعْدَ الْأُمَمِ الْمُتَّحِدَةِ ، لِمُنَظَّمَةِ الْمُؤْتَمَرِ الْإِسْلَامِيِّ دَوْرٌ اسْتِرَاتِيجِيٌّ لِلْغَايَةِ .تَمَّتْ مُحَاوَلَةُ بَرَامِجَ مُخْتَلِفَةٍ لِتَمْثِيلِ مُنَظَّمَةِ الْمُؤْتَمَرِ الْإِسْلَامِيِّ لِلْمُشَارَكَةِ فِي حَلِّ الْمُشْكِلَةِ الْفِلَسْطِينِيَّةِ ، وَالنِّضَالِ مِنْ أَجْلِ السَّلَامِ الدَّائِمِ وَالنِّظَامِ الْعَالَمِيِّ ، وَالتَّخْفِيفِ مِنْ حِدَّةِ الْفَقْرِ ، وَالْأَمْنِ الْغِذَائِيِّ ، وَالِاسْتِثْمَارِ وَالشُّؤُونِ الْمَالِيَّةِ ، وَتَطْوِيرِ الْعُلُومِ وَالتِّكْنُولُوجْيَا ، وَتَغَيُّرِ الْمُنَاخِ ، وَالثَّقَافَةِ وَالْحِوَارِ بَيْنَ الْأَدْيَانِ ، تَمْكِينِ الْمَرْأَةِ ، وَالْعَمَلِ الْإِنْسَانِيِّ ، وَيَشْمَلُ حِمَايَةَ حُقُوقِ الْإِنْسَانِ وَالْحُكْمِ الرَّشِيدَ

فِي الْبِدَايَةِ ، كَانَتْ مُنَظَّمَةُ الْمُؤْتَمَرِ الْإِسْلَامِيِّ مُنَظَّمَةً لِلْمُؤْتَمَرَاتِ. وَمَعَ ذَلِكَ ، فَإِنَّ مُنَظَّمَةَ التَّعَاوُنِ الْإِسْلَامِيِّ الْآنَ هِيَ مُنَظَّمَةٌ تَعَاوُنِيَّةٌ ، تُسَاعِدُ بَعْضَهَا الْبَعْضَ وَالَّتِي لَهَا تَأْثِيرٌ أَوْسَعُ مِنْ مُجَرَّدِ تَعْرِيفِ "الْمُؤْتَمَرِ". هُنَاكَ مِثَلٌ فِي اللُّغَةِ الْإِنْدُونِيسِيَّةِ يَقُولُ "الْأَشْيَاءُ الَّتِي تُعْتَبَرُ ثَقِيلَةً يَتِمُّ حَمْلُهَا مَعًا ، بَيْنَمَا يَتِمُّ حَمْلُ الْأَشْيَاءِ الْخَفِيفَةِ مَعًا" مِمَّا يَعْنِي أَنَّهُ فِي الْفَرَحِ وَالْحُزْنِ ، يَتَحَمَّلُ كُلٌّ مِنْ الْخَيْرِ وَالشَّرِّ بِالتَّسَاوِي. هَذَا هُوَ إِلَى حَدِّ مَا انْعِكَاسٌ لِرُوحِ التَّعَاوُنِ. يَعْلَمُ الْإِسْلَامُ بِشَكْلٍ أَكْثَرَ تَحْدِيدًا أَنَّ رُوحَ التَّعَاوُنِ وَمُسَاعَدَةَ الْآخَرِينَ يَجِبُ أَنْ تَكُونَ دَائِمًا فِي إِطَارِ الْخَيْرِ وَالتَّقْوَى. هَذَا انْعِكَاسٌ لِلْأَخْلَاقِ الْإِسْلَامِيَّةِ ، كَمَا أَمَرَ اللَّهُ تَعَالَى : "وَتَعَاوَنُواْ عَلَى ٱلْبِرِّ وَٱلتَّقْوَىٰۖ وَلَا تَعَاوَنُواْ عَلَى ٱلْإِثْمِ وَٱلْعُدْوَٰنِۚ وَٱتَّقُواْ ٱللَّهَۖ إِنَّ ٱللَّهَ شَدِيدُ ٱلْعِقَابِ "

(المائدة: 2)

اخَوَانِي،

كَمَا هُوَ مَذْكُورٌ فِي مِيثَاقِهَا، فَقَدْ وَرَدَ أَنَّ أَحَدَ أَهْدَافِ إِنْشَاءِ مُنَظَّمَةِ التَّعَاوُنِ الْإِسْلَامِيِّ هُوَ "تَعْزِيزِ حُقُوقِ الْإِنْسَانِ وَالْحُرِّيَّاتِ الْأَسَاسِيَّةِ ، وَالْحُكْمِ الرَّشِيدِ ، وَسِيَادَةِ الْقَانُونِ ، وَالدِّيمُقْرَاطِيَّةِ وَالْمُسَاءَلَةِ فِي الدُّوَلِ الْأَعْضَاءِ وَفْقًا لِأَنْظِمَتِهَا الدُّسْتُورِيَّةِ وَالْقَانُونِيَّةِ"

وَالْخُطْوَةُ الَّتِي اتَّخَذَتْهَا مُنَظَّمَةُ الْمُؤْتَمَرِ الْإِسْلَامِيِّ لِتَحْقِيقِ هَذَا الْهَدَفِ هِيَ صِيَاغَةُ "إِعْلَانِ الْقَاهِرَةِ لِمُنَظَّمَةِ التَّعَاوُنِ الْإِسْلَامِيِّ حَوْلَ حُقُوقِ الْإِنْسَانِ "فِي عَامِ 1990 فِي اجْتِمَاعِ وُزَرَاءِ خَارِجِيَّةِ الدُّوَلِ الْأَعْضَاءِ فِي مُنَظَّمَةِ

هُنَاكَ حَاجَةٌ لِلْمُتَابَعَةِ بَعْدَ إِعْلَانِ الْقَاهِرَةِ ، وَمُنَظَّمَةُ التَّعَاوُنِ الْإِسْلَامِيِّ هِيَ الْمُنَظَّمَةُ الْكَبِيرَةُ الْأَنْسَبُ لِلْمُسَاعَدَةِ فِي بَثِّ الْأَفْكَارِ لِاحْتِرَامِ حُقُوقِ الْإِنْسَانِ وَحِمَايَتِهَا وَالْحِفَاظِ عَلَى دُسْتُورِهَا فِي الْأَنْظِمَةِ الْقَانُونِيَّةِ لِلدُّوَلِ الْأَعْضَاءِ فِيهَا.

مِنْ نَاحِيَةٍ أُخْرَى ، شَهِدَ دَوْرُ الْقَضَاءِ كَأَحَدِ فُرُوعِ أَصْحَابِ السُّلْطَةِ تَطَوُّرًا كَبِيرًا لِلْغَايَةِ وَحَظِيَ بِالْكَثِيرِ مِنْ الِاهْتِمَامِ مِنْ الْجُمْهُورِ ، بِمَا فِي ذَلِكَ فِي الدِّرَاسَاتِ الْأَكَادِيمِيَّةِ. أَصْبَحَ تَطَوُّرُ الدُّسْتُورِيَّةِ ، وَمُمَارَسَةُ حِمَايَةِ الْحُقُوقِ الدُّسْتُورِيَّةِ مِنْ قِبَلِ الْمَحَاكِمِ الْمَحَلِّيَّةِ ، قَضِيَّةً إِسْتِرَاتِيجِيَّةً فِي دِرَاسَاتٍ مُخْتَلِفَةٍ فِي مَجَالِ الْقَانُونِ ، وَخَاصَّةً الْقَانُونَ الدُّسْتُورِيَّ. وَمَعَ ذَلِكَ ، فَإِنَّ ظَاهِرَةَ التَّطَوُّرِ الْقَضَائِيِّ فِي الْبُلْدَانِ الْإِسْلَامِيَّةِ لَمْ تَحْظَ بِنَفْسِ الِاهْتِمَامِ.

إِنَّ مَسْأَلَةَ تَقْيِيدِ السُّلْطَةِ عَلَى أَسَاسِ النُّصُوصِ الْوَارِدَةِ فِي نَصِّ الدُّسْتُورِ هِيَ طَرِيقَةٌ لِخُضُوعِ السُّلْطَةِ وَمَنْعِهَا مِنْ أَنْ تَكُونَ مُطْلَقَةً وَتَعَسُّفِيَّةً. يَتِمُّ تَبَنِّي هَذَا الْمَنْظُورِ عَلَى نِطَاقٍ وَاسِعٍ كَآلِيَّةٍ دُسْتُورِيَّةٍ فِي مُخْتَلِفِ النُّظُمِ الْقَانُونِيَّةِ الْمَعْمُولِ بِهَا فِي بُلْدَانِهِمْ. سَيَكُونُ مِنْ الرَّائِعِ أَنْ نَتَبَادَلَ نَحْنُ الدُّوَلَ الْأَعْضَاءَ فِي مُنَظَّمَةِ الْمُؤْتَمَرِ الْإِسْلَامِيِّ الْأَفْكَارَ حَوْلَ الْمُمَارَسَاتِ الَّتِي تَتِمُّ فِي كُلِّ دَوْلَةٍ عُضْوٍ ، لَا سِيَّمَا فِيمَا يَتَعَلَّقُ بِدَوْرِ الْقَضَاءِ فِي كُلِّ دَوْلَةٍ. مِنْ خِلَالِ تَبَادُلِ الْأَفْكَارِ ، يُمْكِنُنَا تَبَادُلُ الْخِبْرَاتِ وَالْبَحْثُ عَنْ الْإِلْهَامِ لِلْحُلُولِ الْمُمْكِنَةِ لِلْمَشَاكِلِ الْقَانُونِيَّةِ الَّتِي تُوَاجِهُهَا الْمَحَاكِمُ فِي كُلِّ دَوْلَةٍ عُضْوٍ.

هَذِهِ الْفِكْرَةُ الْعَظِيمَةُ بَدَأَتْ وَحَاوَلَتْ أَنْ تَتَحَقَّقَ فِي اجْتِمَاعِنَا بِهَذِهِ الْمُنَاسَبَةِ.

اخَوَانِي الِمَحْبُوْبِيْنَ،

أَعْتَقِدُ أَنَّهُ لَا يُوجَدُ وَقْتٌ أَفْضَلُ مِنْ الْآنَ لِتَعْزِيزِ التَّعَاوُنِ ؛

لَيْسَ هُنَاكَ مِنْبَرٌ أَكْثَرُ مُلَاءَمَةً لِصِيَاغَةِ الْوَحْدَةِ لِلتَّغَلُّبِ عَلَى مَشَاكِلَ مُخْتَلِفَةٍ مِنْ مَحَفِّلِنَا الْيَوْمَ.

وَلَا يُوجَدُ صَدِيقٌ أَنْسَبُ لِدَعْوَتِهِ لِلتَّحَرُّكِ سَوِيًا مِنْ إِخْوَتِيْ أَعْضَاءِ هَذَا الْمُنْتَدَى.

مَحْظُوظُونَ نَحْنُ الَّذِينَ وَحْدْنَا قُلُوبُنَا فِي اوَاصِرِ دِينِ اللَّهِ .لِأَنَّنَا بِهَذِهِ الرَّابِطَةِ نُقِيمُ التَّعَاوُنَ بِرُوحِ الْأُخُوَّةِ.

وَقَدْ ذَكَرَ اللَّهُ تَعَالَى فِي القرآن الكريم:

وَٱعۡتَصِمُواْ بِحَبۡلِ ٱللَّهِ جَمِيعٗا وَلَا تَفَرَّقُواْۚ وَٱذۡكُرُواْ نِعۡمَتَ ٱللَّهِ عَلَيۡكُمۡ إِذۡ كُنتُمۡ أَعۡدَآءٗ فَأَلَّفَ بَيۡنَ قُلُوبِكُمۡ فَأَصۡبَحۡتُم بِنِعۡمَتِهِۦٓ إِخۡوَٰنٗا وَكُنتُمۡ عَلَىٰ شَفَا حُفۡرَةٖ مِّنَ ٱلنَّارِ فَأَنقَذَكُم مِّنۡهَاۗ كَذَٰلِكَ يُبَيِّنُ ٱللَّهُ لَكُمۡ ءَايَٰتِهِۦ لَعَلَّكُمۡ تَهۡتَدُونَ (ال عمران: 103)

وَاللَّهُ الْمُوَفِّقُ إِلى أَقْوَمِ الطَّرِيقِ،

السَّلَامُ عَلَيْكُمْ وَرَحْمَةُ اللَّهِ وَبَرَكَاتُهُ

AZERBAIJAN

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

Mr.Rovshan Ismaylov
Judge
Constitutional Court of
the Republic of Azerbaijan

Constitutional Protection of Social Rights in the Republic of Azerbaijan

Dear Mr. Chief Justice of the Constitutional Court of the Republic of Indonesia Honorable Anwar Usman,

Dear Colleagues from Constitutional and Supreme Courts and Councils of OIC Members and Observer States,

Ladies and Gentlemen,

Let me first of all express my gratitude to the Constitutional Court of the Republic of Indonesia for organizing of this timely and highly interesting conference.

The primary objective of my presentation is to assess how the Constitution of the Republic of Azerbaijan deals with social rights. To this end I will try to focus your attention on three interconnected issues: the model on constitutionalization of social rights, the way the social rights are defined in Constitution and the problem of justiciability of social rights.

With respect to European context some sources mention three main models of incorporation of social rights in national constitutions: liberal, a Southern European and a moderate. The liberal model would renounce the explicit inclusion of social rights in their constitutional texts. However, this a priori negative attitude towards these rights is compensated by a very protective ordinary legislation (this is especially true with respect to Austria). In countries representing Southern European model one may observe wide integration of social rights in constitutions. And finally, in some European constitutions the reference to social rights is either unspecific or of very limited character.

Under this classification Azerbaijan mostly corresponds to Southern European model. Constitution of Azerbaijan adopted in 1995 contains quite detailed catalog of social rights.

It could be obvious to see a logical link between the political and legal history of a country and the choice of method of constitutionalization of social rights. Within Azerbaijani context one of possible important factors affecting the inclusion into Constitution of impressive list of social rights was explained by country's soviet past.

The universal system of social protection in the USSR was the indispensable consequence of a system of planned and centralized economy, and was of a magnitude that had no equivalent in the Western social democracies. All public services, from education to health, as well as pensions, housing subsidies, social insurance were universally insured by the State.

This obviously have certain implications on the content of the catalogue of human rights guaranteed in Constitution of Azerbaijan.

On the other hand, it should be mentioned that from the constitutional point of view, the Soviet legal regime provided for primacy of socio-economic rights over all other rights, configuring them as prerequisites for the realization of an individual in socialist society. Social guarantees were not regarded as rights of the individual in itself, or the rights that the State had to recognize and guarantee according to the conception of liberal constitutionalism, but as the direct emanation of the State, which was considered as a sole regulator of social life. Moreover, the social rights and their level of protection were both an integral part and a consequence of planned economy, as well as considered as the means aiming at educating the population based on socialist principles.

Such an approach was abandoned in Constitution of Azerbaijan, which being inspired by some European Constitutions, accepted the principle of equalization between civil, political, and social rights. This principle was confirmed in the Constitutional Court's case-law. The Court stated in several decisions that the Constitution guarantees the protection of social rights on the same level with other constitutional rights.

As a practical consequence of such a statement it could be suggested that the study of constitutional guarantees of human rights in Azerbaijan could be viewed as a coherent matter which may raise common issues. Does this thesis have reservations?

In order to answer to this question, I have to first of all address the second point

mentioned above: the way the social rights were defined in Azerbaijan constitutional order.

The consideration of this issue is usually limited to juxtaposition of two approaches. Under the first approach the social rights are defined as political objectives or programs addressed solely to legislator. The constitutions simply refer to certain values and principles that the State should seek to protect and ensure. There is usually no individual right corresponding to these imperatives. This makes social rights different from civil and political rights. This approach defines the social rights by a historical analysis in terms of generations of human rights. It relies on conceptual differences between first generation (civil and political) rights and second generation (social and economic) rights. These generations are often found in the recognition of separate sections in constitutions that distinguish between more important rights, those are the civil and political rights, and others. In other words, under this approach the social rights are regarded as second-class rights.

On the other hand, some national constitutions do not provide for specific legal regimes for social rights and, with certain nuances, place the civil, political, economic and social rights on the same level. Another words, this second approach considers social rights as subjective entitlements, at pair with civil and political rights. Many constitutions of Central and Eastern Europe follow this approach, by employing the same expressions for civil, political and social rights as well. This is equally true as far as Constitution of Azerbaijan is concerned. So, for example, Constitution provides that "everyone has the right to rest" (Article 37), "everyone has the right to social security" (Article 38) or "everyone has the right to health care and medical assistance" (Article 41).

On the other hand, unlike civil and political rights in Constitution of Azerbaijan certain social rights are explicitly defined not only as rights entailing State's obligations. For example, under Article 34 (V) children have the duty to respect and care for their parents. Children who have attained eighteen years of age and who are capable of working shall be responsible for the care of their parents if the latter are not capable of working. Or in accordance with Article 38 (II) family members are the first to be duty-bound to render assistance to their needy kin.

The text of these constitutional provisions suggests that social rights could be also

defined in terms of rights dealing with the relationship between an individual and constitutionally recognized social communities such as the family. This, however, should not mean that it is because the family cannot provide assistance to his/her relative that the State is obliged to take care of it. Presumably, it could be claimed that these constitutional provisions imply the provision of social assistance, based on coexistence of interpersonal assistance and aid provided by the State.

Does the constitutional text contain other provisions, which makes implementation of social rights different from civil and political rights? This, in fact, brings us to the third issue I would like to address - the problem of justiciability of social rights.

This term refers to the quality of what is suitable for examination by judges. A justiciable right is a right that can be reviewed by a judge, and the justiciability of rights is defined as the ability of the courts to hear and determine whether they were allegedly violated.

Analysis of the Constitutional Court's case-law shows that the justiciability of social rights basically is conditioned by two limitations. Firstly, the Court applies a "reservation of the law", which emphasizes the margin of appreciation granted to legislator by constitutional text itself. For example, under Article 38 (III) of Constitution "everyone has the right to social security upon attaining the age prescribed by law, in case of illness, disability, loss of bread-winner in the family, loss of work capacity, unemployment or in other cases prescribed by law".

Secondly, the Court invokes so-called "possible disclaimer", which limits the implementation of social rights through taking into account the financial resources of the State. This argument is based on the idea that it is up to legislator to make budgetary choices and allows the Court relying on certain interpretation of separation of powers, to draw a distinction between the field of politics and that of law.

On the basis of those arguments Constitutional Court stated that the legislator has a wide margin of appreciation in the field of social rights, which in its turn is accompanied by a comparatively lesser amount of control exercised by the Court.

Yet, the Court held that this margin is not unlimited. For example, with respect to

right to social security it was stated that the legislator is obliged not only to determine the types of social security which are directly specified in Article 38 of Constitution but also establishes the stable, predictable, effective, and fair system of the social security, which corresponds to pro rata criteria of social security, allowing to accumulate the funds necessary for pension payment and benefits, including the implementation of corresponding payments.

Despite this, it could be concluded that although the Constitution provides for the principle of equalization between civil, political and social rights its application is conditioned by the content of constitutional text itself and case-law of Constitutional Court based on the idea of limited justiciability of social rights.

In the end, I thank you for your kind attention and seize this opportunity to wish all participants health and peace.

JORDAN

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

The constitutional judiciary plays a fundamental and pivotal role in protecting human rights, as it is considered the primary tool for protecting and maintaining those rights. The constitutional judiciary works to build the foundations of the democratic state of which it is a part.

The increasing importance that human rights and freedoms issues have become in our society has made it the duty of the state, which harnesses all its capabilities to protect those rights and freedoms.

Perhaps the constitutional judiciary is considered the most effective tool of the state in maintaining and consolidating these rights, and it stands against all means of violence or abuse that citizens may be exposed to, which represents the entity of society.

In front of the power of the state, the powers of the legislative and executive authorities, and the actions that it may exercise or take that may violate rights, the judiciary exists to protect them by imposing its constitutional control over the laws enacted by the legislature or by addressing any action that the executive authority may take that affects or violates The rights and public freedoms of the citizens of the state as a basic protector against the arbitrariness of the two authorities.

The concept of human rights is usually related to the issue of the democratic construction of states and their constitutional institutions, where democracy refers to respecting the general will of the people, and human rights refer to the natural rights that apply to all individuals in all societies.

The aim is to demonstrate the interrelationship between human rights and democracy, with special emphasis on the application of these concepts.

It is necessary here to address the process of political development in order to achieve political pluralism and enable political parties to play their role effectively and deservingly. It also focuses on respect for human rights as an indicator of democracy and the strengthening of the role of civil society, the transparency of elections as a political process, the separation of powers and judicial reform.

We now turn to the principle of equality in political rights and freedoms, and the extent to which constitutional jurisprudence contributes to their consolidation.

This issue acquires great importance, which is reflected in the value of the principle of equality as a constitutional principle, and the importance of political rights and freedoms for the citizen, who aspires to participate in the conduct of the political affairs of his country

without discrimination. Monitoring the conformity of laws related to elections and political parties to the constitution.

Jordan attaches utmost importance to international cooperation in the field of human rights, based on its firm belief that protecting the basic rights and freedoms of the human being and preserving his dignity is a prerequisite for achieving freedom, justice and peace in the world.

Emphasizing the cultural and historical role of the Kingdom as the heir of the Great Arab Renaissance, which aims to promote freedom, justice and a better life, Jordan was based on Islamic, national and humanitarian principles that aim to raise the human condition, preserve his dignity, preserve his entity, and affirm his right to a decent life, freedom and equality.

Therefore, Jordan ratified and acceded to many international treaties and conventions on human rights. It actively participates in and supports the United Nations human rights system through:

Active participation in the formulation and discussion of resolutions issued by the Third Committee of the United Nations General Assembly.

Continuous cooperation with the Human Rights Council as the main governmental body responsible for promoting human rights, with the Office of the High Commissioner for Human Rights, with the UN Security Council and the Economic and Social Council, in addition to the human rights treaty bodies to which it is a party.

The comprehensive review mechanism within the framework of the Human Rights Council is a unique process, as it includes a comprehensive review of human rights developments in all UN member states. The mechanism gives the concerned countries an opportunity to present and explain all measures taken to develop human rights in them and implement their international obligations in this field.

A constitutional right can be a specific privilege, duty, or condition recognized by a sovereign state or a federation of several states. All constitutional rights are written and expressly enshrined in an agreed, unified national constitution.

These rights are the supreme laws of the state, which means that any other laws that conflict with them are considered unconstitutional and therefore void.

The constitution usually specifies the structure of the national government that governs the state, the functions of this government, its powers and limits, individual freedoms, rights and duties that the constitution guarantees protection and enforcement when needed by the national authorities in the state.

Does the constitution guarantee the people their human rights in a country? Do public authorities act in accordance with the constitution? These two questions are among the most frequently asked questions when measuring the general situation in a country, and they reflect the central place occupied by the constitution in the lives of peoples and states.

Most legal systems are based on a hierarchical structure of legal instruments with the constitution at its apex. All laws or other legal measures of the State shall be in conformity with the Constitution. In the event that the State adopts a law or a legal procedure that contradicts the Constitution, then it should be declared null and void by the competent judicial institution.

Judge Taghreed Hikemt

Member of Constituional Court

IRAQ

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

In the name of God most gracious most merciful

"O, David! Behold, We have made thee a [prophet and, thus, Our] vicegerent on earth: judge, then, between men with justice, and do not follow vain desire, lest it leads thee astray from the path of God: verily, for those who go astray from the path of God there is suffering severely in store for having forgotten the Day of Reckoning!"

His Excellency the Respected President of the Republic of Indonesia

Mr. Chief Justice of the Constitutional Court of Indonesia

Ladies, gentlemen, presidents, and members of the Supreme Courts, constitutional courts, and constitutional councils

Ladies and gentlemen generous presence with the preservation of titles and posts

Peace be upon you and God's mercy and blessings

In the beginning, I would like to thank His Excellency the Respected President of the Republic of Indonesia for his high patronage of the Second Judicial Conference of the Supreme and Constitutional Courts of the OIC member states.

I also sincerely thank Mr. Chief Justice of the Constitutional Court of Indonesia.

Ladies, gentlemen, presidents, and members of the supreme courts, constitutional courts, and constitutional councils, the world today is moving in various directions, but the most prominent thing in these trends is respect for human rights and freedoms and the right to peacefully transfer power through free and fair universal suffrage, considering that the people are the source of the powers and their legitimacy exercised by direct public secret ballot and through their constitutional institutions. A civilized political system that respects human rights and freedoms can only be established through a strong and independent judiciary.

Hence, the independence of the judiciary became a well-established doctrine and a firm faith stipulated in the heavenly laws before it was called for by international treaties, conventions, constitutions, and national laws, and the independence of the judiciary became part of the human conscience so that it is no longer acceptable to ignore it or deny it, and deepening this principle and establishing it has become imperative to secure justice, guarantee rights, safeguard freedoms and protect citizens, so all the basic laws prevailing in today's world (charters, constitutions, and laws) have been unanimous, with the judiciary only subject to its work. The law and conscience and therefore all other legislative and executive authorities must not intervene in the work of the judiciary to ensure the principle of impartiality of the judge, which embodies the independence of the judiciary.

The principle of judicial independence comes as a logical result of two important principles: the separation of powers and the principle of legitimacy, and the principle of separation of powers requires that the legislative, executive and judicial authorities exercise their powers and jurisdictions on the basis of the terms of reference specified under the Constitution and not exceed them and that the main source of this principle is the Constitution itself and through which the people work to determine the working conditions of the political authority and the powers of the rulers so that the mechanisms of governance are no longer applied according to the freedom and the will of these rulers, but their actions remain subject to the conditions of that rule adopted by the nation and in case the method of governing does not emanate from the will of the people expressed publicly, it means that there is no constitution, since the main purpose of the Constitution is to preserve the rights and freedoms of citizens from the tampering of power, and that the Constitution is the owner of the abstract and permanent authority and that the rulers are in fact only agents charged with implementing what is stated in it, so the constitution has become a living work open to continuous development. For human rights and freedoms, the Constitution is no longer a closed and isolated text that expired the moment it was adopted, but rather it is a work that keeps pace with development in accordance with the progress of society and based on the above refrains

the legislative and executive authorities must refrain from interfering in the work of the judiciary in its procedures and decisions or judgments, and to this end, the focus should be on two main points: the judiciary should be an authority, not just employment, in order to prevent interference with the sanctity of the judicial authority, to undermine the prestige and dignity of the judiciary, to question its integrity and justice without significant legal evidence, and the second point is that judges should have the right to express their opinions in all ways. The independence of the judiciary, in addition to preventing other authorities from interfering in its actions, requires that the judges themselves refrain from responding, accepting or subjecting themselves to any interference or influence from others. In the context of this, the Constitution of the Republic of Iraq 2005 in the article (47) stipulates that (the federal powers shall consist of the legislative, executive, and judicial powers and they shall exercise their competencies and tasks on the basis of the principle of separation of powers) as stipulated in article (87) of it (the judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law) and article (88) of it stipulates that (Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice). With regard to the principle of legitimacy, it is intended that all the actions of the public authorities in the country should be within the limits of the law and in accordance with its provisions and the principle of legitimacy is what distinguishes the rule of law from others, and talking about the state of institutions and the principle of the rule of law in a state where there is no independent judiciary becomes a kind of absurdity and this requires in all countries that believe in the rule of law the existence of judicial bodies with an independent system consisting of competent men who enjoy absolute independence towards political power and must provide respect from the rulers and governed to the judgments and decisions issued by these judicial bodies and if the rights and freedoms vary from one constitution to another according to the ideology adopted by the political system, the agreement among them is most constitutions of the countries of the world is their recognition of those rights and freedoms and the inclusion of rights and freedoms in

Treaties and constitutions are very important in their recognition, but more importantly, these rights are applied in practice and the legislature is known to hold the legislative task and in this regard, the legislature intervenes in regulating the rights adopted by the Constitution, but it must not ignore the constitutional provisions concerning rights and freedoms, nor should it abuse the authority granted to it and not deviate from its specific framework, as it must abide by the constitutional framework when it passes laws the state to respect human freedoms and rights. So that the state of the law is not just any law but the law that expresses those values and rights, which gives the citizen rights to confront the authority these rights derived by the citizen from the text of the law so that he can embody the reality and his freedoms and rights as modern democracy are seen through the Constitution and not through the law and linking rights and freedoms to the constitution gave it a wide scope to keep up with the guarantees of these rights and freedoms and the development that keeps pace with the movement of society and the constitution became a legal document imposing its rules on all authorities and in the negative case this results in the annulment of the works of these authorities by the judiciary this trend would not have been embodied without the certainty felt by citizens and politicians alike the need to circumvent the constitution as it constitutes the safety valve for institutional stability political or social and thus and by this rational development and communication the majority of modern democracies adopted the principle of control over the constitutionality Laws and the principle of constitutional justice imposes itself in the political pre-legal structure in this or that state as it is derived from the Constitution, considering that the Constitution is a legal charter of human rights since the purpose of controlling the constitutionality of laws is to protect the individual with his rights and freedoms from the abuse of power, this is the basis of democracy, before democracy has the goal of creating a just political society or abolishing all forms of control and exploitation, its main objective should be to allow individuals and groups to become free and history-making capable of combining the gatherness of reason with the specificity of personal and collective identity, so democracy and control of the constitutionality of laws have both created human thought to further protect human rights and freedoms that

remain the goal and purpose. The constitutional purpose is the Federal Supreme Court as an independent judicial body in accordance with article (92/1st) of the Constitution of the Republic of Iraq 2005, which stipulated (the Federal Supreme Court is an independent judicial body, financially and administratively) and the above-mentioned court controls constitutionality of the laws and regulations in force and interprets the provisions of the Constitution in accordance with items (1st and 2nd) of the article (93) of the Constitution. Moreover, the Court has a big effect in reducing overtaking Significant violation of its constitutional powers by the legislative and executive authorities in accordance with the item (3rd) of the article (93), which stipulates (The Federal Supreme Court shall have jurisdiction over the following: third: settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal above-mentioned). All that is issued by the legislative and executive powers as mentioned are subject to the oversight of the Federal Supreme Court. Besides, The people's rights and freedoms remain merely worthless constitutional provisions, as there is no independent judiciary away from the interference of the executive and legislative authorities in the selection of judges for all judicial committees, first and foremost the selection of judges for the supreme courts, constitutional courts, and constitutional councils, but the judiciary must be the only authority in their choice as they are the most aware of their judges, far from giving any role to any other authority in their choice and finally. I wish you the presidents of the Supreme Courts, constitutional courts, and constitutional councils success and for this conference.

and peace and mercy of God and blessings be upon you.

PAPERS
SESSION III

PROCEEDING
THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

"Human Rights and Constitutionalism:
The Contribution of the Judiciary
in Muslim Countries."

Bandung, September 16—17, 2021

ALGERIA

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

2nd Judicial Conference of Constitutional Courts and Supreme Courts/Councils of the OIC Member States/Observer States

Bandung, INDONESIA

September 15 – 17, 2021

Statement of Mr. Kamel FENICHE

President of the Algerian Constitutional Council

Your Excellency President JOKO Widodo, President of The Republic of Indonesia

Honorable Dr Anwar Usman, Chief Justice of the Constitutional Court of the Republic of Indonesia,

Honorable Presidents and members of Constitutional Courts and Councils and Supreme Courts of the Organization of Islamic Cooperation Member States/Observer States,

Honorable heads and members of international organizations,

Ladies and Gentlemen,

First of all, I would like to take this opportunity to extend my deepest thanks to the Indonesian authorities for hosting the 2nd Judicial Conference of Constitutional Courts and Councils and Supreme Courts of the Organization of Islamic Cooperation Member States/Observer States. I thank, in particular, His Excellency M. The President of the Republic of Indonesia, and the Chief Justice of the Indonesian Constitutional Court Honorable Anwar Usman who addressed to me an invitation to participate with you today, which I gladly accepted. I was hoping to be among you, but unfortunately, I was not able to, due to the occurrence of some major constraints, and I will be happy to meet you in the near future with God's will.

Our Conference is a new milestone on the path we started three years ago, in Istanbul, in order to create a space for constitutional justice that gathers all Constitutional Courts and Councils and Supreme Courts of the Organization of Islamic Cooperation Member States/Observer States.

This space, to which Algeria declared its full support, will be the avenue to share our knowledge and to benefit mutually from our experiences and expertise.

Algeria, who is member of the working group emerging from Istanbul declaration, will spare no effort to ensure the success of this endeavor and we are completely ready to continue working with other member States for the success of the founding

Conference, to be held in the next three years, and we made proposals on Bandung Declaration draft.

Ladies and Gentlemen,

The 1st November 2020 constitutional revision, initiated by the President of the Republic, Mr. Abdelmadjid TEBBOUNE with the blessing of the People, came to lay the basis for a new Republic ingrained in the principles of the 1st of November 1954, founded on democracy, fundamental rights and freedoms and the Rule of law, to be, as enshrined in the Constitution Preamble, the reflection of the People's aspirations towards bringing deep social and political changes in favor of building the New Algeria which the authentic people's Hirak claimed in an exemplary peace.

The new Constitution strengthened the principle of separation and balance between powers and the independence of the Judiciary. It came with guarantees to eradicate corruption and protect citizens' rights and freedoms and enable people to choose their representatives in full freedom through a new election law; one of its most elements is changing election pattern by adopting the open list, which would enable voters from choosing their representatives freely.

The new Constitution has adopted the semi-presidential system that merges the best practices of both presidential and parliamentary system, to create a flexible separation of powers that allows the inter-institutional collaboration and makes sure no power would usurp the others' competencies.

Ladies and Gentlemen,

The drafters of the Constitution have, also, made sure to safeguard the human rights and to consolidate democracy in our country, by ensuring the independence of Judiciary through a set of rules aiming to provide a maximum protection to the judge, most prominently the enshrinement of the principle of the irremovability of the trial Judge, in addition to the prohibition of their impeachment and punishment while exercising their duties, except in compliance with the law and by a reasoned decision of the Supreme Judicial Council.

The independence of the Judiciary is, also, reflected in the composition of the Supreme Judicial Council, which became made up of 75% of elected judges, with the exclusion of the Minister of Justice as representative of the executive branch from its composition. Furthermore, the Council was mandated, under the presidency of the first President of the Supreme Court, to handle the judges' careers, to ensure the compliance with the organic law of the Judiciary and to monitor the discipline of the judges.

Ladies and Gentlemen,

The new Constitution has established a number of regulatory bodies in order to protect the political, civil, economic and social rights of citizens, starting with the replacement of the Constitutional Council with the Constitutional Court within one year from the date of the promulgation of the Constitution, to the strengthening of the Court of Auditors' competencies in a way that should lead to the promotion of governance and transparency and the wise management of public funds which represent a fundamental aspect of the moralization of the public life, in addition to the establishment of independent national authority of elections. The Constitution has also introduced the Supreme Authority for Transparency, Preventing and Combating Corruption, as an independent institution in charge of the development, the implementation and the monitoring of a national strategy for preventing, combating and pursuing corruption. It is also in charge of collecting and communicating information about corruption to the competent authorities and notifying the Court of Auditors and the competent judicial authorities of irregularities.

Ladies and Gentlemen,

As I have mentioned earlier, the new Constitution provides for the substitution of the Constitutional Council by a Constitutional Court that will carry on the mission of ensuring the observance of the Constitution. Moreover, it will be endowed with larger competences than the Constitutional Council to play a pivotal role, especially in regulating institutions functioning, public authorities' activities and ruling on conflicts between constitutional authorities.

Besides, the possibility of referral to the Constitutional Court, by the legally competent parties to interpret constitutional dispositions, would preserve the country's stability and spare it harmful repercussions that would result from any ambiguity or misinterpretation, which will contribute in ensuring that no power encroaches, deliberately or inadvertently, on the competencies of the other power. All what have been aforementioned may strengthen democratic pillars, since the Constitutional Court will act as arbiter and guarantor of stability between the three powers.

Ladies and Gentlemen,

Over more than three decades of its existence, the Constitutional Council contributed significantly in consolidating the rule of law and democracy through its jurisprudence in the area of reviewing law's constitutionality and the compliance of organic laws and the Parliamentary rules of procedure of the two Chambers of Parliament with the Constitution, which consecrated the principle of respecting the constitutional distribution of competencies, separation of powers and rule of law and the constitutional supremacy.

In accordance with our jurisdiction approach, democracy is a *sine qua non* condition for building the rule of law. The constitutional review jurisdiction ensures compliance with transparency, impartiality and freedom rules in different electoral operations. Article 191 of the Constitution stipulates: "the Constitutional Court shall review the appeals it receives on the provisional results of the presidential and legislative elections and referendums and shall announce the final results of all the operations".

In this context, the Constitutional Council was once again before another historical responsibility, which consists in ensuring the regularity of the first election under the Constitution of the new Algeria and the election law deriving, a responsibility that the Council has fulfilled properly. The election of 12th June is the best example of transparency and honesty.

Furthermore, the competency of the constitutional review jurisdiction in protecting human rights and strengthening democratic process in our country is also provided for expressly in the framework of the exception of unconstitutionality, enshrined in the Constitution by virtue of the dispositions of Article 195, which is a quantum leap in the area of constitutional justice and human rights. It consists of the possibility of referral to the Constitutional Court, pursuant to a request by the Supreme Court or the Council of State when one of the parties in a trial claims before the jurisdiction that the legislative provision upon which the issue of the litigation relies may adversely affect the rights and freedoms granted by the Constitution.

Bearing in mind that the decisions of the Constitutional Court are final and binding on all official authorities according to the article 198 of the Constitution.

On international level, by virtue of the constitutional revision on 1st November 2020, international norms of human rights were promoted to constitutional norms. Paragraph 16 of the Constitution Preamble stipulates that the Algerian people express its attachment to human rights as defined in the Universal Declaration of Human Rights of 1948 and international treaties ratified by Algeria.

The article 34 of Constitution stipulates that: "Constitutional provisions relating to fundamental rights, public liberties and guarantees shall apply to all public powers and institutions" and that
"no restriction on rights, liberties and guarantees can be imposed except by virtue of a law and for reasons related to the maintenance of public order, security, and the protection of national constants as well as those necessary for the safeguard of other rights and liberties protected by the Constitution", and that "Under no circumstances shall these restrictions impinge on the essence of rights and freedoms".
The Constitution has also put in place new measures to protect the social rights of vulnerable groups, particularly those related to education and health.

Ladies and Gentlemen,

Our endeavor aiming at the continued enhancement of democratic practice, protection of rights and freedom in our countries, increases the importance of the responsibility placed upon the constitutional review jurisdictions that we represent.

No doubt that the diversity of our experiences and pathways as well as the compatibility of our values and principles constitute a rich heritage that we should preserve and take profit from as much as we can.

Thus, the reinforcement of our cooperation ties and concerted efforts will help us to fulfill perfectly our responsibilities and will strengthen our bonds around commonalities gathering us for the good of our countries.

Thank you.

المؤتمر الثاني للمحاكم والمجالس الدستورية والمحاكم العليا للدول الأعضاء والأعضاء الملاحظين لمنظمة التعاون الإسلامي

باندونغ، إندونيسيا

من 15 إلى 17 سبتمبر 2021

كلمة السيد كمال فنيش

رئيس المجلس الدستوري الجزائري

- فخامة السّيد جُوكُو وِيدُودُو Joko Widodo، رئيس جمهورية إندونيسيا،
- معالي السيد أَنْوَرْ عُثْمَانْ رئيس المحكمة الدستورية لجمهورية إندونيسيا،
- السيدات والسادة رُؤَسَاءُ وأعضاء المحاكم والمجالس الدستورية والمحاكم العُليا للدول الأعضاء والأعضاء المُلَاحِظِين بمنظمة التعاون الاسلامي،

- السيدات والسادة رؤساء وأعضاء المنظمات الدولية،

أَيَّتُهَا السَّيِدَاتُ، أيُهَا السَّادَة،

أَوَدُ بِدايَةً أن أتقدم بخالص الشُكْرِ إلى السُّلُطات الانْدُونيسية على اِسْتِضَافَتِهَا لهذا المؤتمر الثاني للمحاكم والمجالس الدستورية والمحاكم العليا للدول الأعضاء والأعضاء الملاحظين بمنظمة التعاون الاسلامي وأَخُصُّ بالذِّكْرِ رئيس الجمهورية الإندونيسية المُوقّر، وكذا رئيس المحكمة الدستورية السيد أَنْوَرْ عُثْمَانْ الذي تَفَضَّلَ بتوجيه الدعوة إِلَيَّ للمشاركة معكم اليوم وكان لي شَرَفُ قَبُولِ دعوته الكريمة. وكنت أتمنى التَّوَاجُدَ بَيْنَكُمْ إلّا أنّ ظُرُوفًا قَاهِرَةً مَنَعَتْنِي من ذلك، وسأكون سعيدا بلقائكم في المستقبل القريب بحول الله

إِنَّ مُؤْتَمَرَنَا هذا لَهُوَ خُطْوَةٌ أخرى هامة على الطريق الذي بَدَأْنَاهُ منذ ثلاث سِنِينَ في إسطنبول بهدف إِنْشَاءِ فَضَاءٍ لِلْقَضَاءِ الدُّسْتُورِي يَجْمَعُ المحاكم والمجالس الدستورية والمحاكم العليا للدول الأعضاء والأعضاء الملاحظين بمنظمة التعاون الإسلامي.

هذا الفضاء الذي أَعْلَنَتْ الجزائر دَعْمَهَا الكامل له سيكون مَجَالًا لنا لِتَبَادُل مَعَارِفِنَا والاِسْتِفَادَةِ المُتَبَادَلَة من خِبْرَاتِنَا وتَجَارِبِنَا.

إن الجزائر وهي عضو بفوج العمل المُنْبَثِقِ عَنْ اِعْلان إسطنبول لَنْ تَدَّخِرَ أَيَّ جُهْدٍ في سبيل إِنْجَاحِ هذا المسعى وهي على كَامِلِ الاِسْتِعْدَاد لِمُوَاصَلَةِ العمل مع الدول الأعضاء الأخرى لإنجاح المؤتمر التأسيسي المُنْتَظَرِ عَقْدُهُ خلال الثلاث سنوات القادمة وقد قَدَّمَتْ اِقْتِرَاحَاتٍ حول مُسْوَدَّةِ إِعْلان باندونغ Bandung.

أيتها السيدات أيها السادة

لقد جاء التعديل الدستوري الذي بادر به رئيس الجمهورية السيد عبد المجيد تبون وباركه الشعب الجزائري بتاريخ الأول من نوفمبر 2020 لِيُرْسِيَ أُسُسَ جُمهورية جديدةٍ مُتَجَذِّرَةٍ في مَبَادِئِ أول نوفمبر 1954 قَائِمَةٍ على

الديمقراطية والحقوق الأساسية والحريات ودولة القانون تَكُونُ مِثْلَمَا نَصَّتْ عليه ديباجة الدستور اِنْعِكَاسًا لِتَطَلُّعَاتِ الشّعب في إِحْدَاثِ تَغْيِيرَاتٍ اِجْتِمَاعِيَة وسياسية عَمِيقَة في سبيل بناء الجزائر الجديدة التي عَبَّرَ عنها بِسِلْمِيَةٍ مِثَالِيَةٍ الحراك الشعبي الأصيل.

وقد عزز الدستور الجديد مبدأ الفصل بين السلطات وتوازنها واستقلال القضاء وأتى بضمانات لِاِسْتِئْصَالِ جُذُورِ الفساد وحماية حقوق المواطنين وحُرِّيَاتِهِمْ وتمكين الشعب من اِخْتِيَارِ مُمَثِّلِيه بحرية وذلك عبر قانون انتخابات جديد من أبرز ما جاء به تغيير نمط الاقتراع بِاِسْتِحْدَاثِ نظام القائمة المفتوحة التي تُمَكِّنُ النَّاخِبِينَ من اختيار مُمَثِّلِيهِمْ بكل حرية.

وقد تَبَنَّى الدستور الجديد النّظام شِبْهَ الرِّئَاسِي الذي يجمع بين مُمَيِّزَات النّظام الجمهوري والنّظام البرلماني، ليُحْدِثَ فَصْلًا مَرِنًا بين السُّلُطات يَسمح بِتَكَامُلِ عمل المؤسسات والسّلطات مع بعضها البعض ويضمن عدم تَغَوُّلِ أَيَّةِ سُلْطَةٍ على الأخرى.

أيتها السّيدات، أيها السّادة،

لقد حَرَصَ المُشَرِّعُ الدُّسْتُورِي على صَوْنِ حقوق الإنسان وترسيخ الدّيمقراطية في بلادنا أيضا من خلال ضمان استقلالية القضاء عبر جُمْلَةٍ من القَوَاعِدِ التِي تُوَفِّرُ أقصى حماية للقاضي أَبْرَزُهَا تكريس مبادئ عَدم نَقْلِ قاضي الحكم وعَدَمِ عَزْلِهِ وعِقَابِهِ أَثْنَاءَ ممارسة مهامه إلا طبقا للقانون وبقرار مُعَلَّلٍ من المجلس الأعلى للقضاء.

كما تَجَلَّتْ استقلالية السّلطة القضائية في تشكيلة المجلس الأعلى للقضاء الذي أصبح يتشكل بنسبة 75% من قُضَاةٍ مُنْتَخَبِينَ مع إِبْعَادِ وَزِيرِ العَدْل

مُمَثِل السلطة التنفيذية من تشكيلته، بالإضافة إلى تكليف المجلس بِكُلِّ ما يَتَصِّلُ بالمَسَارِ المِهَنِي للقاضي واحترام أحكام القانون الأساسي للقضاء ورقابة اِنْضِبَاطِ القُضَاةِ تحت رئاسة الرئيس الأوّل للمحكمة العليا.

أيتها السّيدات أيّها السّادة،

لقد أحدث الدّستور الجديد جملة من الهيئات الرّقابية، الغَايَةُ مِنْها العمل على حماية الحقوق السّياسية، المدنية، الاقتصادية والاجتماعية للمواطن، بدءا بِاِسْتِبْدَالِ المجلس الدّستوري بالمحكمة الدّستورية في أجل أقصاه سنة من تاريخ صدور الدّستور، وتعزيز صلاحيات مجلس المحاسبة بِالشَّكِلِ الذي يسمح بترقية الحَكَامَةِ والشّفافية في تسيير الأموال العمومية وهو شِقٌّ مُهِمٌّ وأساسي في أخلقة الحياة العامة، بالإضافة إلى دسترة السّلطة الوطنية المستقلّة للانتخابات. كما استحدث الدّستور السّلطة العليا للشّفافية والوقاية من الفساد ومكافحته وهي مؤسسة مستقلّة تتولى مهام وضع استراتيجية وطنية للوقاية من الفساد ومكافحته وتنفيذها ومتابعتها، وجمع وتبليغ الجهات المختصة بالمعلومات حول الفساد وإخطار مجلس المحاسبة والجهات القضائية المُخْتَصَة بالمُخالفات.

أيتها السيدات، أيها السادة،

لقد جاء الدستور الجديد، لِيَنُصَّ، كما ذكرت آنفا، على استخلاف المجلس الدستوري بمحكمة دستورية سَتُوَاصِل مهمة ضمان احترام الدستور مع تمتعها، علاوة على ذلك، بصلاحيات أوسع مقارنة بالمجلس الدستوري سَتُؤَهِلُهَا للعب دور مِفْصَلِي، خاصة فيما يتعلق بضبط سير المؤسسات

ونشاط السلطات العمومية والفصل في الخلافات التي قد تحدث بين السلطات الدستورية.

وفي نفس الإطار، تندرج إمكانية إخطار المحكمة الدستورية من قبل الجهات المُخَوَّلَةِ قَانُونًا من أجل تفسير الأحكام الدستورية وهو ما من شأنه المُحَافَظَة على استقرار البلاد وتَجْنِيبِهَا عَوَاقِبَ قد تَنْجَرُّ عن أي لُبْسٍ أو سوء تفسير والمساهمة في ضمان عدم اعتداء أي سلطة، عن قصد أوعن غير قصد، على صلاحيات أخرى.

ومن شأن ما سبق ذكره تعزيز دعائم الديمقراطية من خلال قيام المحكمة الدستورية بدور الحكم والضامن للاستقرار بين السلطات الثلاث.

أيتها السيدات، أيها السادة

على مدى أكثر من ثلاثة عقود من وجوده، ساهم المجلس الدستوري بشكل كبير في ترسيخ سيادة القانون والديمقراطية وهذا من خلال اِجْتِهَادِهِ في مجال الرّقابة على دستورية القوانين ومراقبة مطابقة القوانين الأساسية والنِّظَامَيْنِ الدَّاخِلِيَيْنِ لغُرْفَتَيّ البرلمان مع الدستور والتي كَرَّسَتْ مبادئ احترام التوزيع الدستوري للاختصاصات والفصل بين السلطات وسُمُوّ الدستور.

فَوِفْقًا لقواعدنا وأعرافنا القَضَائية، فإن الديمقراطية شرط لا غِنَى عنه لبناء سيادة القانون. حيث تضمن هيئة الرقابة الدستورية الاِمْتِثَالَ لِقَوَاعِدِ الشَّفَافِيَة والحِيَاد والحرية في العمليات الانتخابية المختلفة، إذ تنص المادة 191 من الدستور على أن "المحكمة الدستورية تنظر في الطعون التي تتلقاها حول النتائج المؤقتة للانتخابات الرئاسية والانتخابات التشريعية والاستفتاء وتعلن النتائج النهائية لكل هذه العمليات".

وعليه فقد كان المجلس الدستوري مرة أخرى أمام مسؤولية تاريخية تتمثل في السهر على صحّة أول عملية انتخابية في ظل دستور الجزائر الجديدة ونظام الانتخابات المُنْبَثِقِ عنه وهي المسؤولية التي اِضْطَلَعَ بها على أفضل وجه فكانت انتخابات الثاني عشر من جوان مِثَالًا في الشفافية والنزاهة.

ومن جهة أخرى، كرّست أحكام المادة 195 من الدّستور آلية الدّفع بعدم الدّستورية وهي قَفْزَةٌ نوعية في مجال القضاء الدستوري وحقوق الانسان. وتقضي هذه الآلية بإمكانية إخطار المحكمة الدستورية بناء على إحالة من المحكمة العليا أو مجلس الدولة عندما يدّعي أحد الأطراف في المحاكمة أمام جهة قضائية أن الحكم التشريعي أو التنظيمي الذي يتوقف عليه مآل النزاع ينتهك حقوقه وحرياته التي يضمنها الدستور.

علما أنّ قرارات المحكمة الدّستورية نهائية وملزمة لجميع السّلطات طبقا لأحكام المادة 198 من الدّستور.

وعلى الصعيد الدولي، وبموجب المراجعة الدستورية للفاتح من نوفمبر 2020، تم الاِرْتِقَاءُ بالمعايير الدولية لحقوق الإنسان إلى معايير دستورية. حيث تنص الفقرة 16 من ديباجة الدستور على أن الشعب الجزائري يُعَبِّرُ عن تمسكه بحقوق الإنسان المنصوص عليها في الإعلان العالمي لحقوق الإنسان لعام 1948 والاتفاقيات الدولية التي صادقت عليها الجزائر.

فقد نصّت المادة 34 من الدّستور على أن "تُلزم الأحكام الدّستورية ذات الصّلة بالحقوق الأساسية والحريات العامة وضماناتها، جميع السّلطات والهيئات العمومية"، ومنعت تقييد الحقوق والحريات والضمانات إلا بموجب قانون، ولأسباب مرتبطة بحفظ النظام العام والأمن، وحماية الثوابت الوطنية وكذا

تلك الضرورية لحماية حقوق الإنسان، وفي كل الأحوال، لا يمكن أن تمس هذه القيود بجوهر الحقوق والحريات. كما وَضَعَ الدُّسْتُورُ تَدَابِيرَ جديدة تصون الحقوق الاجتماعية للفئات الهشة لاسيّما ما اِتَّصَلَ منها بالتعليم والصّحة.

أيتها السيدات، أيها السادة،

إِنَّ مَسْعَانَا الرَّامِي الى التّعْزيز المُسْتَمِرّ للممارسة الديمقراطية وحماية الحقوق والحريات ببلداننا يَزِيدُ من أهمية المسؤولية المُلْقَاة على عَاتِقِ هيئات الرقابة الدستورية التي نُمَثِّلُهَا.

ولا شك في أنّ تَنَوُّعَ تجاربنا ومساراتنا وفي نفس الوقت تطابق قِيَمِنَا ومَبَادِئِنَا يشكلان رصيدا ثريا ينبغي لنا أن نحافظ عليه وأن نستلهم منه قدر المستطاع.

وعليه فإن تَوْطِيدَ أَوَاصِرِ التعاون بيننا وتَضَافُرِ جُهُودِنَا سَيُعِينَانِنَا على الاضطلاع بشكل أفضل بمسؤولياتنا وسَيَزِيدَانِ من تماسك لُحْمَتِنَا حول القواسم المشتركة التي تجمعنا بما فيه خير بلداننا.

وشكرا

EGYPT

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

حقوق الإنسان الدستورية

تضمنت الوثائق الدستورية المصرية نصوصًا متعددة لحماية حقوق الإنسان المصرى. ولم تغفل تلك الوثائق أى حق منها.

وأصدرت المحكمة الدستورية العليا المصرية عدة أحكام مؤكدة فيها أهمية حقوق الإنسان المصرى. وقد بينت تلك الأحكام مضامين هذه الحقوق والحريات بالنسبة للإنسان المصرى. من هذه الحقوق والحريات :

فى مجال الحريات الشخصية :

ثمة مناطق من الحياة الخاصة لكل فرد تمثل إغوارًا لا يجوز النفاذ إليها، وينبغى دومًا ألا يقتحمها أحدٌ ؛ ضمانا لسريتها وصونًا لحرمتها، فلا يكون اختلاس بعض جوانبها مقبولاً، وهذه المناطق من خواص الحياة ودخائلها.

أولاً : حرية العقيدة وحرية إقامة الشعائر الدينية :

* حرية العقيدة – فى أصلها – تعنى ألا يُحمل الشخص على القبول بعقيدة لا يؤمن بها، أو التنصل من عقيدة دخل فيها أو الإعلان عنها، أو مماألأة إحداها تحاملاً على غيرها سواء بإنكارها أو التهوين منها أو ازدرائها، بل تتسامح الأديان فيما بينها، ويكون احترامها متبادلاً.
* التزم المشرع فى جميع الدساتير المصرية مبدأ حرية العقيدة، وحرية إقامة الشعائر الدينية، باعتبارهما من الأصول الدستورية الثابتة المستقرة فى كل بلد متحضر. فلكل إنسان أن يؤمن بما يشار من الأديان، والعقائد التى يطمئن إليها ضميره، وتسكن إليها نفسه، ولا سبيل لأى سلطة عليه فيما يدين به فى قرارة نفسه وأعماق وجدانه.

حرية الزواج :

كفل صونها دستور جمهورية مصر العربية الذى تقرر أن لحياة المواطنين الخاصة حرمة يحميها القانون يؤيد ذلكِ أن أبعاد العلاقة بين النصوص الدستورية وربطها ببعض كثيرًا ما ترشح لحقوق لا نص عليها، وتشى بثبوت ما يتصل بها من الحقوق التى كفلها الدستور، والتى تعد مدخلاً إليها بوصفها من توابعها أو مفترضاتها أو لوازمها، وكثيرًا ما تقضى فروع بعض المسائل التى نظمتها الوثيقة الدستورية، إلى الأصل العام الذى يجمعها، ويعتبر إطارًا محددًا لها، ولا يكون ذلك إلا من خلال فهم أعمق لمراميها، واستصفاء ما وراءها من القيم والمثل العليا التى احتضنها الدستور.

حق الاجتماع :

الحق فى التجمع – وسواء كان حقًا أصيلاً أم تابعًا – أكثر ما يكون اتصالاً بحرية عرض الآراء وتداولها كلما أقام أشخاص يؤيدون موقفًا أو اتجاهًا معينًا، تجمعًا منظمًا يحتويهم، يوظفون فيه خبراتهم، ليكون هذا التجمع نافذة يطلون منها عليه بما يعتمل فى نفوسهم، وصورة حية لشكل من أشكال التفكير الجماعى.

حرية التعبير :

حرية التعبير تمثل فى ذاتها قيمة عليا لا تنفصل الديمقراطية عنها، وإنما تؤسس الدول على ضوئها مجتمعاتها صونًا لتفاعل مواطنيها معها، بما يكفل تطوير بنيانها وتعميق حرياته، وإن جاز القول بأن حرية التعبير أهدافها التى يتصدرها بناء دائرة للحوار العام لا تنحصر آفاقها ولا أدواتها، تُدنى الحقائق إليها، فلا يكون التعبير عن الآراء حائلاً دون مقابلتها ببعض وتقييمها ولا مناهضتها لآراء قبلها آخرون مؤديًا إلى تهميشها؛ ولا تلقيها عن غيرهم مانعًا من ترويجها أو مقصورًا على بعض جوانبها، ولا تدفقها من مصادر تزدريها، مستوجبًا إعاقتها أو تقييدها، كذلك فإن إنماءها للشخصية الفردية، وضمان تحقيقها لذاتها، إنما يدعم إسهامها فى أشكال من الحياة تتعدد ملامحها بما يكفل حيويتها وترابطها، فلا يكون تنظيمها مقتضيًا إلا أقل القيود التى تفرضها الضرورة.

إن حرية التعبير – وكلما كان نبضها فاعلاً وتأثيرها عريضًا – هى الطريق لبناء نظم ديمقراطية تتعدد معها مراكز اتخاذ القرار، تتسم بتسامحها مع خصومها، ومسئوليتها قبل مواطنيها، وبرفضها لكل قيد يخل بمصداقيتها واستجابتها بالإقناع لإرادة التغيير، وطرحها من خلال الحوار لبدائل يفاضلون بينها لاختيار أصلحها، أيًّا كان مضمونها، وما تقدم مؤداه: أن الآراء على اختلافها لا يجوز إجهاضها، ولا مصادرة أدواتها، أو فصلها عن غاياتها ولو كان الآخرون لا يرضون بها، أو يناهضونها، أو يرونها منافية لقيم محدودة أهميتها يروجونها، أو يحيطون ذيوعها بمخاطر يدعونها، ولا يكون لها من وضوحها وواقعها، ما يبرر القول بوجودها.

حرية الانتقال :

حرية الانتقال غدوًا ورواحًا – بما تشتمل عليه من حق مغادرة الإقليم – تُعد حقًا لكل مواطن يمارسها بما لا يعطل جوهرها، وإن جاز أن يتدخل المشرع لموازنتها بمصلحة يقتضيها الأمن القومى.

THAILAND

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

Presentation

"Constitutionalism, Human Rights and Judicial Justice in a Non-Muslim State: Thailand"

by

Hon. Justice Noppadon Theppitak

Justice of the Constitutional Court of the Kingdom of Thailand

at

The 2nd Conference of the Judicial Conference of Constitutional and Supreme Courts/Councils of the OIC Member States / Observer States (J-OIC)

"Human Rights and Constitutionalism: The Contribution of Judiciary in Moslem Countries"

Bandung, Republic of Indonesia

15-17 September 2021

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

Distinguished Participants,

Ladies and Gentlemen,

First of all, I would like to express my sincere gratitude to Dr Anwar Usman, Chief Justice of the Constitutional Court of the Republic of Indonesia, for his kind invitation to the Constitutional Court of the Kingdom of Thailand regarding this instructive conference. Although the COVID-19 global pandemic is an obstacle to us to participate in an in-person platform, I am certain that this virtual conference will be particularly successful due to the considerable effort of

the Honourable Chief Justice Anwar Usman and his esteemed members of the Indonesian Constitutional Court.

As for the purpose of this conference is to discuss how the judiciary promotes and protects human rights, especially in Islamic society, I would like to present my paper titled "***Constitutionalism, Human Rights and Judicial Justice in a Non-Muslim State: Thailand***". In my presentation, I shall consider constitutionalism relevant to the human rights regime in the Thai context in Part I. Some examples of judicial justice regarding civil and constitutional matters, will be examined in Part II. Then, I shall draw a conclusion in the last section. Having considered the prevailing circumstances in my country, I would like to state that all the Thai people—regardless of their religious beliefs—are constitutionally protected under the same human rights regime in the Kingdom.

I. Constitutionalism and Human Rights in Thailand

Thailand is generally said to be a Buddhist country; however, those who believe in other religions are widely respected. According to the National Statistical Office, the majority of the people in Thailand are Thai buddhists, who make up 93.5%, while Thai muslims account for 5.4%.[1] This figure, however, does not imply any discrimination treatments with regard to Thai muslims as they are all Thais under the same Constitution.

Focusing on the concept of "*constitutionalism*", I would like to quote the speech of H.M. late-King Bhumibol Adulyadej of Thailand as follows:[2]

> "...All the people shall have absolute rights and liberties. Once they have such rights, they shall also have duties. The constitutions of various states, thus, stipulate provisions relating to rights and liberties as implementation principles. Rights and liberties coexist. .... However, to exercise such rights, ones shall

1 National Statistical Office <www.nso.go.th>.

2 Royal Guidance of His Majesty the King Bhumibol Adulyadej in the graduation ceremony of Chulalongkorn University, 1960.

follow basic rules—that is, preserving common interests as they are an important tool to maintain the nation's independence. That would be to preserve individual interests, eventually".

Therefore, in Thailand, rights and liberties are the key principles in the Constitution. Such concepts as a human rights value have been recognised since the first Constitution of the Kingdom of Thailand. That is to say, all the Thais, regardless of being buddhists, muslims, christians and others, are equal under the Constitution without discriminations. The state shall, moreover, provide safeguards for the practice of the rule of law, separation of powers, checks and balances and good governance. However, as the state's citizens, all the Thai people—no matter what religion they worship—shall uphold the constitutional value of the country *vice versa* in order to preserve both common and individual interests. One of the most significant values is provided in section 1 of the Thai Constitution, which reads: "Thailand is one and indivisible Kingdom".[3] Thus, all the Thai people shall protect their Kingdom as one state and prevent her from any harm of the country's division.

II. Judicial Justice for Thai Muslims' Community

Ladies and Gentlemen,

As I mentioned earlier, although Thai muslims represent a relatively small proportion of the whole population, they are the members of the second largest religious group in Thailand. They are equally treated in the same system of constitutionalism, and their human rights values are likewise advocated as Thai citizens. More importantly, their legal tradition is firmly sustained, and the judiciary plays a vital role in administering justice for them under uniform standards. In this section, I shall provide some legal perspectives relevant to civil and constitutional justice, especially for Thai muslims' society.

3 Section 1.

A. Civil Justice

Although Thai muslims reside nationwide, four provinces, namely Pattani, Narathiwat, Yala and Satun, in the deep south of Thailand is the most densely populated by this religious group. The state understands that this Islamic community has practised its unique customs, particularly in civil matters. Historically speaking, the application of the customary law for Thai muslims in southern Thailand can be traced back to the early Rattanakosin (Bangkok) period. The former kings allowed Thai muslims to apply their own law for their civil disputes. Nonetheless, due to the nationalism policy of Field Marshal Plaek Phibunsongkhram, former Thai Prime Minister from 1938 to 1944, such law did not come into effect. Many Thai muslisms were in trouble at that time as their civil customary life was different from the civil law drafted by Thai buddhist law makers. Therefore, to recognise Islamic tradition and introduce customary legal practice suitable for specific areas, the Thai Government enacted the Act on Application of Islamic Law in Areas of Pattani, Narathiwat, Yala and Satun Provinces in 1946, which has come into force since then.

Due to this law, any civil cases relating to family and succession matters in the four southern provinces are tried under the Islamic legal regime. In other words, family and succession law in Book V and Book VI of the Civil and Commercial Code of Thailand is not applied by the Courts of Justice in such areas.[4] In this respect, I would like to give an example of a family case. In the above-mentioned provinces, Thai muslims are allowed to marry more than one wife. The legal question might be raised: whether or not such law is contrary to or inconsistent with the Constitution, which recognises the principle of gender equality. I would like to emphasise that the Constitution also guarantees the right to worship religions and follow religious rules. That customary practice of Thai muslims' families is, therefore, constitutionally recognised. As a result, such marriage law applied to the muslims' community in the south of Thailand is constitutional.

4 Act on Application of Islamic Law in Areas of Pattani, Narathiwat, Yala and Satun Provinces, B.E. 2489 (1946), s 3.

Moreover, regarding procedural justice, a *Kadi* who has sound knowledge in Islamic principles shall try such cases together with judges of the Courts of First Instance.[5] This procedure can guarantee that at least one of the three judges as a quorum has a solid understanding of muslims' family and succession customs to render a judgment in such civil proceedings.

It is clear that the Thai judiciary respects muslims' culture and ways of life. In fact, Thailand recognises such diversity under the Kingdom of Thailand.

B. Constitutional Justice

All the Thai people—regardless of what religion they practise—are all equal under the Thai Constitution. Although Thailand rarely has religious rights-oriented disputes as constitutional complaints at the Constitutional Court, it can administer constitutional justice to all the people—buddhists, muslims and other religious followers—based on constitutionalism. All the Constitutional Court rulings provide fairness for all the Thais equally as they are the citizens of the Kingdom of Thailand. In this respect, I would like to draw your attention to some of the most interesting rulings and orders enhancing constitutional justice to Thai society.

The Pathumwan District Court referred a defendant's objection to the Constitutional Court for a ruling.[6] He objected that the Announcement of the Council for Democratic Reform (CDR) No. 25, concerning offences and penalties in the case of any alleged person who failed to provide a fingerprint, handprint or footprint according to the order of a state attorney, a prosecutor or an inquiry officer,[7] was unconstitutional.

5 Section 4.

6 Constitutional Court Ruling No. 2/2562 (2019).

7 Announcement of the Council for Democratic Reform No. 25, para two.

The Constitutional Court considered that any action in violation of or non-compliance with such Announcement did not constitute a serious act or affect public order to the extent of imposing imprisonment term of six months for such offence. Moreover, it was found that there were other legal measures concurrently in force for officers in criminal justice process. To be more specific, a person who violated the officer's order without reasonable cause shall be punishable by an imprisonment term not exceeding ten days or a fine not exceeding five thousand baht or both, which was a petty offence under the Penal Code of Thailand. This penalty was deemed appropriate to such violation.

In this respect, so long as no judgment has been rendered, the defendant is deemed innocent. The criminal offence, thus, could not be imprisoned only for refusal to be fingerprinted. On the other hand, the state itself should take appropriate measures to convince those who refuse to be fingerprinted. Having constituted an unreasonable restriction of rights and liberties and caused disproportion between public interests and individuals' rights, the Announcement, hence, prejudiced human dignity and was inconsistent with the rule of law. By virtue of this reasoning, the Constitutional Court ruled that the Announcement contradicted or was inconsistent with the Constitution.

Such a ruling promotes standard of justice in terms of constitutional human rights for a suspect or a defendant.

In addition, there was an individual's attempt at recognising Buddhism as a national religion in the Constitution based on the notion that buddhists are the majority of the Thai people. However, Thai society fully accepts a wide diversity of religious beliefs and practices. This is reflected in the role of the nation's main institutional pillar. To illustrate, section 7 of the Constitution provides that "the King is a Buddhist and Upholder of religions".[8] That means although the King practises Buddhism, other religious beliefs shall be advocated by the Royal Institution. Such a principle is also confirmed in section 67, which

8 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), s 7.

provides that the State should support and protect Buddhism and other religions.[9] Consequently, a person shall enjoy full liberty to profess a religion and exercise any forms of worship according to his or her religious principles.[10]

With respect to the constitutional complaint filed with the Constitutional Court, the applicant submitted his application after the Ombudsman had ceased investigation. Lodging the motion to the Ombudsman, the applicant said that the National Legislative Assembly and its President as a state official had neglected to draft the Constitution to recognise Buddhism as a national religion despite the buddhist majority. The Ombudsman considered that the Constitution guaranteed individuals' liberty to profess a religion. Thereby, the motion was irrelevant to a direct violation of the complainant's rights and liberties by a state agency or an official.

The Constitutional Court held that even though the applicant had a right to submit his application to the Court after the Ombudsman's consideration, he was not a person whose constitutional rights and liberties were directly abused. His notion was merely an individual opinion against the two respondents. Consequently, the case was not in line with the Organic Act on Procedures of the Constitutional Court.[11]

It can be seen that all the major national institutions—the King, the Constitutional Court, as well as other state agencies—promote the religious rights of any person without discrimination. Non-recognition of Buddhism or any others as a national religion in the Thai Constitution is not deemed to be a rights violation as the rights of all religious groups in Thai society are equally recognised.

9 Section 67.

10 Section 31.

11 Constitutional Court Order No. 65/2563 (2020).

III. Conclusion

Ladies and Gentlemen,

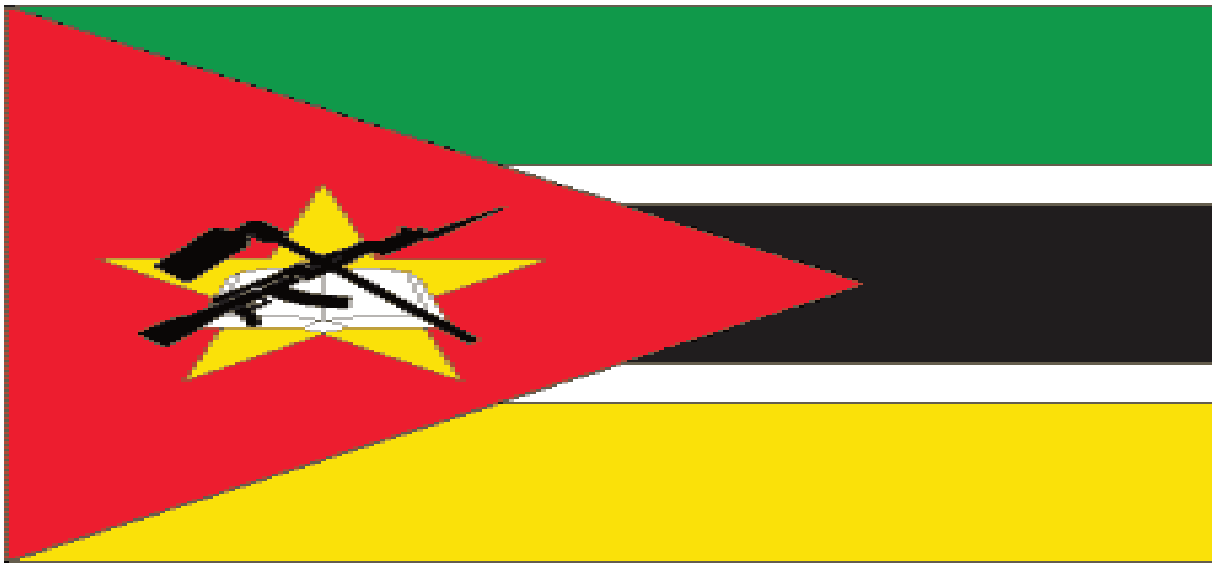
In conclusion, I would like to emphasise that even most of the Thai people believe in Buddhism, and the present Thai Constitution provides that any person shall enjoy full liberty to profess a religion including the liberty to practise any form of worship provided that in so doing, it shall not endanger the safety of State nor shall it be contrary to public order or good morals. Consequently, Thai muslims in Thailand as well as any person who belongs to any particular religion enjoy the same rights and bear the same duties as the Thai buddhists.

Thank you for your kind attention.

MOZAMBIQUE

PAPERS

MOZAMBIQUE



PAPERS

TO

2ND JUDICIAL CONFERENCE OF CONSTITUTIONAL COURTS AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER STATES/OBSERVER STATES

BANDUNG, INDONESIA

SEPTEMBER 15-17, 2021

STATEMENT OF ALBANO MACIE,

JUDGE OF CONSTITUTIONAL COUNCIL OF MOZAMBIQUE

TOPIC: "*The position of the religious phenomenon in the Mozambican State*"

MOZAMBIQUE

Honourable Dr Anwar Usman, Chief Justice of the Constitutional Court of the Republic of Indonesia,

Honourable Professor Lúcia Ribeiro, President of the Constitutional Council of the Republic of Mozambique, with your indulgence, on behalf of Mozambique, I present our contribution

Honourable President and members of Constitutional Courts and Councils and Supreme Courts of the Organization of Islamic Cooperation Member States/Observer States,

Honourable heads and members of international organizations,

First, I would like to congratulate the Second Judicial Conference of Constitutional Courts and Supreme Courts of Justice, the J-OIC and to the Indonesian authorities for hosting this Conference.

Participation in the conference as an observer is valuable for the Constitutional Council of Mozambique, because Mozambique is a State of many ethnicities and many religions. Therefore, it is obvious to us that it is very important to reconcile different values represented by civilizations, to find compromise and grounds for dialogue, diversity and tolerance.

Mozambique is a Republic, with Multi-Party Democracy based on the Rule of Law, founded on June 25, 1975, after ten years of struggle against the Portuguese colonial regime.

Mozambique is a multiracial and multicultural State, with almost 30 million inhabitants, located in East Africa, along the Indian Ocean, being part of the SADC and African Union.

Mozambique suggested to this Magna Conference to address the topic "*THE POSITION OF THE RELIGIOUS PHENOMENON IN THE MOZAMBICAN STATE*", within the scope

of the relationship between the State and religion and to analyze the power of religion in the public sphere in Mozambique.

According to statistics from the National Institute of Statistics referring to the 2017 Population Census, in Mozambique there were about 28,861,863 inhabitants (30 million), 26,899,105 of whom attended a religion, particularly Catholic with 7,313 576 believers; the Anglican, with 457,716 believers; Islamic, with 5,094,024 believers; the Zion, with 4,199,108 believers; the Evangelical/Pentecostal, with 4,124,710 believers; others with 1 297 856 believers; and unknown with 674 761 believers.

From this synoptic picture it seems conclusive to affirm that Mozambique is a State of religious pluralism or multi-religious

How has the Mozambican Constitution placed itself in the face of this religious pluralism?

This is the central issue of this presentation

Looking at foreign experiences, we can put ways of positioning the Constitutions in relation to the religious phenomenon.

1- There are States that in their Constitutions make a religion official and we call it a confessional State. The State confesses a specific faith and promotes it, or not, in society. The most paradigmatic cases are that of Egypt, with article 2 of the respective Constitution stating that "Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation'; that of Iran, whose Constitution, in article 2, proclaims that "The Islamic Republic is a system based on belief in: 1. the single God (as stated in the phrase "There is no god except Allah"), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands"; and that of Saudi Arabia, whose Constitution enshrines in Article 1 that "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion".

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The constitution of Indonesia says in Article 29 "1. The State shall be based upon the belief in the One and Only God". However, this fact, the Indonesian Constitution securities that "The State guarantees all persons the freedom of worship, each according to his/her own religion or belief".

In these confessional states, religion guides governance, legislation and judgment. Basically, religion guides the management of public affairs.

2- Non-confessional state. The non-confessional nature of the State means that it does not identify with religious confessions, the political sphere is separate from the religious sphere, although the State recognizes all religious confessions, but the rulers abstain from any decision about their internal life, just as house of worship turn away from political life. Basically, the State is proclaimed as secular.

3- Anti-confessional state. It is a state that opposes religious confessions. This type of state can assume two perspectives of separation from religions: one absolute and the other relative. In the absolute system, the State has the duty to promote the social and economic progress of the people, freeing them from the superstitious yoke of religion. Therefore, they are in a situation of absolute opposition from the State to religion, which can lead to the State being called an "atheist". The second perspective is that of relative separation. Under this regime, the State admits the existence of religious confessions, but does not take sides with the social and religious reality, denying beliefs to the private sphere, without recognizing or appreciating the work of religious confessions. Therefore, the State is secularist.

The case of Mozambique is that of the non-confessional nature of the State

According to articles 12 and 54 of the Constitution, Mozambique is a secular state.

Secularity is a concept of a normative and political nature whose primary function is to establish a public space for freedom of religion, belief and worship; a model of

coexistence in society based on the pluralism of ideas, ways of life and a way of living in tolerance and diversity.

Secularity is essentially characterized, as provided for in number 2 of article 12 of the Constitution, by the "separation between the State and the religious confessions". This explains that the Mozambican state does not profess or favor any religious confession and cannot take up religious activities or speak out on religious issues, being, therefore, neutral in relation to them.

Thus, in Mozambique, as a consequence of secularism/laicism, we have:

1st - Freedom and equality of religious confessions under the laws of the State

Religions are free to organize and exercise their functions and worship and must conform to the laws of the State.

Religions are free to adopt the forms and schemes of organization that best suit the pursuit of their religious objectives, as well as the freedom to carry out their activities, if they are linked to religious purposes.

Religions may freely establish relationships with other national or foreign religious entities, without State interference, if they are part of the pursuit of religious purposes.

Religions can also interact with the State, concluding agreements with public institutions, with a view to promoting human rights, social development, strengthening the environment of peace, tolerance, solidarity and national unity.

2nd - Religions are equal. It is the proclamation of the principle of equality between religions. The State cannot use any criteria to benefit a certain religion at the expense of others, claiming, for example, that a certain religion holds most of the population or has greater representation in the national territory.

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3rd - Religions must respect the laws of the State. Religious confessions, although they have their own right/laws that govern their organization, functioning and relationship with their members, must respect the laws of the State.

Therefore, religious freedom has limits and is subject to a set of restrictions imposed by law, if they are necessary for the safeguarding of constitutionally and legally protected national or public rights and interests

For example, a church cannot invoke religious freedom to persuade its members to refuse to fulfill legal duties such as the performance of military service or other patriotic duty, or to justify the commission of a certain crime.

4th - The State recognizes and values the activities of religious denominations aiming to promote a climate of understanding, tolerance, peace and the strengthening of national unity, the spiritual and material well-being of citizens and economic and social development. It is within the scope of recognition and appreciation of religions that the State approves a set of measures with social-religious impact:

— Recognition, appreciation and support of religious institutions of social solidarity, with a view to promoting tolerance, peace, solidarity and strengthening national unity, without discrimination;

— The granting of tax benefits to institutions of religious confession, such as exemption from a certain category of taxes;

— Religious leaders cannot, for example, appear as witness in court because of their role in the Church;

— The assimilation of religious activities to professional activity, when carried out with economic dependence and constitute a means of personal and/or family support;

— The protection of goods acquired by legally constituted religious confessions;

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— Recognition of the legal effectiveness of religious marriages, provided they are duly transcribed, under the terms of the law;

— The punishment of aggravated homicide for an act motivated by religious hatred; the punishment of genocide for religious reasons; the punishment of discrimination on religious grounds; the punishment of the destruction of religious monuments; the aggravation of criminal penalties for religious reasons;

— The granting of period allowances on days of religious celebration of religious confessions;

— The prohibition of the use by political parties of denominations that contain expressions directly related to any religious denomination or churches or the use of emblems that are confused with national or religious symbols.

Ladies and Gentlemen,

IN CONCLUSION,

Laicism must be understood within the framework of the republican character of the State, with a view to creating a free public space in which it is possible for all citizens to express their opinions, convictions and beliefs, with tolerance and acceptance of difference in diversity.

Thank you so much for listening to us.

PAPERS
SESSION IV

PROCEEDING
THE 2ND CONFERENCE OF THE JUDICIAL CONFERENCE OF CONSTITUTIONAL AND SUPREME COURTS/COUNCILS OF THE OIC MEMBER/OBSERVER STATES (J-OIC)

"Human Rights and Constitutionalism:
The Contribution of the Judiciary
in Muslim Countries."

Bandung, September 16—17, 2021

PAKISTAN

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

ADDRESS

BY

MR. JUSTICE GULZAR AHMED

CHIEF JUSTICE OF PAKISTAN

AT

2nd JUDICIAL CONFERENCE

OF

CONSTITUTIONAL AND SUPREME COURTS/ COUNCILS OF THE OIC MEMBER STATES/ OBSERVER STATES

AT

BANDUNG, INDONESIA

ON

15TH TO 17TH SEPTEMBER, 2021

His Excellency Mr. Anwar Usman, Chief Justice of the Constitutional Court of the Republic of Indonesia;

His Excellency Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Turkey;

His Excellency Mr. Kamal Fenniche, President of the Constitutional Council of Algeria;

His Excellency Mr. Hassan Bubacar Jallow, Chief Justice of the Supreme Court of Gambia;

Organizers of the 2nd Judicial Conference of Constitutional and Supreme Courts/Councils;

Representatives of all countries participating virtually;

Ladies and Gentlemen!

Asalam-o-Alaikum!

It is my great pleasure to be here before you today as Chief Justice of the Islamic Republic of Pakistan. In an increasingly inter-dependent and inter-connected world, the continuous interaction of institutions of various countries, in the faces of unprecedented challenges and adversities is felt great than ever, especially after the out break of Corona Virus Pandemic. I appreciate the General Secretariat of the Organization of Islamic Cooperation and also the Constitutional Court of the Republic of Indonesia for holding this judicial conference, which will be a big step towards achieving the goals of supremacy of constitution and protection of human rights in OIC member states.

The Organization of Islamic Cooperation is rightly so the collective voice of the Muslim World. With the rise of islamophobia and hate crimes against Muslims across the world, the role of this organization has become more important than ever. I also appreciate greatly the call of the General Secretariat of the OIC to raise voice against the gross violations of the human rights around the globe.

The topic for today's Conference "Human Rights and Constitutionalism: The Contribution of Judiciary in Moslem Countries", which relates to how the Courts can promote and protect human rights. The sub-themes are, lesson learned: the role of Judiciary to promote Humanity and Democracy; and the Protection of Social, Economic and Cultural Rights in Pluralistic Society. The conference will shed light upon how the judiciary of Muslim countries promote humanity and democracy and how the protection of social, economic and cultural rights in a pluralistic society can be achieved.

The question is what are the basic human and fundamental rights. The basic accepted characteristics of the human rights are that the human rights are universal and belong to all individuals, irrespective of their religion, ethnicity, gender or sex; they are absolute and innate, not grants from states or some authority; they are the properties of individual subjects who possess them because of their capacity for rationality, agency and autonomy.

It is often alleged by the west that the basic human rights are not compatible with the injunctions of Islam, which do not provide many rights to the minorities. All the human rights stem from the basic principles of dignity and equality. To negate the above allegation, it is sufficient to mention that Allah Almighty has ordained in the Holy Quran that "*O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.*" [Quran 49:13] Here, Allah Almighty has not addressed only to the Muslims, rather to the whole mankind – both male and female – and the only yardstick to gauge the status of a human being is the righteousness.

In the last sermon, the Holy Prophet Muhammad s.a.w.w. has mandated, *inter alia*, that "*All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety (taqwa) and good action". … "Return the goods entrusted to you to their rightful owners. Hurt no one so that no one*

may hurt you. Remember that you will indeed meet your Lord, and that He will indeed reckon your deeds." … "Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friends with any one of whom you do not approve, as well as never to be unchaste."

Therefore, both the principles of dignity and equality of mankind, which are the basis of all human rights, are protected in Islam. Islam also ensures protection of right to life and liberty, freedom of belief, right to justice, and rights of women, including equality, inheritance, education, business and to indulge in political affairs.

With regard to the issue of minority rights, I may mention the words of our founding father, Quaid-i-Azam Muhammad Ali Jinnah, who in first Presidential Address to the Constituent Assembly on 11th August, 1947 assured that:

> "*You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State*."

In March 1949, the Objectives Resolution was passed by the Constituent Assembly of Pakistan, wherein it was resolved to frame a Constitution for the newly sovereign independent State of Pakistan, which will guarantee that "adequate provision shall be made for the minorities to freely profess and practice their religions and develop their cultures;" and Fundamental Rights would be guaranteed including … "freedom of thought, expression, belief, faith, worship and association, subject to law and public morality".

The framers of the Constitution adopted the above ideals resolved in the Objectives Resolution in the true perspective, in that, in the Preamble to the Constitution of 1973, the above principles were also kept at the forefront. In addition, various fundamental rights were provided to the minorities, including the Freedom to profess religion and to manage religious institutions (Article 20), Safeguard against taxation for

purposes of any particular religion (Article 21), Safeguards as to educational institutions in respect of religion, etc. (Article 22), Equality of citizens (Article 25), Non-discrimination in respect of access to public places (Article 26) and Safeguard against discrimination in services on the basis of religion or caste, etc. (Article 27). Besides, under the Principles of Policy, it is mandated that the state shall safeguard the legitimate rights and interests of minorities, including their due representation in the federal and provincial services (Article 36). In order to ensure representation of minorities in the Government, Articles 51, 59 and 106 of the Constitution provide for a quota of reserved seats for non-Muslims in the National Assembly, Senate and Provincial Assemblies. Besides, quota has been provided to the minorities in the government services. The minorities have full opportunity to engage themselves in any business or profession. Even, some of the top businessmen belong to minorities.

Article 25 of the Constitution of Pakistan that all citizens are equal before law and are entitled to equal protection of law, and there shall be no discrimination on the basis of sex, however, it shall not prevent the State from making any special provision for the protection of women and children. Article 27 provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth. Besides, Article 34 of the Constitution mandates full participation of women in national life and Article 35 mandates that the State shall protect the marriage, the family, the mother and the child. In order to ensure representation of women in the Government, Articles 51, 59 and 106 of the Constitution provide for a quota of reserved seats for women in the National Assembly, Senate and Provincial Assemblies. Besides, quota has been provided to women in the government services. Thus, the Constitution of Pakistan guaranteed equal opportunities to the women to take part in every sphere of life.

The Constitution of Pakistan also ensures the right to education by mandating in Article 25A that the State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.

As the Guardian of the Constitution and the protector of the Fundamental Rights of the Pakistani citizens, the Supreme Court of Pakistan has always safeguarded the rights of the minorities. The Supreme Court, under Article 184(3) of the Constitution, upon a letter received from an NGO, regarding a bomb blast in a church in Peshawar and threats being made to other religious minorities took suo motu notice and in its judgment[1], while interpreting the scope of Article 20 of the Constitution, held that freedom of religion must be construed liberally to include freedom of conscience, thought, expression, belief and faith. It pointed out that the freedom of religion has both individual and community-based connotations, thus given the right a wide interpretation. The Court in this celebrated judgment directed to constitute a taskforce with the aim of developing a strategy of religious tolerance; appropriate curricula to be developed at school and college levels to promote a culture of religious and social tolerance; and directed the Federal Government to take appropriate steps to ensure that hate speeches in social media are discouraged and the delinquents are brought to justice under the law; a National Council for minorities' rights be constituted; a Special Police Force be established with professional training to protect the places of worship of minorities. A one man Commission was Constituted by the Supreme Court, to consider all aspects regarding the implementation of the said judgment of the Court.

During implementation proceedings of said case, the burning of a Hindu Temple at Karak, Khyber Pakhtunkwa was brought to the notice of the Court. The Court directed to arrest the culprits and immediately start construction work at the site to restore the Temple in its original form. On 11th June 2021, it was brought to the notice of the Supreme Court that in Karachi, land measuring 716 Sq. Yards was a Dharam Shala but the same was being demolished. The Court immediately stayed the demolition of the building and directed the Commissioner, Karachi to take over the said building for its protection and preservation. On 5th August, 2021, it came to the notice of the Supreme Court that a Hindu Temple at Rahimyar Khan, Punjab was attacked and damaged by an

[1] Reported as Suo Motu Case No.1 of 2014 (PLD 2014 SC 699)

angry mob. I, being the Chief Justice of Pakistan, fixed the matter for hearing on the very next day and issued strict directions to the Government to arrest and bring to justice all the concerned people. The Government was also directed to reconstruct the *Samadhi* and temple, and take measures to restore the atmosphere of peace and harmony among all religious and cultural sects.

The Supreme Court takes the fundamental rights and freedoms of all the citizens of Pakistan seriously and sincerely. We have been at the forefront of ensuring that no unfairness, atrocity or violation of the rights of the public take place. Whenever any instance of violation of fundamental rights has been brought to the notice of the Supreme Court, it never hesitated to take up the issue and rectify the wrong.

Starting from the case of forced bonded labour at brick kilns, the then Chief Justice of Pakistan on a telegram received from a brick kiln worker named Darshan Masih, took suo motu action and held[2] that the form of work in a brick kiln was forced labour and not permissible. This case paved the way for the Bonded Labour Abolition Act, 1992. In another historic judgment[3], the Supreme Court gave wide interpretation to the 'Right to Life' enshrined in Article 9 of the Constitution of the Islamic Republic of Pakistan. The right was held to cover all facets of human existence and included "*all amenities and facilities which a person born in a free country is entitled to enjoy with dignity and, legally and constitutionally*". It also reiterated the very basic and intrinsic principle that constitutional rights, including the fundamental rights were higher than legal rights conferred by secondary legislation. In a similar case[4], the Supreme Court upheld the rights of people to have supply of clean and unpolluted water. In widely interpreting the scope of the 'Right to Life', the Supreme Court held[5] that impure food items also fall into the category of deprivation of life. In another case[6], the Supreme Court held that a public

[2] Reported as Darshan Masih vs. The State (PLD 1990 SC 513)
[3] Reported as Ms. Shehla Zia vs. WAPDA (PLD 1994 SC 693)
[4] Reported as General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jehlum vs. The Director, Industries and Mineral Development, Punjab (1994 SCMR 2061)
[5] Reported as Adeel-ur-Rehman and others vs. Federation of Pakistan and another (2005 PSC 774)
[6] Reported as Moulvi Iqbal Haider vs. Capital Develoment Authority (PLD 2006 SC 394)

park, if is earmarked in a housing scheme, creates a right amongst the public and that right includes their entry in the park without any obstacle, being fundamental right enshrined in Article 26 read with Article 9 of the Constitution.

There are hundreds of such cases where the Supreme Court of Pakistan has ensured protection of fundamental rights of people. Recently, in a case[7], the Supreme Court has held that right to pension had a constitutional significance, it drew its strength from the right to life or the right to livelihood under Article 9 of the Constitution. In another case[8], the Supreme Court has held that every person is entitled to all the rights and freedoms set forth in the Constitution, without distinction of any kind, therefore, it applied equally to persons with disabilities, guaranteeing them full enjoyment of their fundamental rights without discrimination.

Even the Supreme Court of Pakistan has contributed greatly in ensuring the constitutionalism and democracy in the country. Starting from Dosso's case[9] in 1958 till Sindh High Court Bar Association's case[10] in 2009, the Supreme Court has evolved as a true custodian of the Constitution and protector of the democratic norms. Although, in Dosso's case, the Supreme Court had validated the supra-constitutional actions of a dictator, but in Asma Jilani's Case[11], it over ruled the Dosso's Case and declared the then Military Dictator as a usurper. Even thereafter, whenever any supra-constitutional action was taken in past, the Supreme Court tried to restore the democratic system in the Country. In 1977, General Zia-ul-Haq did not abrogate the Constitution but made certain amendments to the Constitution of Pakistan 1973. The Supreme Court legitimized the actions[12] but it paved way for return of the democratically elected government, after the general elections of 1985. In 1999, when General Pervez Musharraf imposed emergency

[7] Reported as The Province of Punjab through Secretary, Finance Department, Government of the Punjab, Lahore v. Kanwal Rashid (2021 SCMR 730)
[8] Reported as Malik Ubaidullah vs. Government of Punjab [2021 PLC(CS) 65]
[9] Reported as State vs. Dosso (PLD 1958 SC 533)
[10] Reported as Sindh High Court Bar Association through its Secretary vs. Ministry of Law and Justice Islamabad and Others (PLD 2009 SC 879)
[11] Reported as Asma Jilani Miss Asma Jilani vs. Province of Punjab (PLD 1972 SC 139)
[12] Reported as Begum Nusrat Bhutto vs. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657)

and held in abeyance some portions of the Constitution, the Supreme Court validated[13] the actions but directed that the fresh elections must be held within three years and in this way the Country could return to the democratic setup. In 2007, again supra-constitutional steps were about to be taken, the Supreme Court issued a restraint order against any such steps, and ultimately declared[14] all such actions to be ultra-vires the Constitution and consequently being illegal and of no legal effect. This judgment of the Supreme Court has practically put an end to the supra-constitutional actions and ensured the supremacy of the Constitution and rule of law besides, the continuous democratic rule in the Country. In this manner, the judiciary of Pakistan has played a vital role in the constitutional development and promotion of Humanity and Democracy in the Country. The judiciary of Pakistan is committed relentlessly to continue and take all necessary actions against any violation of human and fundamental rights or deviation from the Constitution.

In the end, I thank you all and wish for the successful completion of this conference.

[13] Reported Zafar Ali Shah etc Vs General Pervez Musharaf etc (PLD 2000 SC 869)
[14] Reported as Sindh High Court Bar Association through its Secretary Ministry of Law and Justice Islamabad and Others (PLD 2009 SC 879)

RUSSIA

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

Speech

of the Judge of the Constitutional Court of the Russian Federation G.A.Gadzhiev,

2nd Judicial Conference of Constitutional and Supreme Courts of the OIC

(16-17 September 2021, online)

Dear Colleagues!

First of all, on behalf of the Constitutional Court of the Russian Federation let me express gratitude for the possibility to attend the second conference of constitutional and supreme courts of the Organisation of Islamic Cooperation.

Participation in the conference as an observer is valuable for the Constitutional Court of the Russian Federation. Russia is a State of many ethnicities and many religions. Therefore, it is obvious to us that it is very important to reconcile different values represented by civilizations of East and West, to find compromise and grounds for dialogue.

We have had many opportunities to see for ourselves that the legal basis of Islamic world in terms of human rights is based on dignity, mercy and cooperation, as many Islamic legal scholars rightly point out. Human dignity as legal value is embodied in the text of the Constitution of the Russian Federation, as well as many international treaties that form the basis of systems of human rights protection throughout the world.

Therefore, one can surely call these bases for recognition and protection of human rights universal. They can be perceived as fundamental for conscience of humanity, equally understandable for Muslim, Christian or secular states. At that, they acquired legal, juristic dimension fairly recently – I will hardly be wrong to name the second half of the twentieth century as the time when legal definition of human dignity flourished. But even before, our forefathers attributed large importance to these values largely due to religion. As you know, in 2020 the continuity of generations and belief in God conveyed by the ancestors were reflected in the Constitution of the Russian Federation.

Universal nature of human rights opens great perspectives for dialogue and cooperation. Of course, judicial bodies play a very significant role in this process. First of all this is true for higher judicial bodies, since by their very nature they are empowered to protect human rights; and by virtue of their work they face the mission to establish fair balance between human rights and obligations.

Preserving dialogue is all the more important given that modern world time and again faces the threat of separation. This threat is conditioned both by the pandemic that created new rules of social distancing, and by more deep tendencies. I mean the intention, commonly concealed by globalisation, to automatically impose and imply the standards, values and approaches of one state or group of states to the whole world. It seems appropriate here to make reference to Jürgen Habermas who in his work Divided West states, that while the liberal version of constitutionalism is perceived as universal, neutral and therefore objective, it is utilised geopolitically, in fact like means of pressure of the Western discourse, ensuring its dominance over parallel discourses. Approach described by the philosopher is of course dangerously close to disintegration of law. It can threaten the heart of every nation. I mean the basics of their existence represented in their law, in essence, something that is sometimes called constitutional identity.

I think that the international community understands the danger of aggressive universality. Suffice to remind of the perfectly objective and neutral ASEAN human rights declaration of 2012. Its provisions underline that realisation of human rights must be considered in the regional and national context – which practically amount to constitutional identity.

I would like to say a few words about the Russian judicial experience on protection of national constitutional identity, particularly in the context of realtions with the European Court of Human Rights. I must confess, in this context constitutional identity sometimes is described as "defensive" concept used when a state is confronted with somewhat coercive promotion of universalist version of constitutionalism.

The situation which I will cite further is well known for Russian and likely European constitutional scholars. But for the states outside the Council of Europe it may be of

interest as an illustration of the work of constitutional supervisory body on protection of constitutional norms included in the essence of national constitutional legal order.

In its judgement of 2013 in the case "Anchugov and Gladkov against Russia" the European Court of Human Rights criticised Russian Constitution provisions that fully forbid participating in votes for persons convicted by court to prison terms. This judgement was widely discussed by legal scholars and attracted its fair share of criticism. After all, a constitutional norm can never be revoked by an international court – this would amount to attack on the state sovereignty. Moreover, in this case the issue concerned the unchangeable constitutional provision.

In 2015 the powers of the Constitutional Court were expanded. The Court was empowered to check the possibility of execution of international court's judgements under the Constitution of Russian upon request of competent state authorities. The first judgement, the execution of which was deemed doubtful, became the Anchugov judgement. In its Judgement of 19 April 2016 No 12 the Constitutional Court made a reminder that interaction of European convention order and Russian constitutional order is not conducted subordinately, as only a dialogue of different legal systems shall be the basis for their adequate balance. Therefore, the respect for European Convention on Human Rights largely depends on the respect shown by the European Court of Human Rights to national constitutional identity.

The Constitutional Court held that it was impossible to execute the Anchugov judgement by amending legislation in such a way so as to apply electoral rights limitations not to all the convicted serving their prison sentences. But it was deemed possible to realise in the legislation and case law such execution of this judgment in respect of general measures ensuring fairness, proportionality and differentiation of limitation of electoral rights. In other words, the court imposing prison terms should take into account the fact of deprivation of electoral rights. It was also recommended to the federal legislator to optimise the system of criminal punishments, including by way of transferring certain regimes of serving the sentence in the form of deprivation of liberty into separate types of punishment – connected to limitation of freedom, but not limiting

electoral rights. This recommendation was fulfilled, in some cases deprivation of liberty (implying limitation of electoral rights) now can be changed to compulsory labour, that does not limit electoral rights.

The compromise has thus been found. The described set of measures was in 2019 recognised by the Committee of Ministers of the Council of Europe, which accepted that it was an adequate way to execute the Anchugov judgement. Moreover, the United Kingdom has referred to the Russian experience when it searched for the way to execute the very similar judgement of the European Court rendered in 2005 in the case of Hirst no. 2.

Thereby the judges of the Constitutional Court of Russia demonstrated that not every conflict between norms of national legislation, international law and the Constitution should be perceived as attack on the Russian constitutional identity. Defence is required for part of Constitution specially protected from review, the embodiment of the essence of the national constitutional order. Not all legal traditions are included into this essence. Therefore, a methodology is required to distinguish between legal values that cannot be challenged without threatening constitutional identity, and such values that are in nature flawed, based on superstitions or social stereotypes. In this broad spectrum it should be understood, that there is constitutional identity, but there is also inertia close to anachronism.

The world is very diverse, and search for common points and basis for dialogue must not transform into full loss of individuality. On the contrary, this search must become basis for deep mutual understanding and respect. If this is achieved, the common values of different nations can ensure cooperation and flourishing. Help and dialogue must accompany the world, and not coercion and conflict. It is no coincidence that the theme "Constitutional Justice and the Peace" is chosen for the Congress of the World Conference on Constitutional Justice coming in 2022.

This also confirms that the discussion at the present event acquire special urgency. "The Role of Judiciary to Promote Humanity and Democracy" and "The Protection of rights in Pluralistic Society" underline progress in understanding and

application of legal values. But these themes also point to perspectives of development of judicial systems of our states. Importantly, we have a dialogue of kindred souls, who do not see their mission as proving superiority, but instead strive to exchange experience and find solutions for common problems and quests.

This was proven by fruitful and insightful discussions that took place yesterday and will be continued today. I have a great pleasure to participate in the present event as an observer. In conclusion, I would like once again to express gratitude to Constitutional Court of Indonesia and His Excellency Mr Anwar Usman. Despite difficult pandemic conditions, you were successful in organising the site of meaningful dialogue and exchange of views.

Thank you for your attention!

BANGLADESH

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

The Role of the Judiciary in Promoting Humanity and Democracy.

Mr. Justice Syed Mahmud Hossain
Chief justice of Bangladesh
Date: 17 September 2021, Friday
Time: 01:00 PM-2:PM (Dhaka time)
Venue: Indonesia (virtual)

Hon'ble Chairman of the Session Mr. Justice Manahan Sitompul, the Honourable of the Constitutional Court of Indonesia.

My dear fellow panelist.

Esteemed Brother and Sister Judges from different countries.

Distinguished Representatives of International Organizations;

Distinguished participants;

Ladies and Gentlemen.

Assalamualikum and a very Good Afternoon.

It is indeed a great pleasure to be here amidst the legal luminaries and distinguished scholars of different countries around the globe. At the very outset, I would like to express my humble gratitude to the Hon'ble Chief Justice of the Constitutional Court of the Republic of Indonesia Mr. Justice Anwar Usman for inviting me to attend this very significant and timely conference on "Human rights and Constitutionalism: the Contribution of the Judiciary in Muslim Countries".

I am overwhelmed with utmost pleasure to be a part of it. I prefer to speak on **"The Role of the Judiciary in Promoting Humanity and Democracy."**

2. The most significant value of human life is best reflected in recognizing human rights and exercising these rights to the extent that it preserves humanity. Life would be meaningless if individuals could not practice their natural rights or adopt the political opinions they believed. Moreover, life would be unendurable if individuals were unable to enjoy security in their respective communities. Conceptually, Democracy, placed within a liberal symbolic framework, draws together the process of representation and election with the imposition of law and rights. With human rights, the idea is that people are bound by rules that originate from their participation in law making process by means of electing representatives from their constituencies. Democracy is one of the fundamental principles of Bangladesh embodied in the Preamble of the Constitution.

3. The Judiciary is obligated to protect the rights and liberties of citizens through judicial review and judicial activism. Courts often travel beyond their normal roles of being mere adjudicators by setting out principles and guidelines that the Executive must carry out. The term 'judicial activism' can be traced back to Marbury v. Madison case, where the Chief Justice Marshall of the USA observed, "It is for the court to say what the law is". Thus, he laid down the foundation of judicial review and judicial activism.

4. Article 8 of the Universal Declaration of Human Rights enumerates that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or law. In Bangladesh, the Constitution has not only guaranteed fundamental rights and the scope of their judicial enforcement,

but has also sufficiently empowered the High Court Division of the Supreme Court to apply them through appropriate directions or orders to any person or authority including public functionaries. Article 44(1) of Constitution of Bangladesh guarantees the right to move before the High Court Division of the Supreme Court to enforce the fundamental rights of any citizen. The Constitution of Bangladesh incorporates 18 fundamental rights under Part-III that are enforceable by the orders of the Court.

5. The High Court Division of the Supreme Court of Bangladesh has also been given the power to issue appropriate writs to remedy any legal wrong or enforce any legal obligation. The concept of Public Interest Litigation has been developed by the Supreme Court of Bangladesh over the years to provide adequate legal remedies to the poor, socially vulnerable, backward and minority groups who have faced limited access to Courts or failed to get judicial remedies due to lack of legal knowledge and consciousness.

6. The Supreme Court of Bangladesh began its journey in 1972 by formally acknowledging its sublime responsibility to help build and equitable social order through the rule of law. On this auspicious occasion, I feel the urge to focus on instances where the Supreme Court of Bangladesh courageously played a significant role in promoting democracy.

A quintessential episode to flourish democracy can be discernible in 1992 ***in Kudrat-E-Elahi Panir v Bangladesh*** case, where the Appellate Division of the Supreme Court of Bangladesh, as a promoter of democracy, exercised strategic activism by issuing a series of structural injunctions but refusing to strike down an Act of Parliament. The petitioner, a political figure,

challenged the Act that repealed an existing local government tier, namely "Upazilla", on the ground that abolishing a local government institution would be incompatible with articles 59 and 60 of the Constitution that provided for elected local government bodies. In this groundbreaking decision, the Appellate Division acknowledged the Legislature's authority in the field but nonetheless issued certain directions asking the Government to make all existing Local Government laws compatible with the Constitutional framework relating to local governance and public participation.

A constitutional amendment was nullified by the Supreme Court in 2005 in the case of ***Bangladesh Italian Marble Works Limited vs. Bangladesh,*** famously Known as the ***5th Amendment Case.*** While the 5th amendment of the Constitution was made to protect the first martial law regime, the Court observed that martial law does not have any authority to bring about amendments to the Constitution.

Similarly, the 7th amendment to the Constitution, which attempted to legitimize the second martial law regime, was also declared unconstitutional by the High Court Division in ***Siddique Ahmed vs Bangladesh*** case in **2011.**

7. The Supreme Court of Bangladesh not only contributes to establish democracy and rule of law but also ensures any public or private individual or organization to abstain from misuse of power with a view to safeguarding and protecting individual rights and liberties. I would like to

portray a glimpse of the Supreme Court's role in protecting humanity through the Court's orders.

In 2003 in the case of ***Bangladesh Legal Aid Services Trust vs. Bangladesh,*** the Supreme Court in a pioneering decision, ensured that persons suspected of crimes are not subject to torture, arbitrary arrest or summary execution by the police. They must be treated under due process of law.

In 2009 ***Human Rights and Peace for Bangladesh vs. Bangladesh*** case, an instance of judicial activism by the Supreme Court paved the way for the Government to improve the condition of the polluted rivers.

In the same year in ***Bangladesh National Women's Lawyers Association vs. Bangladesh*** case, the Supreme Court issued guidelines to prevent sexual harassment against women till any proper legislation comes into force.

In a landmark judgment concerning women's rights in the case of ***Bangladesh Legal Aid Services Trust and others*** **vs** ***Bangladesh in 2009***, the High Court Division declared that imposition and execution of extra-judicial penalties, including those in the name of execution of Fatwa by traditional dispute resolution processes, have no sanction in the eye of law. In this case, the Court cited the constitutional mandate of equality and the State's international human rights treaty obligations to ensure women's right to live free from violence. The Court further directed the law-enforcing apparatus and local government agencies to take preventive measures from issuing of such "fatwas" in their respective areas and to take legal steps for prosecution of offenders in appropriate cases.

Last but not least, I would like to mention the most recent occasion of this very year, where the Appellate Division of the Supreme Court of Bangladesh in the case of ***Ataur Mridha vs. Bangladesh*** finally resolved the issue of imprisonment for life-defining it equivalent to imprisonment for 30 years with the scope of remission as per law. I hope this compassionate way of interpreting and applying this law will serve as an outstanding standard in the upcoming days to further constitutionalism in Bangladesh.

8. I would like to recall the words of Francis Bacon, "If we do not maintain justice, justice will not maintain us". The Judiciary of Bangladesh continues to dispense even-handed justice in all circumstances and uphold democracy and humanity by promoting the rule of law with a strong commitment to the nation. Since its journey, the Supreme Court of Bangladesh has been performing as the flag-bearer of constitutionalism and the rule of law. Hopefully this journey will continue till the Doomsday.

I think, we will be benefited by sharing our thought and experiences today which is indeed the spirit of this Conference.

May our friendship be long-lasting!

May Almighty, the Lord of the Universe, protect the globe from the COVID-19 Pandemic! Stay safe.

With these few words, I conclude.

Thanks for bearing with me.

-:-

CAMEROON

J-OIC

Judicial Conference of Constitutional and Supreme Courts/ Councils of the OIC Members States/ Observer States

PAPERS

LA PROTECTION DES DROITS SOCIAUX, ECONOMIQUES ET CULTURELS DANS UNE SOCIETE PLURALISTE

Quelqu'un a dit : « *la diversité est un fait universel. La façon dont les sociétés répondent à leur diversité est un choix. Le pluralisme est une réponse positive à la diversité ; il implique de prendre des décisions et d'entreprendre des actions en tant qu'individus et en tant que sociétés, en se fondant sur le respect de la diversité* ».

Selon le Grand Dictionnaire Encyclopédique LAROUSSE, la société est un « *ensemble d'êtres humains vivant en groupe organisé* », ou encore un « *groupe organisé d'êtres humains* ». Par ailleurs, il définit le pluralisme comme un « *système reconnaissant l'existence de plusieurs modes de pensée, de comportement, d'opinions politiques et religieuses, de plusieurs partis politiques* ».

Je définirais une société pluraliste comme étant celle qui reconnaît et assume sa diversité pour l'intérêt général.

Les droits économiques, sociaux et culturels « *sont les droits fondamentaux qui concernent le lieu de travail, la sécurité sociale, la vie familiale, la participation à la vie culturelle et l'accès au logement, à l'alimentation, à l'eau, aux soins de santé et à l'éducation*. »(HCDH). Il s'agit pour un autre auteur, « *de droits conventionnels qui encadrent, au sens large, l'ensemble des éléments constitutifs du patrimoine culturel de toute communauté humaine dans son lien avec son environnement. Il s'agit d'un ensemble de valeurs spécifiques au mode de vie d'un groupement humain et dont la protection relève des normes du droit positif* »[1]. Ces droits sont déclarés dans le préambule de la constitution camerounaise.

L'Etat a l'obligation d'assurer progressivement le plein exercice de ces droits. L'article 2 du Pacte International relatif aux droits économiques sociaux et culturels dispose en effet :

> *« 1. Chacun des Etats parties au présent Pacte s'engage à agir, tant par son effort propre que par l'assistance et la coopération internationales, notamment sur les plans économique et technique, au maximum de ses ressources disponibles, en vue d'assurer progressivement le plein exercice des droits reconnus dans le présent Pacte par tous les moyens appropriés, y compris en particulier l'adoption de mesures législatives.*
>
> *« 2. Les Etats parties au présent Pacte s'engagent à garantir que les droits qui y sont énoncés seront exercés sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'opinion politique ou toute autre opinion, l'origine nationale ou sociale, la fortune, la naissance ou toute autre situation.*

[1] Simon-Pierre Zogo Nkada, « *Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens : cas du Cameroun et du Sénégal* », Revue française de droit constitutionnel, 2012/4 (n° 92), pages 1 à 17.

« 3. Les pays en voie de développement, compte dûment tenu des droits de l'homme et de leur économie nationale, peuvent déterminer dans quelle mesure ils garantiront les droits économiques reconnus dans le présent Pacte à des non-ressortissants ».

Ceci étant précisé, je prendrais l'exemple du Cameroun, société pluraliste par excellence, avec notamment, sa multiplicité d'ethnies et de cultures, et sa triple culture juridique, traditionnelle, romano-germanique et anglaise, résultat de son histoire.[2]

Au Cameroun, le principe de protection est inscrit dans la Constitution. La mise en œuvre est pensée et régie par le pouvoir législatif[3], réalisée et exécutée par le pouvoir exécutif, par le pouvoir judiciaire et par d'autres institutions républicaines, en l'occurrence, le Conseil Constitutionnel et la Commission Nationale pour la Promotion du Bilinguisme et du Multiculturalisme. L'on peut dire qu'il s'agit là, du modèle de protection camerounais.

I/ LE PRINCIPE CONSTITUTIONNEL DE PROTECTION

Selon Simon Pierre ZOGO NKADA[4], « *Les nouvelles constitutions africaines élaborées dans la mouvance de la démocratisation et de la promotion des droits humains ont inauguré une forme novatrice de la conception des prérogatives du pouvoir exécutif dans sa posture d'autorité centrale chargée de la régulation des activités sociales* ».

[2] Un auteur a d'ailleurs cru devoir qualifier le Cameroun de « *« bestiaire » des fractures géopolitiques : fracture macropolitique entre la communauté francophone et la communauté anglophone, et fracture micropolitique entre les 230 groupes ethniques qui badigeonnent le paysage politique camerounais ».* NJOYA J. « *Cameroun, bestiaire géopolitique des fractures sociales* », Université Yaoundé II ; 1997, pp.1-22.

[3] **Constitution du Cameroun** *: « **Art. 26**.- (1) la loi est votée par le Parlement. »*
« Sont du domaine de la loi :
« a- Les droits, garanties et obligations fondamentaux du citoyen : 1. La sauvegarde de la liberté et de la sécurité « individuelles ; 2. Le régime des libertés publiques ; 3. Le droit du travail, le droit syndical, le régime de la « protection sociale ; 4. Les devoirs et obligations du citoyen en fonction des impératifs de la défense nationale.
« b- Le statut des personnes et le régime de biens : 1. la nationalité, l'état et la capacité des personnes, les « régimes matrimoniaux, les successions et libéralités ; 2. le régime des obligations civiles et commerciales ; 3. le « régime de la propriété mobilière et immobilière.
« c- L'organisation politique, administrative et judiciaire concernant : 1. le régime de l'élection à la Présidence « de la République, le régime des élections à l'Assemblée Nationale, au Sénat et aux Assemblées Régionales et « locales et le régime des consultations référendaires ; 2. le régime des associations et des parties politiques ; 3. « l'organisation, le fonctionnement, la détermination des compétences et des ressources des collectivités « territoriales décentralisées ; 4. les règles générales d'organisation de la défense nationale ; 5. l'organisation « judiciaire et la création des ordres de juridiction ; 6. la détermination des crimes et délits et l'institution des « peines de toute nature, la procédure pénale, la procédure civile, les voies d'exécution, l'amnistie.
« d- Les questions financières et patrimoniales suivantes : 1. le régime d'émission de la monnaie ; 2. le budget ; « 3. la création des impôts et taxes et la détermination de l'assiette, du taux et des modalités de recouvrement « de ceux - ci ; 4. Le régime domanial, foncier et minier ; 5. Le régime des ressources naturelles.
« e- La programmation des objectifs de l'action économique et sociale.
« f- Le régime de l'éducation. »

[4] Simon-Pierre Zogo Nkada, « *Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens : cas du Cameroun et du Sénégal* », Revue française de droit constitutionnel, 2012/4 (n° 92), pages 1 à 17.

Il poursuit en écrivant qu' « *à l'inverse des droits fondamentaux classiques qui ont un caractère défensif en ce sens qu'ils servent à l'individu à protéger une « sphère de liberté » contre l'État, les droits humains de la seconde génération – notamment les droits économiques, politiques, sociaux et culturels – qui ont une connotation collective, sont consacrés par les États tout en admettant des limites posées par les principes constitutionnels républicains.* »*[…]* « *la majorité de ces Chartes fondamentales ont prévu des garanties d'exercice des droits spécifiques des communautés dont le statut au sein de la collectivité nationale exige un traitement ou une attention particulière. C'est le cas des communautés ethniques ou linguistiques que la terminologie juridique consacre aujourd'hui sous l'appellation de populations (ou peuples) autochtones et minorités* ».

Cette analyse est avérée dans le cas de la constitution camerounaise.

Le principe de protection concerne et les droits et les composantes sociologiques de la société camerounaise. A cet égard, la Constitution camerounaise énonce dans son préambule :

«Le Peuple camerounais

« Fier de sa diversité linguistique et culturelle, élément de sa personnalité nationale qu'elle contribue à enrichir, mais profondément conscient de la nécessité impérieuse de parfaire son unité, proclame solennellement qu'il constitue une seule et même Nation, engagée dans le même destin et affirme sa volonté inébranlable de construire la patrie camerounaise sur la base de l'idéal de fraternité, de justice et de progrès ;[….]

« Tous les hommes sont égaux en droits et en devoirs. L'Etat assure à tous les citoyens les conditions nécessaires à leur développement » ;

« L'Etat assure la protection des minorités et préserve les droits des populations autochtones conformément à la loi » ; […].

« Nul ne peut être inquiété en raisons de ses origines, de ses opinions ou croyance en matière religieuse, philosophique ou politique sous réserve du respect de l'ordre public et des bonnes mœurs » ; « L'Etat est laïc. La neutralité et l'indépendance de l'Etat vis-à-vis de toutes les religions sont garanties » ; « La liberté du culte et le libre exercice de sa pratique sont garantis »

Et dans l'article 1er, ce qui suit :

« Titre Premier De l'Etat Et De La Souveraineté.

Article premier : [….] ;

« (2) La République du Cameroun est un Etat unitaire décentralisé. Elle est une « et indivisible, laïque, démocratique et sociale. Elle reconnaît et protège les « valeurs traditionnelles conformes aux principes démocratiques, aux droits de « l'homme et à la loi. Elle assure l'égalité de tous les citoyens devant la loi. (3) « La République du Cameroun adopte l'anglais et le français comme langues « officielles d'égale valeur. Elle garantit la

promotion du bilinguisme sur toute « l'étendue du territoire. Elle œuvre pour la protection et la promotion des « langues nationales. »

Par ailleurs, l'article 62 est ainsi libellé :

> *« Art. 62.- (1) Le régime général ci - dessus s'applique à toutes les régions. (2) Sans préjudice des dispositions prévues au présent titre, la loi peut tenir compte des spécificités de certaines régions dans leur organisation et leur fonctionnement ».*

II/ LE MODELE DE PROTECTION CAMEROUNAIS

La mise en œuvre de la protection est opérée à travers l'institution du Conseil Constitutionnel, l'organisation judiciaire avec notamment la réforme de la Cour Suprême, la création de la Commission de Promotion du Bilinguisme et du Multiculturalisme.

A- L'institution du Conseil Constitutionnel, garant des libertés des citoyens[5]

Le Conseil Constitutionnel a été prévu par le titre VII de la Constitution, qui dispose :

« Titre VII de la Constitution.
« Du Conseil Constitutionnel »
« Art. 46.- Le Conseil Constitutionnel est l'instance compétente en matière constitutionnelle. Il statue sur la constitutionnalité des lois. Il est l'organe régulateur du fonctionnement des institutions.
« Art. 47.- (1) Le Conseil Constitutionnel statue souverainement sur : La constitutionnalité des lois, des traités et accords internationaux ; les règlements intérieurs de l'Assemblée Nationale[6] et du Sénat, avant leur mise en application, quant à leur conformité à la Constitution ; les conflits d'attribution : entre les institutions de l'Etat ; entre l'Etat et les régions ; entre les régions.

[5] Dans l'affaire de la circonscription électorale du Mayo-Rey, le Conseil a décidé que « *le fait d'empêcher les candidats d'un parti politique de battre librement campagne dans leur circonscription électorale est une donnée fondamentale de fraudes ou d'irrégularités graves susceptibles d'influencer de manière déterminante les résultats du scrutin […] Attendu que ces agissements portent une atteinte injustifiée et discriminatoire à l'égalité des candidats des formations politiques devant la loi électorale et au libre choix par les citoyens de leurs représentants, comme ils constituent une violation manifeste et délibérée des dispositions tant du texte de loi susvisé que de l'article 21 de la Déclaration Universelle des Droits de l'Homme »[…].Arrêt n°51/CE/96-97 du 03 juin 1997, Circonscription électorale du Mayo-Rey.*

[6] Dans la Décision n° 001/CC/02-03 du 28/11/2002, le juge constitutionnel a estimé que "*la procédure de validation" organisée par le règlement intérieur de la Chambre et "en vigueur avant l'institution du Conseil constitutionnel (…) ne trouve plus sa raison d'être*". Cette procédure est, au terme de l'argumentaire du juge constitutionnel, considérée comme un "*contrôle a posteriori de la décision du Conseil constitutionnel déclarant élu des candidats à l'élection législative*". Or les décisions de cette institution sont revêtues de l'autorité absolue de chose jugée et s'imposent *erga omnes*. Aussi cela ne peut être interprété que comme une violation de la Constitution, c'est d'ailleurs à cette conclusion que parvient le juge qui décide que "*les dispositions des articles 3 alinéa 2, 3, 4, 5, 6 et 7, 4 nouveau, 5 nouveau, 6 nouveau, 7 nouveau et 10 in fine sont déclarés contraires à la Constitution* » .

« Art. 48: « (1) Le Conseil Constitutionnel veille à la régularité de l'élection présidentielle, des élections parlementaires, des consultations référendaires. Il en proclame les résultats. » [7]

« Art. 48 (2) En cas de contestation sur la régularité de l'une des élections prévues à l'alinéa 1 ci - dessus, le Conseil Constitutionnel peut être saisi par tout candidat, par tout parti politique ayant pris part à l'élection dans la circonscription concernée ou toute personne ayant qualité d'agent du Gouvernement pour cette élection.

« Art. 48 (3) En cas de contestation sur la régularité de la consultation référendaire, le Conseil Constitutionnel peut être saisi par le Président de la République, le Président de l'Assemblée Nationale ou le Président du Sénat, un tiers des députés ou un tiers des sénateurs ».

« Art. 50.- (1) Les décisions du Conseil Constitutionnel ne sont susceptibles d'aucun recours. Elle s'impose aux pouvoirs publics et à toutes les autorités administratives, militaires et juridictionnelles, ainsi qu'à toute personne physique ou morale. (2) Une décision déclarée inconstitutionnelle ne peut être ni promulguée ni mise en application ».

Puis, il a été organisé par la loi n°***2004/004 du 21 avril 2004 portant organisation et fonctionnement du Conseil constitutionnel.***

« *Article 1er: - La présente loi fixe l'organisation, le fonctionnement et les modalités de saisine du Conseil Constitutionnel ainsi que la procédure suivie devant lui, en application de l'article 52 de la Constitution. Article 2:- Le Conseil constitutionnel est l'instance compétente en matière de contrôle de la constitutionnalité*

« Article 3 : (1) Le Conseil constitutionnel statue sur: - La constitutionnalité de lois, des traités et accords internationaux; - Les règlements intérieurs de l'Assemblée nationale et du Sénat avant leur mise en application, quant à leur conformité à la Constitution ; - Les conflits d'attribution entre les institutions de l'Etat, entre l'Etat et les régions, entre les régions. (2) Il veille à la régularité de l'élection présidentielle, des élections parlementaires, des consultations référendaires et en proclame les résultats. (3) Il émet des avis sur les matières relevant de sa compétence

[7] La Cour Suprême, faisant alors office de Conseil Constitutionnel, a reprécisé les attributions de cet organe :
« *Attendu qu'aux termes de l'article 47 alinéa 1 de la loi n°91/20 du 16 décembre 1991 fixant les conditions d'élection des députés à l'Assemblée nationale modifiée par celle n°93/13 du 19 mars 1997, le Conseil Constitutionnel veille à la régularité de l'élection des députés à l'Assemblée nationale : Qu'à ce titre, il vérifie les opérations électorales au vu des procès-verbaux et des pièces annexes, transmis par la Commission nationale de recensement général des votes* ». CS. Arrêt n°32/CE/01-02 du 17 juillet 2002, Affaire *Social Democratic Front (SDF), Union Nationale pour la Démocratie et le* Progrès (UNDP) c/Etat du Cameroun (MINAT).

« Article 19 : (1) Conformément à l'article 47 (2) et (3) de la Constitution, le président de la République, le président de l'Assemblée nationale, le président du Sénat, un tiers des députés ou un tiers des sénateurs, les présidents des exécutifs régionaux lorsque les intérêts de leur région sont en cause, peuvent saisir le Conseil constitutionnel par simple requête datée et signée du requérant pour le contrôle de constitutionnalité des lois en instance de promulgation. (2) Cette requête doit être motivée et comporter un exposé des moyens de fait et de droit qui la fondent. »

Il a effectivement été installé le 17 février 2018, par les décrets n°2018/104 du 07 février 2018 portant organisation et fonctionnement du Secrétariat général du Conseil Constitutionnel, et n°2018/105 portant nomination des membres du Conseil Constitutionnel. Et la Cour Suprême du Cameroun, qui jusque- là en assurait les fonctions à travers sa Formation des Chambres Réunies, est rentrée dans son rôle classique.

B- La prise en compte de la pluralité dans la protection des droits économiques sociaux et culturels par la Décentralisation[8]

Suivant le *décret n°2018/449 du 1er Août 2018, portant organisation du Ministère de la Décentralisation et du Développement Local*, ce département ministériel est responsable de l'élaboration, du suivi, de la mise en œuvre et de l'évaluation de la politique du Gouvernement en matière de décentralisation ainsi que de la promotion du développement local.

A ce titre, il est chargé :

« 1/ Dans le domaine de la décentralisation :

« - de l'élaboration de la législation et de la réglementation relatives à l'organisation et au fonctionnement des « Collectivités Territoriales Décentralisées ;

« - de l'évaluation et du suivi de la mise en œuvre de la décentralisation ;

« - du suivi et du contrôle des Collectivités Territoriales Décentralisées ;

« - de l'application de la législation et de la réglementation sur l'état civil ;

« -sous l'autorité de Président de la République, de l'exercice de la tutelle de l'Etat sur les Collectivités Territoriales Décentralisées.

« 2/ Dans le domaine du développement local :

- *« De la promotion du développement socio-économique des Collectivités Territoriales Décentralisées ;*
- *« De la promotion de la bonne gouvernance au sein des Collectivités Territoriales Décentralisées ;*

« Il exerce la tutelle sur les organismes publics de mise en œuvre de la décentralisation, notamment :

[8] **Loi n°2019/024 du 24 décembre 2019 portant code général des Collectivités Territoriales Décentralisées, article 5 :** ***«*** *(1) La décentralisation consiste en un transfert par l'Etat, aux Collectivités Territoriales, de compétences particulières et de moyens appropriés » ;*

« (2) Elle constitue l'axe fondamental de promotion du développement, de la ·démocratie et de la bonne gouvernance au niveau local ».

« - le Fonds Spécial d'Equipement et d'Intervention Intercommunale (FEICOM) ;
« - le Centre de Formation pour l'Administration Municipale (CEFAM) ;
« - le Bureau National de l'Etat Civil (BUNEC). »

La ***loi n°2019/024 du 24 décembre 2019 portant code général des Collectivités Territoriales Décentralisées*** vient réaliser la déclaration contenue dans l'article 1er de la Constitution.

« Article 1er :
(1) La présente loi porte Code Général des Collectivités Territoriales Décentralisées, ci-après désignées « les Collectivités Territoriales » ;
(2) Elie définit : le cadre juridique général de la décentralisation territoriale ;
- le statut des élus locaux - les règles d'organisation et de fonctionnement des Collectivités Territoriales;
- le régime spécifique applicable à certaines Collectivités Territoriales ;
- le régime financier des Collectivités Territoriales **».**

Elle prend en compte spécifiquement le particularisme des régions du Sud-ouest et du Nord-ouest :

« Article 3 : « {1) Les Régions du Nord-Ouest et du Sud-Ouest bénéficient d'un statut spécial fondé sur leur spécificité linguistique et leur héritage historique;
« (2) Le statut spécial visé à l'alinéa 1 ci-dessus se traduit, au plan de la décentralisation, par des spécificités dans l'organisation et le fonctionnement de ces peux Régions.
« {3) Le statut spécial se traduit également par le respect des particularités du système éducatif anglophone, et la prise en compte de spécificités du système judiciaire anglo-saxon basé sur la Common Law.
« (4) Des textes particuliers précisent le contenu des spécificités et particularités visées à l'alinéa 3 ci-dessus. «
« Article 4.-Des mesures d'incitation fiscales et économiques spéciales peuvent, en tant que de besoin, être accordées à certaines Régions, en fonction de leur contexte, par .des textes particuliers ».

Le *TITRE V* de la loi traite du statut spécial de ces deux régions (articles 327 à 339 de la loi).

La loi veille aussi sur la composante sociologique des organes décisionnels des collectivités.

Article 166 : […] ;
« (3) Le Conseil Municipal doit refléter les différentes composantes sociologiques de la Commune. Il doit, notamment, assurer la représentation des populations autochtones de la Commune, des minorités et du genre. »

Des auteurs ont pensé à la suite de cela que *« Théoriquement, les organes des collectivités locales sont ainsi appelés à faire asseoir une véritable politique de développement de leur*

localité tout en respectant les lois et règlements en vigueur, et en prenant en compte les principes de démocratie et de bonne gouvernance »[9].

C- La prise en compte de la pluralité dans la protection des droits économiques sociaux et culturels par l'organisation judiciaire

Le législateur camerounais a pensé l'organisation judiciaire de manière à tenir compte de la diversité rapidement présentée plus haut[10].

1) *Le principe qui prévaut en matière civile, est que « l'option de juridiction emporte option de législation*[11] *».*

Les différents ordres juridictionnels

La lecture et l'analyse de la loi portant organisation judiciaire démontre qu'il y est prévu deux grands ordres de juridictions :

- *les juridictions de droit traditionnel* d'une part (*Customary courts*, *Alcali courts* dans les zones de culture juridique anglaise[12], *Tribunal de Premier Degré*, *Tribunal Coutumier*, dans les zones de culture juridique française[13]) ;

- et d'autre part, *les juridictions de droit écrit ou droit moderne* (Tribunal de Première Instance, de Grande Instance, Tribunal Administratif et Tribunal Régional des Comptes).

Une subdivision intervient ici, entre les tribunaux judiciaires et les tribunaux administratifs et des Comptes.

Les tribunaux judiciaires appliquent, en matière civile, le droit français d'essence romano-germanique dans les zones d'expression francophone à l'origine, et le droit anglais,

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[9] https://calenda.org/868032 *« La décentralisation territoriale au Cameroun : jeu, enjeux, nouveaux acteurs, nouveaux défis* », appel à contribution du 15 avril 2021, Calenda

[10] **Loi n°2006/015 du 29 décembre 2006** portant organisation judiciaire du Cameroun, modifiée et complétée par la loi n°2011/027 du 14 décembre 2011, article 3(nouveau) :
« L'organisation judiciaire comprend : - la Cour Suprême; - les Cours d'Appel;- le Tribunal Criminel Spécial ; - les juridictions inférieures en matière de contentieux administratif; - les juridictions inférieures des comptes; - les Tribunaux Militaires ; - les Tribunaux de Grande Instance ; - les Tribunaux de Première Instance ; - les juridictions de droit traditionnel ».

[11] Consacrée par l'arrêt n°28/CC du 10 décembre 1981, *Affaire ANGOA Parfait c/DEYINDI Pauline* RCD n°21-22, p.301.

[12] **Loi n° 79/04 du 29 juin 1979** portant rattachement des Customary Courts et Alkali Courts au Ministère de la Justice, ***« Art. 1er** : Les Customary Courts et les Alkali Courts des Provinces du Sud-Ouest et du Nord-Ouest, sont, pour compter de la date d'entrée en vigueur de la présente loi, rattachées au Ministère de la Justice ; **« Art. 2** : (1) Les Customary Courts et les Alkali Courts appliquent les coutumes des parties non contraires à la loi et à l'ordre public. « (2) Elles doivent énoncer clairement la coutume qu'elles appliquent ».*

[13] **Décret n°69/DF/544 du 19 décembre 1969** fixant l'organisation judiciaire et la procédure devant les juridictions traditionnelles, ***«Art. 1er:** Les juridictions traditionnelles du Cameroun oriental sont : a)Les tribunaux du premier degré ;b) Les tribunaux coutumiers.*
***« Art. 2** : 1) La compétence de ces juridictions est subordonnée à l'acceptation de toutes les parties en cause ;*
« 2) Sous cette réserve, ces juridictions sont compétentes pour connaître des procédures civiles et commerciales que les textes en vigueur ne réservent pas aux juridictions de droit moderne ;
« 3) La partie qui entend décliner la compétence de la juridiction traditionnelle doit le faire avant toute défense au fond, à peine de forclusion ».

essence Common Law[14], dans les zones d'expression anglaise. Cette distinction, est prise en compte dans les différentes chambres qui composent la Cour d'Appel.

La réforme de la Cour Suprême[15]

La Cour Suprême du Cameroun, qui se trouve au cœur du pouvoir judiciaire camerounais, contrôle l'application de la loi dans le but de la protection des droits sociaux , économiques et culturels, tels que définis par les différents instruments internationaux pertinents[16] auxquels le Cameroun est partie, et reprécisés dans les lois camerounaises.

La structuration de la Cour Suprême reflète les préoccupations du législateur.[17] Ainsi celui qui choisit un ordre de juridiction donné, se verra appliquer le droit qu'il connaît jusqu'à la Cour Suprême.

Sur la base de cela, la haute juridiction est composée de trois Chambres : la Chambre Judiciaire[18] qui est l'équivalent de la Cour de Cassation sous d'autres cieux, la Chambre Administrative[19] qui renvoie au Conseil d'Etat dans d'autres législations, et la Chambre des Comptes[20] qui est appelée Cour des Comptes ailleurs.

La Chambre Administrative et la Chambre des Comptes sont divisées chacune en cinq sections qui correspondent aux différents types de contentieux dont elles sont appelées à connaître.

La Chambre Judiciaire quant à elle compte six Sections ainsi dénommées : Civile, Pénale, Sociale, Commerciale, De Droit Local et Common Law[21]. **Il apparaît ainsi très clairement que chaque composante sociologique de la société a son juge, et le juge de son choix**. Il

[14] La Common Law désigne le droit qui a été développé par les juges des anciens tribunaux en Angleterre à partir du 12ème siècle. Ce droit était basé sur les coutumes communes et non écrites du pays et constitue la fondation du droit privé anglais (Justice Lucy ASUAGBOR, « *la coexistence de droits dans un même espace économique : la perspective camerounais* » Congrès de Lomé 2008 : le rôle du droit dans le développement économique.)

[15] Loi n°2017/014 du 12 juillet 2017 modifiant et complétant certaines dispositions de la loi n°2006/016 du 29 décembre 2006 fixant l'organisation et le fonctionnement de la Cour Suprême.

[16] « *Les droits économiques, sociaux et culturels sont protégés par différents traités internationaux, régionaux ainsi que par des constitutions nationales. Le Pacte International relatif aux Droits Économiques, Sociaux et Culturels est le traité le plus complet quant à la protection de ces droits au niveau international*. »

[17] **Loi n°2006/16 du 29 décembre 2006** fixant l'organisation et le fonctionnement de la Cour Suprême du Cameroun.

[18] *« Art. 39.-« La chambre judiciaire statue souverainement sur : Les recours en cassation admis par la loi contre les décisions rendues en dernier ressort par les Cours et les Tribunaux de l'ordre judiciaire ; les décisions des juridictions inférieures de l'ordre judiciaire devenues définitives dans les cas où l'application du droit est en cause ; toute matière qui lui est expressément attribuée par la loi*

[19] *« Art. 40.-« La chambre administrative connaît de l'ensemble du contentieux administratif de l'Etat et des autres collectivités publiques. Elle connaît en appel du contentieux des élections régionales et municipales. Elle statue souverainement sur les décisions rendues en dernier ressort par les juridictions inférieures en matière de contentieux administratif. Elle connaît de tout autre litige qui lui est expressément attribué par la loi.*

[20] *« Art. 41- " la Chambre des comptes est compétente pour contrôler et statuer sur les comptes publics et ceux des entreprises publiques et parapubliques. Elle statue souverainement sur les décisions rendues en dernier ressort par les juridictions inférieures des comptes.* »

[21] Article 8, loi n°2017/014 du 12 juillet 2017 modifiant et complétant certaines dispositions de la loi n°2006/016 du 29 décembre 2006 fixant l'organisation et le fonctionnement de la Cour Suprême

faut d'ailleurs préciser que les deux dernières sections s'adressent directement au caractère pluriel et composite de la société camerounaise.

Le juge a le droit de veiller à la protection de ces droits, tels qu'ils sont prévus par le législateur national.

2) A la multiplicité des coutumes et des cultures, répond l'obligation d'appliquer la coutume des parties, et le droit qu'elles connaissent.

En effet, dans les juridictions de droit traditionnel du fond et dans la Section de droit local de la Cour Suprême, le droit appliqué est la coutume des parties[22]. Le juge du fond est donc obligé de l'énoncer[23], et pour la connaître il est assisté, dans la zone francophone, d'assesseurs choisis parmi les notables de la société représentatifs des coutumes du ressort territorial concerné[24]. La Cour Suprême sanctionne la non énonciation de la coutume des parties par l'annulation de la décision rendue par les juges du fond. Cette coutume ne peut être écartée que si elle est contraire aux bonnes mœurs.

De même, le Camerounais de culture juridique anglaise sera jugé selon la Common Law, une fois qu'il aura exprimé son choix en se présentant devant les juridictions des Régions du Nord-Ouest et du Sud-Ouest (ancien territoire sous tutelle de la Grande Bretagne). Les recours formés contre les décisions rendues par les juridictions concernées seront portés devant la Section de Common Law de la Cour Suprême.[25] Le citoyen de culture francophone bénéficie de la même attention de la part du législateur (Section Civile).
Par ailleurs, les juges ne s'exprimant que dans les deux langues officielles que sont l'anglais et le français, le service des interprètes est prévu pour faciliter les échanges ; le principe

[22] **Décret n°69/DF/544 du 19 décembre 1969 fixant l'organisation judiciaire et la procédure devant les juridictions traditionnelles**, article 18(F) : « «*les jugements des tribunaux du premier degré doivent être motivés et contenir, la coutume de chacune des parties, avec l'indication de ses déclarations ou conclusions et éventuellement le serment .f) l'énonciation de la coutume ».*
Loi n° 79/04 du 29 juin 1979 portant rattachement des Customary Courts et Alkali Courts au Ministère de la Justice, ***« Art. 2** : (1) Les Customary Courts et les Alkali Courts appliquent les coutumes des parties non contraires à la loi et à l'ordre public. « (2) Elles doivent énoncer clairement la coutume qu'elles appliquent ».*

[23] **Cameroun, Cour suprême, 29 décembre 2004, 32/L**
... « *Attendu qu'en se contentant de ces diverses indications sans faire allusion à la coutume dont relève chacune des parties, ni faire ressortir les conclusions dont il affirme la production, le juge d'appel a méconnu les dispositions impératives du texte visé au moyen; »*

[24]**Décret N° 71-Df-607 du 3 Décembre 1971 portant modification du Décret N°69-Df-544 du 29 Décembre 1969 Organisant Les Juridictions Traditionnelles Au Cameroun Oriental** :
« Art. 10, alinéa 2 : « a) (Nouveau) : Une liste de six notables est arrêtée, pour chacune de ces juridictions, par le ministre de la Justice, sur proposition conjointe du préfet et du président du Tribunal de première instance du ressort. Elle est complétée dans les mêmes conditions en cas de vacance. La liste est composée de façon à assurer une représentation équitable des coutumes. Une même personne peut figurer sur la liste des assesseurs du tribunal de premier degré et sur celle des assesseurs du tribunal coutumier.
« b) (Nouveau) : Les personnes portées en tête de chaque liste ont les qualités d'assesseurs titulaires, et les quatre autres ont qualité d'assesseurs suppléants. Dans les tribunaux coutumiers, l'absence ou l'empêchement éventuel du président doivent être officiellement constatés par ordonnance du président du Tribunal de première instance du ressort ; en ce cas, les deux assesseurs titulaires ont, dans l'ordre de leur inscription, qualité pour assurer la présidence. »

[25] **La loi n°2017/014 du 12 juillet 2017** modifiant et complétant certaines dispositions de la loi n°2006/016 du 29 décembre 2006 fixant l'organisation et le fonctionnement de la Cour Suprême du Cameroun (cf : art. 8,11, 37, 37-1)

étant par ailleurs que le justiciable a le droit d'être entendu dans la langue qu'il comprend et maîtrise.

A côté de cette prise en compte de la diversité de la société, le législateur a pensé unifier la réponse aux questions communes essentielles des droits de l'homme, à savoir la vie, comprise dans ses moyens d'existence et son environnement, dans le cadre de l'obligation du respect de l'égalité de tous en matière de droits civils et politiques. C'est pourquoi, le droit pénal, le droit du travail, le droit administratif ont été unifiés, par exemple.

D- La reconnaissance de l'égalité des coutumes entre elles et des différentes langues officielles : création de la Commission Nationale pour la Promotion du Bilinguisme et du Multiculturalisme

Créée par **décret n°2017/013 du 23 janvier 2017**, la Commission est un Organe consultatif avec personnalité morale et autonomie financière. Placée sous l'autorité du Président de la République du Cameroun, elle est chargée d'œuvrer pour la promotion du Bilinguisme et du Multiculturalisme au Cameroun dans l'optique de :

« *- Maintenir la paix ;*
- Consolider l'unité du pays ;
- Renforcer la volonté et la pratique quotidienne du vivre ensemble de ses populations. »

1) *Missions de la Commission* :

Les tâches suivantes lui sont assignées :
- Soumettre des rapports et des avis au Président de la République et au Gouvernement, sur les questions se rapportant à la protection et à la promotion du bilinguisme et du multiculturalisme ;
- Assurer le suivi de la mise en œuvre des dispositions constitutionnelles faisant de l'anglais et du français deux langues officielles d'égale valeur ;
- Mener toute étude ou investigation et proposer toutes mesures de nature à renforcer le caractère bilingue et multiculturel du Cameroun ;
- Elaborer et soumettre au Président de la République des projets de textes sur le bilinguisme, le multiculturalisme et le vivre ensemble ;
- Vulgariser la règlementation sur le bilinguisme, le multiculturalisme et le vivre ensemble ;
- Recevoir toute requête dénonçant des discriminations fondées sur l'irrespect des dispositions constitutionnelles relatives au bilinguisme et au multiculturalisme et en rendre compte au Président de la République ;
- Accomplir toute autre mission à elle confiée par le Président de la République, y compris des missions de médiation.

A ces fins, la Commission élabore à l'attention du Président de la République, un rapport annuel sur l'état de la mise en œuvre de ses missions. Ledit rapport est rendu public. Il

convient de noter toutefois que des rapports intermédiaires sur des questions importantes et pertinentes peuvent être soumis au Président de la République à tout moment

2) Organisation de la Commission :

La Commission comprend quinze (15) membres, dont un (01) Président et un (01) Vice-Président (choisis parmi des personnalités de nationalités camerounaises, reconnues pour leur compétence, leur intégrité morale, leur honnêteté intellectuelle et leur sens patriotique.)[26]. Leur mandat est de cinq ans, renouvelable.

Pour l'accomplissement de ses missions, elle est dotée d'un Secrétariat Général, placé sous l'autorité d'un Secrétaire Général, nommé par décret du Président de la République. Il est chargé de l'administration, de la coordination de tous les services administratifs et techniques de la Commission.

La Commission tient au moins une session par semestre sur convocation de son Président. Elle peut se réunir également en session extraordinaire, le cas échéant, sur convocation de son Président ou à la demande du Président de la République.[27]

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Ce balayage rapide de la mise en œuvre de la protection des droits économiques, sociaux et culturels dans une société pluraliste, en ce qui concerne le Cameroun permet de constater que la réalisation de cette protection est une quête permanente vers le mieux faire, tout comme la réalisation de ces droits est un mouvement progressif de la part de l'Etat.

Je vous remercie de votre aimable attention.

Marie Louise ABOMO (Dr en Droit Privé Toulouse I)
Magistrat Hors Hiérarchie 1er Groupe
Conseiller à la Cour Suprême
Présidente de la Section Pénale à la Chambre Judiciaire
Cour Suprême du Cameroun

[26] Dates et décrets de Nominations du Président, du Vice-Président, des Membres et du Secrétaire Général :
- Le Président : Décret No 2017/095 du 15 mars 2017 ;
- Le Vice- Président : Décret No 2017/096 du 15 mars 2017 ;
- Les Membres : Décret No 2017/097 du 15 mars 2017 ;
- Le Secrétaire Général : Décret No 2017/166 du 25 avril 2017

[27] La mise en place de la Commission est effective. Elle est dotée d'une structure qui abrite ses bureaux et cette structure est effectivement occupée par la Commission.
Sessions tenues: A ce jour, la Commission a tenu trois sessions aux dates ci-dessous indiquées :
- Première session plénière : le 28 avril 2017;
- Deuxième session plénière : le 14 juin 2017;
- Troisième session plénière : le 14 juillet 2017

معالي المستشار رئيس المحكمة الدستورية في الجمهورية الاندونسية السيد /انور عثمان

اصحاب المعالي رؤساء المحاكم الدستورية والمحاكم العليا والمجالس الدستورية في المؤتمر القضائي الثاني لمنظمة التعاون الاسلامي

السيدات والسادة الافاضل

اتوجه بالشكر لرئيس المحكمة الدستورية الاندونسية وجمهورية اندونيسيا على استضافتهم لهذا المؤتمر .

السلام عليكم ورحمة الله وبركاته

يسرني في هذا المؤتمر القضائي الثاني لمنظمة التعاون الاسلامي التدخل حول القاضي الدستوري في فلسطين في حماية حقوق الانسان وحرياته والتأكيد على الالتزام الراسخ لدولة فلسطين على ضمان وحماية حقوق الانسان وحرياته الأساسية المنصوص عليها في القانون الأساسي والتأكيد على دور المحكمة الدستورية العليا على ضمانة واحترام وحماية حقوق وحريات المواطن الفلسطيني الأساسية لما لها من اثر واضح في تحقيق دولة الحق وترسيخ سيادة القانون والديمقراطيه فشرعية الرقابه الدستوريه تعد علامه على نضج الديمقراطيه بحيث

يمكن القول انه لا يوجد ديمقراطيه بغير قضاء دستوري يكفل تطبيق نصوص الدستور على وجه سليم يحدد حكم دولة سيادة القانون .

ان وجود دولة القانون لا يمكن ان تقوم الا بوجود قضاء فاعل ومستقل على وجود رقابة دستورية القوانين حيث تعد الرقابه الدستوريه احدى وسائل الرقابه على الشرعيه كما تعد أهم ضمانات دعم حقوق الانسان وحرياته،وأهم معايير تحقيق التوازن بين هذه الحقوق والمصلحه العامه ، فالرقابه هي الضامن والحارس لحرية الفرد وحقوقه ، وأساسا لمشروعية السلطه ،حيث ان القانون الأساس يكفل الحقوق ويحفظها ويؤثر على التشريعات الاخرى ويسمو فوقها بما

يقيد هذه التشريعات ويحفظ حديتها وعدم اهدارها للحقوق والحريات المكفوله دستوريا . هذه الرقابة التي تقوم بها المحكمة الدستورية العليا في فلسطين لعبت دورا أساسيا في تدعيم الضمانات الدستورية وحماية مختلف الحقوق والحريات التي نص عليها (القانون الأساسي) أي الدستور المؤقت في فلسطين.

حيث حرص القاضي الدستوري الفلسطيني على صون الحقوق والحريات وعلى صون النظام السياسي في فلسطين ، فالقاضي الدستوري باحكامه وقراراته في اطار ممارسة صلاحياته في الرقابة الدستورية حدد معيارا أساسيا قائما على أساس المساواه وبسط الحريات والأمان في

المجتمع والعلاقات الانسانية وتقويم بناء (الدولة) السلطة على أسس المشروعية والشرعية الدستورية التي تجعل من القواعد الدستورية حائطا منيعا وقيدا على كل نص تشريعي أو سلطة تخالف القواعد المنصوص عليها في القانون الأساسي بهدف تحقيق العدالة الدستورية

فاذا كان القضاء الدستوري يعد ضمان العدالة في الدولة فالعدالة الدستورية أساسها الأحكام والقرارت الصادرة عن المحاكم والمجالس الدستورية كما أن العدالة الدستورية ضمانة الحفاظ على الحقوق والحريات وضمانة استقرار اداء المؤسسات الدستورية ومن ثم الحفاظ على المنظومة القانونية في الدولة التي أساسها الدستور .

- هذا وقد حدد القانون الأساسي وقانون المحكمة الدستورية العليا اختصاص المحكمة، وهي اختصاصات تتمحور حول الرقابة على دستورية القوانين واللوائح والانظمة اضافة الى اختصاصات اخرى حيث صدر عن المحكمة الدستورية الفلسطينية مجموعة من القرارات هدفت الى حماية حقوق وحريات الانسان الفلسطيني في العديد من المجالات سواء الحقوق و الحريات الشخصية او الحريات الاقتصادية المدنية والثقافية

ان أهم ما قامت به المحكمه الدستوريه في تحقيق العداله الدستوريه ومبدأ سيادة القانون وحماية حقوق الانسان وحرياته يتمثل فيما يلي :

ترسيخ مبدأ الشرعيه الجزائيه .

ان من أهم ما قامت به المحكمه الدستوريه العليا من خلال بعض أحكامها وقرارتها انها رسخت مبدأ الشرعيه الجزائيه في أحكامها حين قالت :ان لشخصية الانسان قيمه عليا ، فلا يجب ان يتعرض احد لعقوبه لا يستحقها ، او تفقد تناسبها مع الجريمه التي ارتكبها ، فمبدأ التناسب يعد من أهم الضمانات لصون الحريه الفرديه التي تتجسد في اليقين الذي يعيشه الفرد بان يكون عرضه من السلطه لاي تدابير تعسفيه تسلبه حريته الماديه مثل التوقيف والاحتجاز او تقييد حرية التنقل فيجب التحرر من هذه القيود للسمو في الحريه الفرديه الى أعلى مقام ، لان الحريه الفرديه هي نقطة الارتكاز للحريات كافه ،وهي جديره ان تجسد بضمانات اكيده .

تاكيد مبدأ حرية التنقل :

حيث ان حرية التنقل تعد مبدأ له قيمه دستوريه عاليه لا يجوز للمشرع ان يضع ضوابط على ممارستها تحول دون تطبيقها ،وبما لا يتوافق مع تطور المجتمع ، او من دون امر قضائي ومجرد الردع فقط لا يعد كافيا لايقاع الجزاء ولا يؤدي او يكفل مكافحة ظاهرة الاجرام .

تاكيد المحكمه على ان الأصل قرينه البراءه

وحيث ان الأصل البراءه يمتد الى كل فرد سواء كان مشتبها فيه او متهما باعتباره قاعده أساسيه في النظام الاتهامي اقرتها الشرائع الدوليه لا لتكفل حماية المدنين انما لتدرأ بمقتضاها وطأة العقوبه عن الفرد كلما كانت الواقعه الإجرامية قد احاطتها الشبهات دون أن يحول من مقارفة المتهم لها وكان افتراض براءة المتهم يمثل أصلاً ثابتا يتعلق بالتهمه الجنائيه وعلى امتداد اجراءاتها فقد صار لزاما ألا يزحزح الإتهام أصل البراءه ، بل يظل دوما لصيقا بالفرد فلا يزيله سواء في مرحلة ما قبل المحاكمه أو أثنائها وعلى إمتداد حلقاتها .

تكريس مبدأ استقرار وصيانة نظم الحياه الإجتماعية والمحافظه عليها .

في ضوء تحقيق العلاقه بين الدوله كسلطه وبين الفرد تحدد قائمة الحقوق والحريات فتثور مسألة العداله الدستوريه وما يُلقى على كاهل المحكمه الدستوريه من تكريسه في قرارتها وأحكامها، لاستقرار وصيانة نظم الحياه الإجتماعية والمحافظه عليها ، فهي أولى واجبات المحكمه الدستوريه لتثبيت دعائم العداله بمختلق صورها ،وهذا ما يستشف من خلال الحكم الذي أصدرته المحكمه الدستوريه العليا الذي مفاده يتلخص بفكرة انه لا تحصين أو قيود

تفرض على المتضرر في اللجوء الى القضاء والمطالبه بالتعويض المناسب والملائم جراء الضرر المادي أو المعنوي الذي يلحق به من أعمال الحكومه واختصامها حيث لا تحصيناً لأعمال الحكومه ما دام التعويض مسأله مكفوله مرتبطه بقضية الفعل الذي يسبب الضرر .

تكريس مبدأ المساواه أمام القانون كمبدأ أساس لحماية الحقوق والحريات وتكريس مبدأ الديمقراطيه

هذا المبدأ الذي يعد توأم الحريه، وبدونه تصبح ممارسة الحريات العامه كلمه عابثه فهو أقدس المبادئ الذي تردده أغلب الدساتير ومنه القانون الأساسي الفلسطيني لاعتباره ركيزه أساسيه للحقوق والحريات على اختلافها وأساسا للعدل والسلم الإجتماعي، غايته صون الحقوق والحريات في مواجهة صور التمييز التي تنال منها أو تقيد ممارستها وبإعتباره وسيله لتقرير الحمايه المتكافئه للحقوق جميعها .إلا إن مجال إعماله لا يقتصر على ما كفله القانون الأساسي من حريات وحقوق وواجبات بل يمتد الى تلك التي يقررها التشريع. فقد بينت ذلك المحكمه الدستوريه العليا في إحدى قراراتها أن المحكمه تجد أن النص المطعون بعدم دستوريته قد خالف مبدأ أساسيا من مبادئ القانون الأساسي ألا وهو مبدأ المساواه بين المخاطبين بأحكامه الامر الذي يترتب عليه إهدار مبدأ آخر وهو مبدأ تكافؤ

الفرص بينهم إذ أنه فرق بين حقوق الفئه الواحده التي يخاطبها متناسيا أن مبدأ مساواة المواطنين أمام القانون يعتبر ركيزه أساسيه للحقوق والحريات بأشكاله المختلفه ودعامه أساسيه للعدل والسلام الإجتماعي فمبدأ المساواه هو حق لجميع المواطنين .

إرساء المحكمه لحق التقاضي كأهم مقوم من مقومات دولة القانون .

إن من أهم مقومات ودعائم دولة القانون حق التقاضي وما ينبثق عنه من ركائز أساسيه تتمثل في استقلال السلطه القضائيه وحيدة رجالها حيث أن الحق بالتقاضي أحد أهم ركائز دولة القانون الذي يضمن نجاعة القاعده القانونيه ويمكّن الأفراد من اللّجوء الى القضاء لحل نزاعتهم واسترجاع حقوقهم التي جاءت بها القاعده القانونيه ، وبالتالي يعد هذا الحق من الحقوق الأساسيه اللصيقه بالإنسان والتي لا يمكن التنازل عنه. حيث عملت المحكمه الدستوريه العليا في العديد من أحكامها على تكريسه وترسيخه بهدف تكريس دولة القانون وبهدف تحقيق مبدأ إقامة العدل والمساواه وتحقيق الأمن والسلم الاجتماعيين .

كما اتخذت المحكمة الدستورية العليا في فلسطين قرارا تفسيريا يتعلق بالمعاهدات والاتفاقيات الدولة حيث لم ينص القانون الأساسي (الدستور) على المعاهدات والاتفاقيات

الدولية إلا في ما يتعلق فقط في حماية حقوق وحريات الانسان كما نصت عليها المعاهدات الدوليه وعلى ضرورة الانضمام الى هذه الاتفاقيات .

حيث قامت المحكمه الدستوريه في إطار هذا القرار في تفسير أدي الى تطوير المنظومه الدستوريه الفلسطينية (القانون الأساسي).

حيث حددت المحكمه في قرارها التفسيري الى من يحق له التوقيع والتصديق على المعاهدات.

- حددت موقع المعاهدات أو الاتفاقيات الدولية من المنظومة القانونية التي تطبق في فلسطين والتي تأتي في مرتبة بعد القانون الأساسي

- اتخذت قرارا بأن المعاهدات الخاصة بحقوق الإنسان لا تطبق مباشرة إلا بعد موائمتها مع التشريعات الفلسطينية وبما لا يتناقض مع الهويه الدينيه والثقافيه والوطنيه للشعب الفلسطيني .

معالي رؤساء المحاكم الدستوريه والمحاكم العليا والمجالس الدستوريه .

إن رقابة المحكمه الدستوريه العليا في فلسطين هي رقابه لاحقه على اصدار القوانين واللوائح أي رقابه بعدية والمحكمه الدستوريه العليا في فلسطين لا تراقب القوانين الصادره عن المجلس التشريعي (البرلمان) ولا القرارات بقوانين الصادره على رئيس دولة فلسطين، بل تراقب مختلف القوانين واللوائح التي تطبقها فلسطين خاصة القوانين الصادره ما قبل 1967 أي القوانين الأردنيه في الضفه الغربيه والقوانين المصريه التي كانت تطبق بقطاع غزه قبل العام 1967.

وأخيراً يمكن القول وبتواضع ان المحكمه الدستوريه العليا في فلسطين على الرغم من حداثتها والتي لم يمر على تأسيسها الا خمس سنوات فقط ، ورغم المعوقات الماديه والبنويه والوظيفيه التي صاحبت قيامها ورغم تعدد القوانين واللوائح التي تنظر في دستوريتها، ورغم غياب الثقافه الدستوريه الواعية إلا أنها استطاعت ان تحرز تقدما ملموسا في إطار حماية حقوق الانسان الفلسطيني وحرياته رغم المعوقات العديده للإحتلال الإسرائيلي واجراءاته التعسفيه على المواطن الفلسطيني وحقوقه وحرياته، خاصه في القدس عاصمة فلسطين والعديد من المناطق الفلسطينيه .

اشكركم جميعا ونتمنى للمؤتمر النجاح والتوفيق والسلام عليكم ورحمة الله وبركاته.

SUMMARY OF DISCUSSION

2nd Conference of the Judicial Conference of Consitutional and Supremen Courts / Councils of the OIC Member States / Observers St

Under the theme

"Human Rights and Constitutionalism: The Contribution of Judiciary of Muslim Countries"

Bandung, Indonesia, 16-17 September 2021

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1. The 2nd Conference of the Judicial Conference of Constitutional and Supreme Courts / Councils of the OIC Member States / Observers States under the theme "Human Rights and Constitutionalism: The Contribution of Judiciary of Muslim Countries", hereinafter referred to as the Conference, was held in Bandung, Indonesia on 15-17 September 2021.
2. The Symposium was organized by the Constitutional Court of the Republic of Indonesia, and attended by OIC Member States / Observers States, guest courts, and international organizations. The complete list of participants of the Symposium is attached as **ANNEX 1.**

DAY I (SYMPOSIUM): 16 SEPTEMBER 2021

Agenda Item 1: Opening

3. The Vice Governor of West Java, Mr. Uu Ruzhanul Ulum conveyed his opening remark and stated that he hoped this conference can promote, strengthen, and advance constitutionalism, democracy, human rights, and rule of law.
4. The Chief Justice of the Constitutional Court of the Republic of Indonesia, Dr. Anwar Usman conveyed his opening remarks. He stated that the conference

presented an opportunity to engage and share knowledge, experience, and best practices on constitutional cases for the promotion of human rights, constitutionalism, and democracy, notably the role of Judiciary to Promote Humanity and Democracy; and the Protection of Social, Economic and Cultural Rights; as well as Civil and Political Rights in Pluralistic Society. Furthermore, the conference should be used as an opportunity to combat the widespread xenophobic and Islamophobic discourse and practice, as well as terrorism, which undermine the promotion of a dignified life for all humanity and peaceful coexistence between religions and beliefs.

5. The symposium was then officially opened by the President of the Republic of Indonesia, Joko Widodo. He conveyed that Indonesia is a country based on the rule of law and upholds the advancement, protection, and fulfillment of human rights, as well as the manifestation of the principles of constitutionalism. This conference will only enrich the perspectives and experience of all those involved in an effort to materialize the protection of human rights and constitutionalism even further.

Agenda Item 2: Symposium Session 1

1. The first session was chaired by H.E. Kamel Fenniche, Chairman of the Constitutional Council of Algeria.
2. First speaker was the President of the Constitutional Court of Turkey, H.E. Zühtü Arslan. H. E stated that democracy is the primary value to be protected by the constitutions. Today almost all constitutions contain provisions to promote democracy, rule of law and human rights, albeit in different terminology. According to Turkish Constitutional Court, protection of fundamental rights and liberties is a must for democratic society. Therefore, the primary task of a democratic state is to protect and promote these rights and liberties.
3. H.E. concluded that the constitutional court is an indispensable part of liberal or constitutional democracies, even though the legitimacy of constitutional review has long been questioned on the basis of majoritarian arguments. This

is also the case in Turkey where the mechanism of constitutional complaint provided the necessary leverage to adopt a rights-based approach to the protection and promotion of three foundational values of the State, namely democracy, rule of law and human rights.

4. The second presentation was from Mr. Malinovsky Victor, Member of the Constitutional Council of Kazakhstan who mentioned that the stay of the Constitutional Council outside the classical trinity of power created the preconditions for the development of the doctrine of state power and its branches, in particular, constituent, constitutional, control, and, possibly, others.
5. He also mentioned that today, the Constitutional Council in Kazakhstan has established itself in society as an instrument of a firm and authoritative defender of the Basic Law's provisions, its accurate modernization through the official interpretation of the norms, upon the requests of the subjects established in the Constitution, verification for compliance with its values of the laws adopted by the Parliament, as well as current legal acts on the submissions of the courts.
6. The last presentation of this session was delivered by Justice Dato' Suraya Binti Othman, Judge of the Court of Appeal of Malaysia who mentioned that access to justice is a core component of the rule of law, serving as a vehicle for citizens to have their voices heard, rights exercised and to hold an entity accountable to its decisions. This in itself conspicuous of the Court's role in protecting the social, economic and cultural rights of its citizens.
7. Malaysia has always subscribed to the concept of wasatiyya, or moderation, which espouses the value of mutual respect, understanding and tolerance. As a multi-ethnic and multi-religions nation, Malaysia holds on to these values dearly, as Malaysia has done throughout their journey of nationhood. Malaysia believes that wasatiyya can and should contribute to the promotion of humanity, democracy and the protection of the Social, Economic and

Cultural Right in Pluralistic Society.

8. H.E. concluded her presentation by stating that the Malaysian Courts will continue to progress towards the recognition and support of legitimate human rights for the foreseeable future. The general principles of international norms, Islamic values, and local customs will continue to inspire our courts in shaping the legal landscape of the Malaysian jurisprudence.
9. The Papers presented by the Speakers in Session 1 are attached as **ANNEX II.**

Agenda Item 3: Symposium Session 2

10. The second session was chaired by the President of the Constitutional Court of Turkey, H.E. Zühtü Arslan and the first speaker to begin this session was H.E. Wahiduddin Adamas, Justice of the Constitutional Court of the Republic of Indonesia.
11. During his presentation, H.E stated that Indonesia people uphold the five precepts of Pancasila which were born out of the values that lived society, as its state ideology. Following the first precept, Indonesia is a constitutional democracy or a democratic rule of law that believes in the One Supreme God. In is govern based on the belief in the One Supreme God, not a secular principle that refers to the separation of state and religion, and not based on a certain religion. To maintain the world order, Indonesia actively participates in various international cooperation, such as the Organisation of Islamic Cooperation (OIC). Not to mention, Indonesia is one of the founders of the organization, which has been around since 1969.
12. OIC's objective is "to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems." Thus, the OIC is the best organization to help disseminate the idea of respect for and protection of human rights in the member states' constitutional and legal systems. Meanwhile, the judiciary as one of the branches of state power has undergone significant

developments and received a lot of public attention, including being the object of academic studies. Developments on constitutionalism and the protection of constitutional rights by domestic judicial bodies have become strategic issues in various legal research, especially in constitutional law. however, the development of the judiciary in Muslim countries has not received as much attention.

13. H.E. concluded that the OIC member states can exchange ideas on its practices in their country to have an exchange of experiences and find inspirations for alternative solutions to the legal issues in our judiciary. Now is the best time and forum to strengthen cooperation in the field of constitutional justice.

14. The next speaker was Mr. Rovshan Ismaylov, Judge of the Constitutional Court of the Republic of Azerbaijan who assessed how the Constitution of the Republic of Azerbaijan deals with social rights. He concluded that the Constitution provides for the principle of equalization between civil, political and social rights its application is conditioned by the content of constitutional text itself and case-law of Constitutional Court based on the idea of limited justiciability of social rights.

15. Speaker from Jordan, Judge of the Constitutional Court of Jordan, H.E. Taghreed Hikment highlighted that protecting the basic rights and freedoms of the human being and preserving his dignity is a prerequisite for achieving freedom, justice and peace in the world. Therefore, it ratified and acceded to many international treaties and conventions on human rights. It actively participates in and supports the United Nations human rights system.

16. Last speaker, Justice Jasim Al-Omairi, the Head of the Federal Supreme Court of Iraq mentioned that a civilized political system that respects human rights and freedoms can only be established through a strong and independent judiciary. The principle of judicial independence comes as a logical result of two important principles: the separation of powers and the principle of legitimacy, and the principle of separation of powers requires that the legislative, executive and judicial authorities exercise their powers and jurisdictions on the basis of

the terms of reference specified under the Constitution and not exceed them and that the main source of this principle is the Constitution itself.

17. The Papers presented by the Speakers in Session 2 are attached as **ANNEX III.**

Agenda Item 4: Symposium Session 3

18. This session was moderated by H.E. Gulzor Ahmed, Chief Justice of Supreme Court of Pakistan.
19. Speaker from Algeria, Mr. Kamel Feniche, President of the Algerian Constitutional Council opened this session and conveyed that the continued enhancement of democratic practice, protection of rights and freedom in every countries, increases the importance of the responsibility placed upon the constitutional review jurisdictions. The new Constitution of Algeria, amended in 2020, strengthened the principle of separation and balance between powers and the independence of the Judiciary, guarantees corruption eradication and the protection of citizens' rights and freedoms, and allows for direct legislative election through a new election law.
20. Following that was the presentation from H.E. Saeed Marey Amr, Chief Justice of the Supreme Constitutional Court of Egypt) that talked about human rights in Egypt. Egypt has constitutional court to protect human rights and freedom of religion and believe in Egypt means that nobody is force to accept a certain religion or believe. Egypt also gives high protection in the freedom of expression.
21. Thailand was the next speaker and was represented by Hon. Justice Noppadon Theppitak, Justice of the Constitutional Court of the Kingdom of Thailand. Thailand discussed about "Constitutionalism, Human Rights and Judicial Justice in a Non-Muslim State" and concluded that even most of the Thai people believe in Buddhism, and the present Thai Constitution provides that any person shall enjoy full liberty to profess a religion including the liberty to practise any form of worship provided that in so doing, it shall not endanger the safety of State nor

shall it be contrary to public order or good morals. Consequently, Thai muslims in Thailand as well as any person who belongs to any particular religion enjoy the same rights and bear the same duties as the Thai Buddhists.

22. The last but not least was the presentation from Mr. Albano Macie, Judge of the Constitutional Council of Mozambique who discussed about "The position of the religious phenomenon in the Mozambican State" and the presentation concluded that laicism must be understood within the framework of the republican character of the State, with a view to creating a free public space in which it is possible for all citizens to express their opinions, convictions and beliefs, with tolerance and acceptance of difference in diversity.

23. The Papers presented by the Speakers in Session 3 are attached as **ANNEX IV.**

Agenda Item 5: Symposium Session 4

24. This session was chaired by H.E. Manahan Sitompul, Justice of the Constitutional Court of the Republic of Indonesia. It was then opened by the presentation from H.E. Justice Gulzar Ahmed, Chief Justice of Pakistan who stated that the judiciary of Pakistan has played a vital role in the constitutional development and promotion of Humanity and Democracy in the Country. The judiciary of Pakistan is also committed relentlessly to continue and take all necessary actions against any violation of human and fundamental rights or deviation from the Constitution.

25. Next was the presentation from Mr. G.A. Gadzhiev, the Judge of the Constitutional Court of the Russian Federation who demonstrated that in Russia, not every conflict between norms of national legislation, international law and the Constitution should be perceived as attack on the Russian constitutional identity. Defense is required for part of Constitution specially protected from review, the embodiment of the essence of the national constitutional order. Not all legal traditions are included into this essence. Therefore, a methodology is

required to distinguish between legal values that cannot be challenged without threatening constitutional identity, and such values that are in nature flawed, based on superstitions or social stereotypes. He also added that constitutional norm can never be revoked by an international court – this would amount to attack on the state sovereignty.

26. The third presentation during this session was delivered by H.E. Justice Syed Mahmud Hossain, Chief justice of Bangladesh who concluded that the Judiciary of Bangladesh continues to dispense even-handed justice in all circumstances and uphold democracy and humanity by promoting the rule of law with a strong commitment to the nation. Moreover, The Supreme Court of Bangladesh not only contributes to establish democracy and rule of law but also ensures any public or private individual or organization to abstain from misuse of power with a view to safeguarding and protecting individual rights and liberties.
27. The fourth presentation was delivered by H.E. Marie Louise Abomo, Justice of the Supreme Court of Cameroon who shared the experience of Cameroon on the protection of social, economic, and cultural rights. H.E. mentioned that the supreme court in Cameroon recognize that custom is important for the Cameroonian and cannot be separated from the judiciary.
28. The last presentation to close the symposium was from H.E. Mohammed El Haj Kacem, President of the Supreme Constitutional Court of Palestine. He underlined the commitment of Palestine to protect human rights and fundamental freedom and to value humanity and principle of rule of law. H.E. further stated that there will be no democracy without a constitutional institution that guarantee the application of provisions in the constitution. He also discussed about the rights of presumption of innocence, individual liberty, and equal protection for all Palestinians.
29. The Papers presented by the Speakers in Session 4 are attached as **ANNEX V.**

Agenda Item 6: Adoption of Bandung Declaration

30. The Bandung Declaration was adopted and is attached as **ANNEX VI**

THE 2ND CONFERENCE OF THE CONSTITUTIONAL AND SUPREME COURTS/COUNCILS AND EQUIVALENT INSTITUTIONS OF THE MEMBER STATES OF THE ORGANIZATION OF ISLAMIC COOPERATION

BANDUNG DECLARATION

ON HUMAN RIGHTS AND CONSTITUTIONALISM

On 15-17 September 2021, the Constitutional Court of the Republic of Indonesia hosted in Bandung the Second Conference of the Constitutional and Supreme Courts/Councils and Equivalent Institutions of the Member States of the Organization of Islamic Cooperation (OIC), with the theme of "Human Rights and Constitutionalism: The Contribution of Judiciary of Muslim Countries".

The Heads and Representatives from 38 Constitutional and Supreme Courts/Councils and Equivalent Institutions of the OIC Member/Observer States, guest courts, and international institutions participated in the conference. The conference presented an opportunity to engage and share knowledge, experiences, and best practices relating to constitutional cases for the promotion of human rights, constitutionalism, and democracy, notably the Role of Judiciary to Promote Humanity and Democracy; and the Protection of Social, Economic and Cultural Rights; as well as Civil and Political Rights in a Pluralistic Society.

Within the framework of their constitutional competence, the constitutional and supreme courts/councils play an instrumental role to ensure respect for the implementation of national constitutions principles of rule of law, democracy, and human rights.

As guardians of the constitution, rule of law, democracy, and human rights, we, Heads and Representatives of the Constitutional and Supreme Courts/Councils and Equivalent Institutions of the Member States of OIC declare our commitment to ensure rule of law and work against the widespread xenophobic and Islamophobic discourse and practice, as well as terrorism, which undermine the principles of rule of law, promotion of a dignified life for all humanity and peaceful coexistence between religions and beliefs.

Reaffirming the commitment to build partnerships through sharing of information and best practices on constitutional cases for the promotion of rule of law, democracy, and human rights, we hereby agree:

1. To establish a formal platform for the constitutional judiciaries in OIC Member States, as an independent forum to exchange experiences and information on mutual concern relating to dealing with constitutional cases and jurisprudence for the promotion of rule of law, democracy, and human rights;
2. To officially launch the platform under the name of "Conference of Constitutional Jurisdictions of OIC Member States (CCJ-OIC)";
3. To convene the inaugural congress of the CCJ-OIC next year to be held in Istanbul, Turkey;
4. To continue the mandate of the Working Committee consisting of Indonesia, Turkey, Algeria, Pakistan, and Gambia to prepare the working papers of the conference to be submitted to the congress, including but not limited to:
   - The statute of the CCJ-OIC;
   - The consideration of the relationship of the CCJ-OIC and its interaction with the Organization of Islamic Cooperation.

The Heads and representatives of delegations present today hereby express their highest appreciation to the Constitutional Court of the Republic of Indonesia for organizing this conference in an outstanding manner and with excellent hospitality.

Bandung, 17 September 2021

Draf Pidato Penutupan YM Wakil Ketua Mahkamah Konstitusi pada Konferensi ke-2 bagi Mahkamah Konstitusi, Mahkamah Agung dan Dewan Konstitusi dari Negara-Negara Anggota dan Peninjau Organisasi Kerjasama Islam (JOIC)

Bismillaahirrahmanirrahiim,
Assalaamu'alaikum Warahmatullaahi Wabarakaatuh,
Salam Sejahtera untuk kita semua,
Om Swatsiatsu,
Namo Buddhaya,
Salam Kebajikan.

Yang saya hormati,

Yang Mulia Ketua Mahkamah Konstitusi Republik Indonesia dan bapak Ibu Hakim Konstitusi.

Yang Mulia Ketua dan Hakim Mahkamah Konstitusi, Mahkamah Agung, Dewan Konstitusi dan lembaga sejenis Negara-Negara Anggota dan Peninjau Organisasi Kerjasama Islam.

Hadirin sekalian yang saya muliakan.

Alhamdulillah, puji syukur kita panjatkan ke hadirat Allah SWT atas rahmat, petunjuk dan berkah serta berbagai kemudahan yang senantiasa dilimpahkan kepada kita semua sehingga Konferensi Ke-2 bagi Mahkamah Konstitusi, Mahkamah Agung, Dewan Konstitusi Negara-negara Anggota dan Peninjau Organisasi Kerjasama Islam dapat terselenggara dengan baik dan melahirkan sebuah komitmen bersama sebagaimana yang tertuang dalam Deklarasi Bandung.

Saya mengucapkan terima kasih dan penghargaan yang setinggi-tingginya kepada seluruh negara-negara sahabat yang telah berpartisipasi dalam konferensi ini secara daring juga kepada anggota *working committee* yang menyempatkan hadir untuk mengikuti kegiatan ini secara langsung.

Dalam konferensi yang berlangsung selama dua hari ini kita telah mendengarkan pemaparan dari negara-negara sahabat dan memperoleh perspektif tentang bagaimana lembaga peradilan khususnya di negara-negara Islam berkontribusi dalam perlindungan, pemajuan dan pemenuhan hak asasi manusia serta berperan dalam pengembangan gagasan konstitusionalisme yang selaras dengan nilai-nilai Islam. Perlindungan dan pemajuan Hak Asasi Manusia sejatinya telah menjadi komitmen dunia Islam yang tergabung dalam Organisasi Kerjasama Islam sebagaimana tercermin dalam Deklarasi Kairo Tahun 1990. Deklarasi ini menunjukkan kandungan ajaran Islam berdasarkan Al Qur'an dan Hadist yang menempatkan manusia sebagai mahluk yang mulia dan menjaga kemuliaan ini dengan memberikan penghargaan yang tinggi terhadap nilai-nilai kemanusiaan, menjaga dan menghormati hak tanpa membedakan ras, golongan, suku bangsa termasuk agama dan kepercayaan yang dianut. Komitmen yang demikian menunjukkan keselarasan nilai-nilai Islam sebagai *rahmatan lil'alamin* dan prinsip-prinsip Hak Asasi Manusia yang universal. Islam yang *rahmatan lil'alamin* menunjukkan inklusifitas nilai-nilai yang terkandung di dalamnya terhadap aspek-aspek universal hak asasi manusia dan perkembangan pemikiran tentang hukum dan keadilan dalam setiap tahapan peradaban.

Izinkan saya menyampaikan kepada forum yang terhormat ini sedikit tentang spirit ilahiah yang tercermin dalam Konstitusi Republik Indonesia, UUD 1945. Alinea ke-3 Pembukaan UUD 1945 berbunyi, "*Atas berkat rahmat Allah yang Maha Kuasa dan dengan didorongkan oleh keinginan luhur supaya berkehidupan kebangsaan yang bebas, maka rakyat Indonesia menyatakan dengan ini kemerdekaannya"*. Alinea ini berisi pernyataan kemerdekaan yang diawali dengan pengakuan atas Kemahakuasaan Allah SWT dan menunjukkan pengedepanan nilai Ketuhanan dalam kehidupan berbangsa dan bernegara. Nilai Ketuhanan yang demikian juga ditemukan dalam bagian lain dari Pembukaan Konstitusi yakni Aline ke-4 yang di dalamnnya mengandung rumusan Pancasila sebagai dasar negara yang sila pertamanya berbunyi, "Ketuhanan Yang Maha Esa". Nilai Ketuhanan yang

terkandung dalam Pembukaan UUD 1945 ini memberikan landasan dan rujukan konstitusional untuk memahami bahwa nilai-nilai Ketuhanan merupakan unsur integral dalam konstitusi Republik Indonesia.

Sementara itu, kebersamaan kita dalam forum ini untuk membahas isu-isu HAM dan konstitusionalisme berdasarkan nilai-nilai Islam merupakan upaya untuk mewujudkan komitmen penegakan HAM ini dan mewarnai perkembangan pemikiran global tentang konstitusionalisme sekaligus sebagai upaya untuk menjembatani bias pemahaman mengenai keselarasan antara nilai-nilai Islam dan Hak Asasi Manusia.

Yang Mulia dan hadirin yang saya hormati,

Penyelenggaraan konferensi ini merupakan kelanjutan dari konferensi pertama yang diselenggarakan di Istanbul, Turki yang melahirkan Deklarasi Istanbul yang memberi mandat kepada Indonesia untuk menyelenggarakan konferensi ini. Penyelenggaraan konferensi ini merupakan upaya intelektual dalam rangka berbagi pengalaman dan memahami perspektif penegakan hukum dan Hak Asasi Manusia berdasarkan pengalaman berbagai lembaga yudisial dalam memberikan pertimbangannya mengenai isu-isu Hak Asasi Manusia tersebut. Dari berbagai pengalaman dan praktek terbaik yang telah kita simak bersama, kita berharap pemahaman tentang inklusifitas nilai-nilai Islam terhadap prinsip-prinsip Hak Asasi Manusia dan konstitusionalisme menjadi lebih diterima dan diserap secara luas pada tataran global.

Indonesia, sebagai negara dengan penduduk muslim terbesar, berdiri dan bergerak bersama negara-negara sahabat untuk mewujudkan terciptanya ruang dialog ini secara berkesinambungan. Perjalanan Mahkamah Konstitusi Republik Indonesia dalam mengemban tugas dan kewenangan konstitusionalnya juga telah memutus berbagai perkara yang mengandung persinggungan antara nilai-nilai agama dan Hak Asasi Manusia. Kompatibilitas dan keselarasan nilai selalu dapat ditemukan dan forum diskusi sebagaimana yang baru saja kita lakukan akan semakin

memperkaya perspektif guna menemukan rujukan dalam memutus berbagai isu konstitusionalitas yang akan kita hadapi di masa yang akan datang.

Sebagai bentuk gerakan bersama pula, melalui konferensi ini kita telah menyepakati Deklarasi Bandung yang merupakan tonggak sejarah lahirnya sebuh forum bagi lembaga peradilan konstitusi negara-negara anggota dan peninjau OKI dengan nama "*The Conference of Constitutional Jurisdiction of OIC Member States (CCJOIC)*". Platform resmi ini menjadi wadah untuk berdiskusi, berdialog, bertukar pikiran dan pengalaman serta praktik-praktik terbaik yang telah dilakukan oleh negara-negara anggota dalam menyelesaikan perkara-perkara konstitusi yang terkait dengan perlindungan atas hak asasi manusia melalui konferensi yang diselenggarakan secara berkala dan berkesinambungan.

Akhirul kalam, sekali lagi saya ingin mengucapkan terima kasih kepada negara-negara sahabat dan seluruh hadirin yang saya hormati atas partisipasi yang telah diberikan dalam konferensi ini. Semoga Allah Ta'ala senantiasa memberikan kemudahan bagi kita semua untuk bertemu kembali dalam konferensi berikutnya.

Wabillaahi taufik wal hidayah, wassalaamu'alaikum warahmatullaahi wabarakaatuh.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
Gedung 2 MKRI Jalan Medan Merdeka Barat No.7 Jakarta Pusat 10110
Office: +62 21 23529000; Fax: +62 21 3520177
humas@mkri.id