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特　　集　：ポスト権威主義国の民主化プロセスにおける違憲審査機関の役割の比較研究

個 別 論 題

Center for Asian Legal Exchange

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Editors ♦ FUJIMOTO Akira (Chief) ♦ MATSUO Yoh
♦ SATO Fumito ♦ ISMATOV Aziz ♦ MAKINO Emi

Assistant Editor ♦ WEI Jiyuan

Cover Design ♦ KASAYA Yushi

Publisher ♦ Center for Asian Legal Exchange, Nagoya University (CALE)
Furo-cho, Chikusa-ku, Nagoya, 464-8601, Japan
TEL : +81(0)52-789-2325 FAX : +81(0)52-789-4902
E-mail : cale-publication@law.nagoya-u.ac.jp
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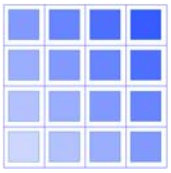

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特集

アジアのポスト権威主義国の民主化プロセスにおける違憲審査機関の役割の比較研究

本特集は、2019 年 6 月 11 日、シンガポール国立大学にて開催された第 16 回アジア法研究所（ASLI）年次大会 2019「アジアにおける法の支配と法の役割」のパネル「アジアのポスト権威主義国の民主化プロセスにおける違憲審査機関の役割の比較研究」の報告者による寄稿論文である。本パネルの一部は、日本学術振興会・研究拠点形成事業 B アジア・アフリカ学術基盤形成型「アジア型立憲主義の解明―人権保障と法的安定性強化のための研究ネットワーク」の支援を受けて実施した。

❖ ❖ ❖

Special Features

The Role of Constitutional Review Bodies in the Asian Post-Authoritarian Democratization Process. A Comparative Perspective

These special features are collection of presentation papers by the speakers at the panel titled “The role of Constitutional Review Bodies in Asian Post-Authoritarian Democratization Process. A Comparative Perspective” of the 16th Asian Law Institute Conference (ASLI) 2019 “The Rule of Law and the Role of Law in Asia”, which was organized on June 11, 2019 at Singapore National University. This panel was partly supported by the JSPS Core-to-Core Program: Asia-Africa Science Platforms “Advancing Research in Asian Constitutionalism - Establishing a Transnational Research Network to Promote Human Rights and Legal System”.

❖ Preface ❖

The Role of Constitutional Review Bodies in the Asian Post-Authoritarian Democratization Process. A Comparative Perspective

ISMATOV Aziz*

What is the system of constitutional review? In modern times it is often discussed in relation to democracy. In the former eastern bloc countries of Europe, a constitutional review was introduced along with the changes in their political and legal systems, and it was widely agreed that having a constitutional review system was considered a membership card for the constitutional democracy club. If to look at a broader Asian perspective, Korea, Mongolia, Uzbekistan, and Myanmar have all introduced constitutional review bodies as a part of their democratic transition. In Vietnam, in the context of the 2013 Constitutional amendments, there were increasing expectations of introducing a Constitutional Council or Court as a part of the democratization process.

Nonetheless, the system of constitutional review is essentially a system to ensure constitutionalism. Constitutionalism emphasizes the protection of the rights of the minority. Thus, there is an aspect of incompatibility with democracy, which places importance on the will of the majority. Although the accepted view of the constitutional review system is that it is 'one of the preconditions for the existence of a pluralistic democratic process,' it can be said that in the process of introducing and developing a constitutional review system, the way in which democracy is concretely understood and how the system of constitutional review is linked to that understanding is prescribed within the historical context of each country. This, in turn, creates the 'uniquely difficult to define' independently developed constitutional review systems of each country.

* Assistant Professor, Center for Asian Legal Exchange, Nagoya University.

A common denominator tying all mentioned countries is that all of them have experienced in the past or continue suffering to a certain extent an authoritarian rule. Furthermore, four of the developing economies are either socialist or states, which are on the way of post-socialist transition. Hence, the level of democratic developments, as well as characteristics of the constitutional review in mentioned five states, is visibly different.

Within the scope of the present panel, it is planned to address multiple factors regarding the constitutional review bodies and their role in posing a positive impact on democratization. Specific attention will be paid to the political and institutional aspects, including on parliamentary interactions, variations of the judicial review designs, the conceptualization of the rule of law tradition, and the level the constitutional review bodies' independence in political deliberations.

The objective of this special volume is to distinct the reasons behind the establishment and intentions to establish constitutional review bodies in Korea, Mongolia, Uzbekistan, Vietnam and Myanmar, clarify factors that shape their operation modes, and examine their capacity to contribute to the political process, democracy, and the rule of law in mentioned states.

【Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan

ISMATOV Aziz*

Abstract

The Constitutional Court in Uzbekistan is the body which is primarily expected to defend and promote constitutionalism. This Court is theoretically expected to perform as an independent actor in assuring respect for fundamental rights and fair competition between political parties. The factual situation, however, demonstrates that the Court rarely acts as an impartial adjudicator and often prefers to distance itself from legislative deliberations. A limited number of the Court's decisions reflects the soul for the constitutionalism in Uzbekistan. Between 1995 and 2019, the Court has taken up a total number of only 33 cases, with the most significant part initiated by its justices. This statistical data indicates structural problems in the area of constitutional justice in Uzbekistan. A careful look at the modern constitutional review system in Uzbekistan, especially its static condition, reveals grave concerns about the issue of protection of fundamental rights and the promotion of democracy. This report is an attempt to shed light on the constitutional review in Uzbekistan with a particular focus on basic features, jurisdiction, and case-study law. The author also aims to clarify the nature of interactions between the Court and democratical processes.

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* Assistant Professor, Center for Asian Legal Exchange, Nagoya University.

I. The Origins of the Constitutional Court of Uzbekistan

In general, the discussion of constitutional review in Uzbekistan starts with the establishment of a standalone Constitutional Court (from now on, the Court) in 1995. The attempts to initiate constitutional review also existed before 1995. A pioneer initiative on constitutional review dates back to 1990 when the Uzbek Soviet Socialist Republic (Uzbek SSR) transplanted the USSR 1989 Law on the Constitutional Supervision[1] and created the Uzbek SSR's Committee for Constitutional Supervision (from now on, CCS).[2]

This Soviet model of constitutional supervision in the Uzbek SSR included ten justices who provided an advisory opinion to the legislature, but had no authority to invalidate unconstitutional statutes or executive decisions, with the exception of those which violated human rights. In practice, the CCS only carried scientific expertise of normative-legal acts and research on their constitutional compatibility. The 1990 law stipulated that only the legislature, the President, one-fifth of parliamentarians, or a limited number of public officials could initiate such scientific expertise of legal-normative acts.[3] The legislature had the authority to appoint the CCS justices and exercise overall control over the CCS's activities. [4]

The mere fact of establishing a pioneer constitutional review system in Soviet Uzbekistan resulted in multiple opinions from legal theorists, both within and outside the country. Mainly, the effectiveness of the CCS was vague and questionable in a country whose state doctrine had generally rejected the principles of judicial review over the constitutionality of legislation as incompatible with the supremacy of parliament or democratic centralism.[5]

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[1] *Zakon SSSR o Konstitutsionnom Nadore v SSSR* [the 1989 Law of the USSR on Constitutional Supervision in the USSR, *Izvestiya* No. 360, Dec. 26, 1989, at 1, 7-8 and at 3, 1-6. (First session was held on May 16, 1990)

[2] *Prikaz ob Utverjdenii Komissii po Razrabotke Zakona o Konstitutsionnom Nadzore v Uzbekskoy SSR* [Regulation on the Establishing a Commission on the Draft Law of the Constitutional Supervision of the Uzbek SSR]. *O'zbekiston Respublikasining Markaziy Davlat Arhivi* [Central State Archive of the Republic of Uzbekistan] *XII Chaqiriq, O'zbekiston Respublikasining Oliy Kengashining 1990 Yil 18-20 Iyun kunlari bo'lib o'tgan XI Sesssiya Materiallari* [11th Plenary Session Materials], (Fond-2454, N 6,7091), 124-25.

[3] Art 12, *Zakon o Konstitutsionnom Nadzore v Respublike Uzbekistan* N 93-XII (Outdated).

[4] Art 5-6, *ibid*.

[5] Ismatov, Aziz, "Specifics of the Late Soviet Constitutional Supervision Debate: Lessons for Central Asian Constitutional Review?" (*CALE Discussion Paper* 19, *CALE/Nagoya University, 2019*)

In 1992, Uzbekistan achieved independence and became the first post-Soviet republic to adopt a written constitution.[6] This 1992 Constitution included a long list of fundamental rights and a Kelsenian, or European-style, stand-alone Constitutional Court. The 1993 law implementing this new Court of Uzbekistan afforded it significant power, including the power to strike down executive acts and formal laws based on the 1992 Constitution.[7] This power notably included the authority to strike down acts based on constitutional invalidity. Formally, this appeared to be a step forward, even though the former CCS practically continued the role of the successor of the court.[8]

In August 1995, the Parliament replaced the 1993 law with the 1995 Law on the Constitutional Court of Uzbekistan.[9] The same year the parliamentarians elected the Court's first team of justices and enabled its administrative regulations. A prominent feature of the 1995 law is that during their deliberations on the model of the Court, the framers referred not only to the existing Soviet model of the constitutional supervision, but also to the U.S. version of diffused judicial review of the Supreme Court, and the Kelsenian model of concentrated constitutional review by the standalone constitutional court.

In particular, during the negotiation process, some parliamentarians considered the U.S. version less burdensome and more achievable at a lesser time and effort for Uzbekistan regardless of the country's hybrid legal system with elements of socialist law, Russian civil law tradition, and local indigenous customs.[10] The feasibility of the U.S. model of judicial review was also strongly associated with the U.S. led legal aid project in Uzbekistan, which aimed to aid legal development mainly through the transplantation of laws.[11] Finally, the application of the U.S. model in Uzbekistan

[6] The Constitution of the Republic of Uzbekistan (December 8, 1992) Supreme Council, 11 session; (Uzbekistan).

[7] *Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan N820-XII (Outdated since 1995) (1993).*

[8] *Postanovlenie o Vremennom Vozlojenii Funkciy Konstitutsionnogo Suda Na Sostav Komiteta Konstitutsionnogo Nadzora Respubliki Uzbekistan.*, Tashkent (Verkhovniy Sovet Respubliki Uzbekistan, 1993).

[9] *Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan* N103-I (Amended in 2017), (1995).

[10] On hybrid legal system of Uzbekistan in Aziz Ismatov and Sardor Alimdjanov, 'Developmental Trajectory of Mahalla Laws in Uzbekistan: From Soft Law to Statutory Law', *Nagoya University Asian Law Bulletin* Vol.4 (December 2018).

[11] Ismatov, Aziz, "Do Hybrid Legal Systems Matter in Legal Transplantation Projects? Some Philosophical Aspects of Legal Aid in Uzbekistan as Provided by Foreign Donors." Paper presented in the ALSA Conference. (Osaka, Japan, 2020)

seemed plausible as there were other examples when a country with a predominantly continental system of law, for example, Japan, transplanted the diffused model of judicial review.[12]

However, despite the strong regional pro-U.S. lobby in the first years of independence, Uzbekistan opted for the Kelsenian model of a constitutional court or concentrated judicial review. Presumably, such a step came as a result of reference to the experience of Eastern European states (i.e., Poland, Hungary) and Russia. Notably, each of these states established a constitutional court as the most effective mechanism for the promotion of *Rechtsstaat*, or rule by the law state (*pravovoe gosudarstvo),* that presumably could best protect constitutional values and principles.

II. Selection Method and Term of the Constitutional Court Justices

The significant amendments to the 1995 law took place as a result of the transition of presidential power in Uzbekistan in 2016. The policymakers initiated specific changes to the selection method and jurisdiction of the Court, and their efforts resulted in a new 2017 Constitutional Law on the Constitutional Court (from now on, the 2017 law).[13]This law stipulates seven Court justices.[14] According to the 2017 amendments to the 1992 Constitution, the President nominates the candidates to the Upper Chamber of the Parliament (Senate), and the Senate finalizes the appointments upon voting for each candidate individually.[15] The Constitution also stipulates that the President should nominate the candidates for the position of justice out of specialists in the area of politics and law recommended by the newly established organ, the Supreme Judicial Council. The nature of this organ is still unclear. Notably, before this Council came into existence, the nominations of justices fell explicitly within the authority of the President. On the other hand, one cannot assert that this Council now actively limits

[12] Or vice-versa, for example in 2011, Myanmar which had inerited its largely common legal tradition from its former British colonial past, introduced a concentrated constitutional review in the form of the standalone Constitutional Tribunal.

[13] *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017).

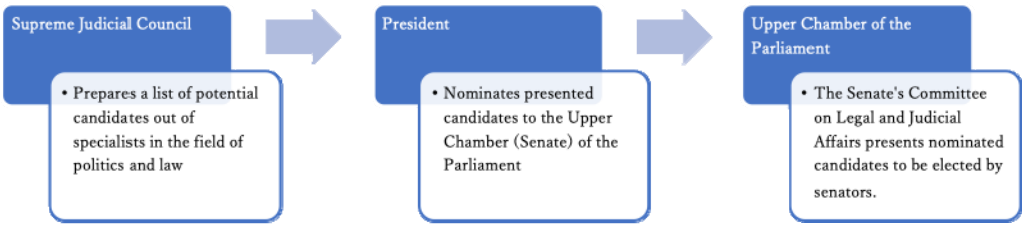
[14] Art 5, *ibid*. Chairman, Deputy Chairman and five members of the Constitutional Court including a judge from the Republic of Karakalpakstan

[15] *Zakon Respubliki Uzbekistan o Vnesenii Izmeneniy v Otdel'nie Stat'yi Konstitutsii Respubliki Uzbekistan,* (st 80, 93, 108 i 109), N430 (2017).

the presidential power to appoint justices as most of the Council's members are presidential appointees.[16] The Constitution separately mentions that one candidate must be a representative of the Republic of Karakalpakstan.[17] (Refer to Table 1)

Table 1. The nomination and election process of the Constitutional Court Justices.

Sources: Article 108, The Constitution of the Republic of Uzbekistan; Article 5, The Law on the Constitutional Court.



The Senate approves justices of the Court by relying on a bare majority (more than 1/2) rather than a qualified majority (more than 2/3 or 3/5). While a similar scheme exists in many emerging democracies, there is a risk that "... the majority party (coalition) in the [parliament] can appoint justices who may defer to the majority without consent of minority parties."[18] Hence, the election of justices in Uzbekistan does not stipulate any framework in which ruling or opposition parties would come to a compromise or consensual decision regarding their appointments to the Court.

Furthermore, by paying closer attention to the practical side of the current Court's justice election system, one might observe a vast presidential influence on the overall nomination process. In other words, the system of checks and balances between the three branches of power is not explicitly applicable in the case of appointments of

[16] Art 5. *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan,* ZRU-431. Please note, this Council is composed of 21 members, 11 of whom are appointed by the President. Refer further to, *Zakon Respubliki Uzbekistan o Vysshem Sudeyskom Sovete Respubliki Uzbekistan*, ZRU-427, (2017).

[17] Art 108, The Constitution of the Republic of Uzbekistan, (*Sobranie Zakonodatel'stva Respubliki Uzbekistan)*, (1992, amended in 2017); Refer also to Art 5, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

No member shall have the right to simultaneously serve as a deputy…. may not be members of political parties ... Judges … have the right of immunity. [and]… shall be independent....

[18] Odonkhuu Munkhsaikhan, *Towards Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation.*, CALE Books 4 (2014), 82.

justices in Uzbekistan. Also, in the actual process of elections of the candidates to the position of justice, there is no rule or practice which would stipulate the right or privilege for the ruling and opposition parties to elect one justice by each, or elect by consensus between the ruling and the opposition parties. Such a rule which would balance the interests in the Parliament does not exist, and only the Senate bears the competence to approve candidates offered by the President. Indeed, the existing practice does not demonstrate even a single case where the senators would question or refuse any presidential nominee.

Justices have a term of five years and cannot hold a justiceship for more than two terms.[19] The same provision also stresses that the maximum age for justices is 70 years old.[20] Scholars and practitioners assert that the term of five years is too short as it does not allow justices to create consistent and logical reasoning for a long-term period, which, in turn, may weaken constitutional integrity.[21] Hence, as the term of the justices is five years, which is the same as the President,[22] and with the possibility of re-election just once, there appears a threat to the independence of the Court, as justices may be reluctant to rule against bodies that had nominated them.

Non-legal professionals may be appointed *de jure* as justices, which makes the existing framework of appointing Court justices in Uzbekistan different from the classic continental constitutional court model. In the context of Uzbekistan's law, the framers considered that apart from legal professionals, experienced politicians were also necessary for the successful functioning of the Court. The parliamentarians widely supported this viewpoint by referring to the idea that constitutional disputes would touch upon various political foundations and social life.[23]

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[19] Art 6, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017).

[20] *Ibid*.

[21] Ronald D. Rotunda, John E. Nowak, and Jesse Nelson Young, *Treatise on Constitutional Law: Substance and Procedure* (West Publishing Company, 1986), 9.

[22] Art 90, the Constitution of the Republic of Uzbekistan, (1992).

[23] B.A. Eshonov, '*Nezavisimost' i Deystvennost' Resheniy Konstitutsionnogo Suda Respubliki Uzbekistan*', *Konstitutsionnoe Pravosudie* 3, no. 13 (n.d.), http://www.concourt.am/armenian/con_right/3.13-2001/uzbekistan.htm. [Accessed on May 16, 2019]

III. The Main Features of the Constitutional Court of Uzbekistan

The Constitution dedicates Chapter XXII to the judicial authority. By taking a careful look at the contents of this part, it is evident that the Constitutional Court is legally independent of the Supreme Court to exercise constitutional review. Ordinary courts do not have this competency. The Court theoretically aims to enforce the supremacy of the Constitution and implement the Constitutional principle of protection of fundamental rights in the acts of the legislative and executive branches of power.[24] In addition, the Court should be able to necessitate compliance to the Constitution in regards to laws and international treaties.

Although Uzbekistan is a unitary state according to its Constitution, the existence within its territorial-administrative division of the autonomous Karakalpak Republic demonstrates that Uzbekistan is indeed a state with elements of federalism. Similarly, Karakalpak has its own constitution, and one of the tasks of the Court is to monitor the compliance of the Karakalpak Constitution and statutes to the Constitution and statutes of Uzbekistan.[25]

Another feature of the Court is normative interpretation. In a few of its cases, the Court offers a constitutional and legal interpretation of unclear or contested norms. The Court also revises petitions of ordinary courts originating in concrete cases. Ordinary courts cannot transfer such petitions directly but only via the Supreme Court. Finally, this Court annually submits a report on constitutional legality conditions in the country and hears cases to which it bears competence. [26]

Hence, *de jure* this Court exercises constitutional review of legislation and executive acts, and analyzes their compatibility with international treaties[27]. The Court

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[24] Art 8, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017). i.e., laws of the Republic of Uzbekistan and resolutions of the chambers of the Parliament of the Republic of Uzbekistan, decrees of the President of the Republic of Uzbekistan, enactments of the government and local bodies of state authority, interstate treaties and other obligations of the Republic of Uzbekistan.

[25] *Ibid*.

[26] Art 109, The Constitution of the Republic of Uzbekistan; Art 4, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431. Also note; Judgments of the Constitutional Court shall take effect upon publication. They shall be final and cannot be appealed.
Organization and procedure for the work of the Constitutional Court shall be specified by law

[27] Please note, as in many cases, the Court of Uzbekistan adjudicates the conformity of international treaties to the Constitution of Uzbekistan before they are ratified. Similarly, most constitutional review bodies do not have the

only hears cases relating to the constitutionality of acts of the legislative and executive authorities.[28] The Court can initiate the examination and settlement of constitutional disputes on its initiative given a relevant request from three or more Court justices.[29] The Parliament (both chambers)[30], the President, the Cabinet of Ministers, Human Rights Ombudsman, the Parliament of Karakalpak Republic, the Supreme Court, and the Prosecutor General also have standing in bringing their claims for constitutional review.[31] However, these bodies can only initiate a matter within the competence of the Court.

There is no individual access to the Court. Analogous to Kelsen's original idea of constitutional review, the framers of the Constitutional Court in Uzbekistan widely rejected *actio popularis*.[32] Hence, individuals do not have the right to make an application to the Court, which, in turn, would have been obliged to review the constitutionality of disputed matter. It is the central critical issue affecting the core constitutional principle of protection of fundamental rights. When violations of rights in Uzbekistan result in statutes, executive acts, or court judgments, individuals have no right to file a complaint to the Court after exhausting all remedies at the ordinary courts. In other words, there is no possibility to initiate a constitutional review of ordinary court judgements or executive acts which are believed to result in the violation of individuals' rights, once ordinary courts fail to quash them.

The Court's jurisdiction also does not stipulate a constitutional question. Therefore, in Uzbekistan, ordinary judges cannot play a direct role in the concrete review of statutes. Whenever judges of ordinary courts have reasonable doubts as to the constitutionality of a specific law, they cannot stop the proceeding and refer directly to

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authority to review those international agreements which have already been ratified as long as such review might negatively impact upon mutual relations with other countries or international agencies.

[28] Art 108, The Constitution of the Republic of Uzbekistan.

[29] Art 25, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

[30] Note that the law also mentions a group of parliament members who are eligible to initiate constitutional review. Not less than ¼ of lower chamber members might initiate constitutional review. Similarly, when it comes to the upper chamber (the Senate), not less than ¼ of senators may initiate constitutional review. Refer further to Art 25, *Ibid*.

[31] *Ibid*.

[32] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution* (Journal of politics, 1942), 197.

the Constitutional Court, which in turn would examine the matter and forward its decision back to the original court in order to resume the instant case. Ordinary judges can forward their queries to the Court only via the Supreme Court. As an example, in Germany, Italy, and Spain because, any judge has an authority to refer a question directly to the constitutional court. On the other hand, in Uzbekistan, similarly to Austria and France, only the Supreme Court may follow such procedure.[33]

The Court *de jure* exercises abstract and concrete review of legislation.[34] Review always focuses on the legal norm but not a case. The Court decides on particular matters only when the consideration of their constitutionality is challenged. The Court may also upon examination for the constitutionality of the normative act simultaneously decide in respect of the other normative acts that contain a reference to the examined statute even they have not been mentioned in the matter introduced for the hearing of the Court.[35] "The issue of the constitutionality of the norm may arise in a pending case, but the review by … the Court is strictly confined to the norm."[36] Although the 2017 law enables the Parliament to initiate review procedure, there is not even a single case in which the Court demonstrated how abstract review acts as a mechanism to protect a parliamentary minority from the abuse of power by the majority groups.[37] This moment raises grave concerns about the qualitative aspects of constitutional review and the parliamentarian culture in Uzbekistan.

Theoretically, once the Court declares a statute or executive act as unconstitutional, it orders their invalidation since the moment of their adoption. The decisions of the Court are final and cannot be appealed.[38] According to the law, the Court itself may

[33] John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe Symposium: Comparative Avenues in Constitutional Law - Constitutional Structures and Institutional Designs', *Tex. L. Rev.* 82 (2003–2004): 1689; Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, Rochester, NY, SSRN Scholarly Paper (Social Science Research Network, 15 March 2015), 9.

[34] In particular, a review of conformity with Constitution.

[35] Refer further to; (https://www.venice.coe.int/WCCJ/Seoul/docs/Uzbekistan_CC_reply_questionnaire-3WCCJ-E.pdf) [Accessed on May 16, 2019]

[36] Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Bloomsbury Publishing, 2017), 190.

[37] Note. Not a preventive control.

[38] Art 33, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

revise its own decision when new or unknown circumstances arise. The Court may also revise a decision if the constitutional norm that was at issue in the dispute changed.[39]

To maintain regular contacts with legal scholars, the framers decided to establish within the Court a separate Scientific-Consultative Council. According to the law this Council must research the most recent trends, and international law's influence on the constitutional courts' decisions in foreign states. This Council is expected to employ and attract prominent legal and political science scholars to cooperate in developing and applying legal-scientific approaches towards constitutional review.

IV. Available Case Study Law

The modern Uzbek constitutional review demonstrates a critically small number of case-study law. Even though the Law on Petitions from Individuals and Legal Entities[40] paved the way for the Court to act on numerous claims from individuals, the Court's reaction has been rare or non-existent.[41] As an example, between 1995-2001, the Court received more than 2,000 letters and petitions from citizens. Generally, these petitions questioned the constitutionality of statutes and acts of the executive branch.[42] Regardless of this chance to actively engage with relevant claims and create precedent database, the Court has demonstrated an unforgivable passiveness. In fact, over 24 years of formal existence, the Court has issued only 33 cases out of which 16 have a form of decrees, 3 definitions, and 14 decisions.

As an example, in the *Frolov case*, the plaintiff lodged a petition against public authorities who barred him from obtaining benefits stipulated by Article 16 of the Law on the Guarantees of Free Entrepreneurship.[43] In particular, the plaintiff, Mr. Frolov, asserted that public taxation and financing organs incorrectly interpreted and applied the provisions of the named statute, which in turn, barred the plaintiff from obtaining financial and tax benefits. In the instant case, the Court had very briefly analyzed the

[39] Art 34, *ibid.*

[40] *Zakon Respubliki Uzbekistan ob obrasheniyah Fizicheskih i Yuridicheskih Lits,* 378 (Uzbekistan 2014).

[41] The Court has elaborated a special Regulation to sort and address the relevant petitions of the citizens.

[42] Interview with the Justices of the Constitutional Court of Uzbekistan, Tashkent (April 2019). (March 2018)

[43] *Frolov case* (2001), *Narodnoe Slovo,* 158, (2718).

circumstances of the dispute and by considering the reports from the Ministry of Finance and State Tax Committee, found a misleading wording in the statute. In the instant case, the Court declared that the actions of the relevant tax and financing organs were unconstitutional because of the provisional vagueness and upheld the statutory provision of the two-year benefit for individual entrepreneurs, as long as individual entrepreneurs had registered before the amendment to the tax code. The conclusion in this concrete review, while being protective of the individual's rights, on the other hand, does not offer a logical and a well-reasoned argumentation story that would help to follow and support the position of justices.

In another case on constitutional interpretation, the Court revised Article 6 of The Law on Bar. Three justices decided to bring the matter before the Court after they had received and analyzed a petition from Mr. Nurmuhammedov, a practicing lawyer in Uzbekistan. In the instant case, Mr. Nurmuhammedov complained that the Forensic Center refused him access to the written expert-conclusion necessary for the legal defense of his client. In particular, the named center pointed to the absence of a legal provision that would enable a practicing lawyer to request such conclusions in procedural matters. Justices initiated the interpretation of Article 6 on The Law on Bar which provided "a lawyer, upon obtaining permission from his client, has the right to inquire and obtain the forensic results or expert-conclusions from the relevant agencies necessary for the legal defense of the client." After reviewing this norm and consulting with specialists in relevant fields, the Court ruled that "expert agencies do indeed have to present files necessary for a person's legal defense to lawyers after they obtain a relevant agreement from their clients." [44] Again, as in the previous case, the Court did not demonstrate in its conclusion a detailed argumentation and legal analysis.

Out of the remaining limited number of Court decisions, there are several in which justices utilized their right for the legal initiative. For example, in 2001, when the Court found inconsistency in several articles of the Code on Administrative Responsibility and declared these articles unconstitutional, it introduced the matter to the Parliament with a request to revise the inconsistency. Notably, it took the

[44] *Nurmuhammedov case* (2000), *Narodnoe Slovo*, 134, (2429).

Parliament two months to revise and resolve the issue in the way the Court requested it.[45]

There have not yet been any cases in the Court's jurisprudence in which political minority parties claimed a legitimacy in Parliamentary deliberations, although such cases should exist in the political arena.[46]One idea might suggest that such situation is an outcome of an underdeveloped condition of the legislature. Another hypothesis suggests that the Court is unable or unwilling to secure parliamentary compliance because of its constant political neutrality. Such distancing from political controversies eventually affects the much-awaited stabilizing role of the Court in political deliberations.

V. Effectiveness of Constitutional Review

The story of Uzbek constitutional review began in the late Soviet period. After the fall of the Soviet Union, the newly independent parliament of Uzbekistan created its Constitutional Court. Formally, this appeared to be a step forward as such a decision suggested the beginnings of a move towards rights-based judicial checks on legislative and executive power. However, this newly empowered court has not emerged as a powerful force for constitutional implementation.

Despite a long list of rights in its Constitution and a separate constitutional court, Uzbekistan's constitutional review has been largely non-existent. Notably, the Court has not relied on the essential methods of review, such as *actio popularis*, constitutional question, or constitutional complaint.

The Court ignored numerous vague legislative and executive acts, as well as cases in which ordinary courts failed to quash apparent violations of fundamental rights. Had the Court taken a more active and detailed approach, these acts could have been used as potential elements that could generate a reasonably grounded case study law.

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[45] Constitutional Court, Constitutional Decision, *O Vnesenii Predlojeniya Ob Ustraneniii Nesootvetstviya Mejdu Statyami 53, 34 i 257 Kodeksa Respubliki Uzbekistan Ob Administrativnoy Otvetstvennosti, Narodnoe Slovo,* 117, (2627), 2001.

[46]Refer to; (https://www.venice.coe.int/WCCJ/Seoul/docs/Uzbekistan_CC_reply_questionnaire-3WCCJ-E.pdf) [Accessed on May 16, 2019]

A few available cases reveal another weak aspect in the Uzbek constitutional jurisprudence, namely, the inability of justices to provide logical reasoning to justify their decisions. In fact, not even a single case out of the 33 decisions rendered by the Court demonstrated a clear and detailed record of how justices interpreted the statutory provisions in a clear, coherent, and justifiable manner.

VI. The Constitutional Court and Democratic Transition

Scholars assert that "the achievement of a stable system of constitutional justice depends heavily on the same factors and processes related to the achievement of a stable democracy." [47] Such factors as an adequate parliamentarian system with competitive parties, fair and transparent elections, the principle of *Rechtsstaadt*, respect for human rights, legal education, and legal profession play a substantial role in creating and sustaining constitutionalism in transition societies.

After Uzbekistan adopted its 1992 Constitution, which contained a set of well-written individual rights and the separate constitutional court, there appeared an impression that the country, being analagous to some successful Eastern European states, had started its transition from state centralism to constitutional democracy. Within the next 25 years of constitutional review's evolution, it became evident that the court failed to perform several functions which are crucial for the facilitation of a transition to democracy. First, within the complicated transition process, the Court failed to act as a dispute resolution tool between various political forces which framed the political system after the fall of the Soviet Union. Second, the Court failed to prove itself as a thriving institution capable to invalidate statutes with prominent unconstitutional elements. The Court could not construct a dialog with the parliament and protect political minority groups. Another critical point touches upon an inability to protect the rights and freedoms of individuals adequately.

Up to 2016, as the Government often approached the human rights concept by actively relying on Asian (Oriental) values and supreme national development interests. By doing so, many policymakers it often utilized an interpretation that in order to achieve developmental goals with particular national characteristics, sacrificing

[47] Alec Sweet, 'Constitutional Courts', *Faculty Scholarship Series*, 1 January 2012, 1.

individual freedoms or restricting particular human rights was unavoidable. This claim for development influenced the degree of democracy which in contemporary Uzbekistan is mainly associated with the importance of the strong rule by a dominant leader aimed at achieving good results. As it is the case in other Asian countries, for example, present-day Indonesia or South Korea in the 1980s, this may have paved the way for the so-called authoritarian developmentalism.[48]

As in the other Central Asian republics, often referred to in the academic literature as "super-presidential,"[49] Uzbekistan may indeed be one example of the rapid development of presidential authority, which is based on constitutional guarantees and public trust. The factual situation demonstrates that presidential authority, additionally represented in such instruments as Presidential Reception Offices (*Priyomnaya Prezidenta, Virtual'naya Priyomnaya Prezidenta*), *de facto* replaces certain elements associated with constitutional review. This situation further raises justified concerns and questions on mainly what mechanism of judicial review is more suitable for a transitional country such as Uzbekistan.

VII. Conclusion

Constitutional review in the Central Asian region was an innovation of the late *perestroika,* which before had been widely unknown to the former Soviet Republic of Uzbekistan. After the collapse of the USSR, Uzbekistan aimed at distancing itself from socialism and moving towards a democratic state. One precondition for such a transition was an ambitious plan to design an institution that would protect the newly adopted constitution using a system of judicial review. Simultaneously, scholars and politicians expressed their hopes that within a short period, such an institution would turn into an actor capable of protecting fundamental rights and freedoms of individuals.

Historically, in the socialist Uzbekistan, legislature enjoyed unlimited sovereignty and denied any notion of limited government. Indeed, strong legislature laid the foundations of the democratic centralism and socialist legality that became core

[48] Refer further to; Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism* (Edward Elgar Publishing, 2019).

[49] Newton, *The Constitutional Systems of the Independent Central Asian States*.

principles in many socialist states across the globe. While these notions existed mainly under the slogans of popular sovereignty, their factual effect often resulted in autocracy. After the fall of socialism in many parts of the world at the end of 1980s, new political elites adopted new constitutions and declared their transition towards a representative democracy and rule of law. In many states, new constitutional courts were thus expected to perform the role of the guarantor in protecting the fundamental rights, and catalyst for the democratic transition. However, in many instances, these instruments could not overcome the judicial passivism inherited from the highly centrist structure of socialist state. Whereas, the centrism, in many states, particularly in Asia had moved from legislative supremacy to the strong authority of executive branch. The Court's active role as a successful adjudicator capable of enforcing rules and principles of the constitutionalism while acting even on political issues, but from purely legal base, could have paved the way for an adequate balance between different branches of power. So far, the analysis of the institutionalization of the constitutional review draws to the conclusion that setting a vibrant and reliable constitutional judiciary in Uzbekistan requires fundamental reconsideration of traditional judicial passivism and resisting the state centrist theory of state.

Appendix

Date of establishment	August 1995
Members	7
How appointed	The President, based on the recommendation of the Supreme Judicial Council nominates the candidates out of specialists in the area of politics and law to the Upper Chamber of the Parliament (*Senate*), and the Senate finalizes the appointments upon voting for each candidate individually.
Term length in years	5
Terms renewable	Yes (Renewable only once)
Actio popularis	No
Petitions from citizens	Yes (based on the Law on Petitions) It is not *Actio Popularis*
Abstract/Concrete review	Both
Constitutional complaint	No
Constitutional question	No
Review of legislation *ex post/ ex ante*	*Ex post*
Are decisions final?	Yes
Impeachment power	No
Declares political parties unconstitutional	No

【Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

Role of Constitutional Tsets in the Consolidation of Democracy in Mongolia

DASHBALBAR Gangabaatar*

Abstract

This paper examines the role of the Constitutional Tsets in consolidation of democracy in Mongolia. Mongolia is one of the successful democracies among the post-socialist countries. The 1992 Constitution introduced a centralized constitutional review model and established the Constitutional Tsets of Mongolia. The Tsets is empowered to rule on the constitutionality of the laws, international treaties, presidential decrees and government decisions. The constitutional review provides an important safeguard for human rights and freedoms enshrined in the Constitution. The Tsets had to confront a number of issues ranging from the problems regarding the qualification of Tsets members to the confrontation on constitutional interpretation and jurisdictional issues with the State Great Khural and the Supreme Court. Although Tsets's independence raises disputes touching upon its competency, it was able to protect democratic principles and individual rights and freedoms for the past 28 years of democratic history in Mongolia. This paper draws attention to the role of Constitutional Tsets in democratic consolidation in Mongolia and discusses current challenges and prospects.

Contents

* Professor, School of Law, National University of Mongolia.

I. History of Constitutional Review in Mongolia

With the collapse of socialist regime in early 1990s, Mongolia was one of the first post-socialist countries to embrace democracy and created a constitutional court. Rapid legal reception and transfer to a democratic constitutionalism led to the inevitable transitional issues faced by many other post-socialist countries. All of these countries went through a difficult transitional period and Mongolia was no exception. 70 years of experience under one party system and three socialist Constitutions left deep marks on Mongolian society and polity.

The first constitution was adopted in 1924. The second and the third constitutions of Mongolia were adopted in 1940 and 1960 respectively. All three constitutions were known as the socialist constitutions of Mongolia. They listed human rights and freedoms citizens would enjoy, but failed to create a constitutional review system for the protection of those fundamental rights and freedoms. Under the socialist constitutions there was no mechanism to effectively protect human rights and freedoms at the constitutional level or to control government behavior. The prosecutor had a role to limit the government behavior, but in practice it worked under the guidance of the Mongolian People's Revolutionary Party and its supervisory role was limited.

With the introduction of Constitutional Tsets (hereinafter, the Tsets) in the 1992 Constitution, Mongolia adopted the Austrian model of abstract norm control. The decentralized constitutional review in the USA and the pre-legislative constitutional review of France were also considered during the drafting phase. The first draft provided for the Tsets to be part of the judicial system, but later it was moved to a separate chapter, independent of the main judicial branch. Like many other post-communist countries of Eastern Europe after the collapse of a socialist regime, Mongolia, for the first time created a constitutional court to review the constitutionality of statutes.

Apart from statutes, the Tsets is entitled to review the constitutionality of resolutions by the State Great Khural, government ordinances, and presidential decrees, and invalidate them if found unconstitutional. However, it did not obtain the jurisdiction over the complaints related to citizens' fundamental rights and freedoms and left them to the jurisdiction of ordinary courts. It can settle disputes on the basis of petitions and information received from citizens or at the request of the State Great Khural, the

President, the Prime Minister, the Supreme Court and the Prosecutor General.[1] The purpose of Tsets was to protect human rights and freedoms and it is entitled to interpret the Constitution and invalidate decisions that are contrary to the constitutional provisions that guaranteed the human rights and freedoms. Establishment of an independent Tsets, therefore, was the most important aspect of the 1992 Constitution. Human rights and freedoms stipulated in the previous constitutions of Mongolia were not enforced in the courts of law.

II. Weak Form of Judicial Review?

Mongolian constitutional review is said to be closest to real weak-form review[2] as it is known to facilitate dialogue between the legislature and the constitutional court. Week-form review is believed to promote constitutional dialogue about the constitution's meaning. "Where a judicial decision is open to legislative reversal, modification, or avoidance," then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.[3]

Mongolian Tsets is among the third generation of constitutional courts, which appeared after the dismantling of the socialist legal system. The first generation of courts followed the American and the Kelsen's centralized constitutional review model, while the German type combined the individual rights protection and the abstract norm control. Mongolian Tsets is a third-generation Constitutional court, which follows the Kelsenian model.

Mongolian Tsets established an abstract norm control and any legislation that violates the Constitution is deemed unconstitutional and invalid. The consequence of choosing this form of constitutional review was that it makes the relations between the Tsets and the State Great Khural far more challenging. A proper relationship between the two is vital for the constitutional democracy to function well.

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[1] Constitution of Mongolia, (1992), art. 66.1.

[2] Mark Tushnet and Rosalind Dixon, Weak-form review and its constitutional relatives: An Asian perspective, in Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia*, (Edward Elgar Publishing, Inc.) 2014, 103.

[3] Hogg, Peter W. and Alison A. Bushell.. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn`t Such a Bad Thing After All)", *Osgoode Hall Law Journal* 35, (1997), 79.

The relationship of these two institutions meant to be one of cooperation and dialogue as a design. When the Tsets makes a conclusion on the constitutionality of a statute, it is sent to the State Great Khural for review. When the conclusion is not accepted by the State Great Khural, the Tsets examines it again with full bench and makes a final judgment. The decisions that found a statutory provision unconstitutional will make the relevant provisions of the law invalid.

The design might seem to be a variant of the weak-form review as it promotes legislative participation in constitutional decision-making. It gives a second chance for the legislature, which might have overlooked some constitutional issues in the law. However, upon closer investigation, the Mongolia's constitutional review appears as a strong-form review. When convening in full bench, the court almost always confirms its earlier conclusion and disregards the parliamentary rejection. Although it may seem to have given the legislature a chance to reverse the conclusion of the court, in practice, it has always confirmed its earlier decisions rejecting the parliamentary interpretation of the constitution.

Another way in which strong-form review can be weakened is via constitutional amendments. As Dixon pointed out, India is an example as the Constitution of India stipulated that amendments can be adopted by a majority vote. This may not be very relevant to Mongolia's case as amendment to the Constitution requires three-fourth majority vote of the State Great Khural. In 2000, the State Great Khural amended the Constitution with a short notice without giving time for deliberation by the public. The seven amendments of 2000 were criticized as "worsening seven amendments" by the drafters of the Constitution and Mongolian scholars, but has not been able to reverse it for about 20 years. Therefore, at best, Mongolian Constitutional review closely resembles the weak-form review.

III. The Relationship Between Tsets and the State Great Khural

The dialogue between the legislature and the constitutional court starts when the middle bench of five to seven Tsets members submits its conclusion on the constitutionality of a statute to the State Great Khural for approval. If State Great Khural accepts the conclusion, it becomes the final decision of the Tsets on that dispute. When

it is rejected by the State Great Khural, the Tsets then makes the final decision by its full bench, which is composed of seven to nine members. This dialogue with the State Great Khural is not only a distinctive feature of Tsets's constitutional review, but also a point of friction between the two.

From one side, the dialogue gives the State Great Khural an opportunity to review the legislation again and correct the inconsistency with the Constitution. On the other hand, it gives an opportunity for the members of the State Great Khural to politicize the constitutional issue, which could affect negatively on the independence of the Tsets. From 1992 to 2016, the Tsets submitted 165 conclusions to the State Great Khural. In 100 conclusions or 60 percent of the cases, the Tsets invalidated the legislation as unconstitutional. The State Great Khural did not agree with the Tsets's decision in most cases by rejecting 57 and accepting only 36 conclusions.[4] The rejected conclusions were then examined by the Tsets's full bench, which reconfirmed its earlier decisions in most cases. Due to these disagreements, some researchers expressed frustration with the unwillingness of the State Great Khural to accept the role of the Tsets in constitutional democracy.[5]

In many instances, the State Great Khural does not respond to Tsets's conclusions within the period of time required by the law. In 39 disputes, the State Great Khural did not respond to the conclusion within the 15-day period stipulated in the statute.[6] In five disputes, it did not even respond to the conclusion of the Tsets at all.

One of the cases was on the constitutionality of the constitutional amendments decided by the Tsets in 2000. The State Great Khural never responded and made a decision as to whether to accept or reject the Tsets's decision to invalidate the constitutional amendments making it impossible for the Tsets to make the final decision on the constitutionality of the seven amendments.[7] When the State Great Khural decides to remain silent and does not respond to the Tsets's conclusion it freezes the whole dialogue. Tsets can no longer make its final decision and pursue its' duty under the

[4] Ochirbat, P, *Mongol Ulsiin Undsen Khuuli: kheregjilt, khyanalt, sudalgaa* [Constitution of Mongolia: enforcement, review, research], (2017), 367. (Hereinafter, Ochirbat Mongol Ulsiin Undsen Khuuli: kheregjilt (2017)

[5] Udval V, Role of Constitutional Tsets in Statehood Building, *NUM Law Review*, 2017, Issue 2, 74.

[6] Law on Constitutional Law Procedure, (1997), art 3.6.

[7] Ginsburg Tom and Gombosuren Ganzorig, 2001, "When Courts and Politics Collide: Mongolia`s Constitutional Crisis." *Columbia Journal of Asian Law* 14: 317.

Constitution. This deadlock can be prevented if the Tsets makes the final decision without the approval by the State Great Khural or if the silence can legally be understood as an acceptance.

In 2016, the State Great Khural issued a decision to recall the Chairman of the Tsets when he sent a letter to the State Great Khural to inform that a dispute was initiated on the amendments of the Law on Constitutional Tsets. The State Great Khural regarded this as an attempt to prevent the State Great Khural from taking any measures to enforce the new amendments, thereby, publicly expressing the conclusions about the case before the court. The amendments were about retirement age and terms of office for members of the Constitutional Tsets.

By recalling the Chairman of the Tsets, the State Great Khural has expressed its willingness to confront the Tsets despite such a move allegedly violated the law. Article 65.4 of the Constitution stipulates that if the Chairman or a member of the constitutional court violates the law, he or she may be recalled by the State Great Khural based on decision of the constitutional court and the recommendation of the institution that nominated him or her. This was further elaborated by the Law on Constitutional Tsets that members of the Tsets can only be recalled with a decision of the court on the violation of the law.[8] The State Great Khural recalled the Chairman of the Tsets without a decision by the court on violation of the law.

This is proof that Tsets's independence is fragile in its relationship with the State Great Khural. This kind of interaction and dialogue between the two could jeopardize the democratic constitutionalism and the independence of the Tsets. Justification behind the dialogue between the two needs to take into account that the purpose of this relationship is to serve the public interest, to show respect for the popularly elected representatives and the consolidation of constitutional democracy.

In dissenting Tsets's decisions, the State Great Khural on many occasions restored the statutory provisions that have been invalidated by the Tsets as unconstitutional. A statutory provision on the lifting of parliamentary immunity, for instance, has been found unconstitutional several times by the Tsets over the years. However, each time the Tsets

[8] Law on Constitutional Tsets, (1992), art 5.3.

invalidates the same provision, the State Great Khural restored an almost identical provision.[9]

Re-appointment of Tsets members by the State Great Khural is another issue that may negatively affect the independence of the Tsets. The Constitution stated that the members will be appointed by the State Great Khural for six years.[10] In practice, many members of the Tsets have been re-appointed more than once. Some members have been re-appointed three or four times. In 2016, Law on Constitutional Tsets was amended so that Tsets members can only be re-appointed once. However, the amendment was invalidated by the Tsets stating that although the Constitution did not explicitly mention about the issue, it did not restrict re-appointment of Tsets members. Tsets could have interpreted that the absence of Constitutional regulation over the re-appointment of the members means that the Constitution left this issue to be decided by the legislature. Unlimited re-appointment by the legislature could potentially pose a significant threat to the independence of the Tsets as it could generate incentives among Tsets members to cooperate with powerful members of the State Great Khural in order to get their support for re-appointment.

IV. Role of Constitutional Tsets in Mongolian Democracy

Establishment of Constitutional Tsets promoted the transition from socialism to democracy, guaranteed protection of human rights and freedoms and the rule of law in general. Tsets settles disputes and limits the power of the branches. “Since the Tsets can negate laws adopted by the parliament, playing the role of the ‘negative law-maker’, the relations between these two bodies are extremely important in understanding the current status and role of the Tsets.”[11]

Tsets has no jurisdiction to hear actual cases related to complaints about human rights violations. This created favorable conditions for citizens to bring a dispute to the Tsets based on abstract and political grounds rather than concrete cases in which alleged violations of constitutional rights took place. Its jurisdiction is limited by an abstract

[9] Law on State Great Khural, (2006), art 6.9.1.

[10] Constitution of Mongolia, (1992), art 65.1.

[11] UNDP, The Role of the Constitution of Mongolia in Consolidating Democracy: An Analysis, (UB, 2015), 71.

review. Under the current Law on Constitutional Tsets, the Tsets cannot restore citizens' fundamental rights and freedom violated in the concrete cases. The Supreme Court's decisions are the final according to the Constitution[12] and Tsets has no jurisdiction over its decisions. Tsets is not a court of appeal although its authority is specified by a separate chapter in the Constitution. The author, along with other Mongolian constitutional law scholars, recommends authorizing the Tsets with reviewing complaints dealing with alleged violations of constitutional rights.

Although the Tsets does not have a jurisdiction over human rights complaints,[13] it can still address human rights violations at constitutional level. It can review legislations, government decisions and presidential decrees, and to decide whether they are constitutionally valid. Since the establishment of Tsets, around 70-80 percent of the conclusions of the Tsets invalidated legislations as unconstitutional. Among the 157 conclusions made by the Tsets by May 2016, 29 were related to citizens' rights and freedoms while the rest were related to the state structure and other provisions of the Constitution. Apart from the abstract norm control, there is a mechanism established by the Law on Courts. This law enables ordinary courts to forward a presumably unconstitutional legislation to the Tsets review. However, ordinary courts cannot forward such issue directly but only to via the Supreme Court.[14] If Tsets finds the statute unconstitutional, this could potentially redress fundamental rights and freedoms in concrete cases.

The drafters of the Constitution deliberately envisaged and designed the Tsets as the guarantee for strict observance of the Constitution and a mechanism that exercises supreme supervision over the implementation of the Constitution. The current Constitution differs from the former socialist constitutions as it confers upon the Tsets authority to decide on the constitutionality of statutes, presidential decrees, the decision of the Government, international treaties, decisions of the Central Election Authority and national referendum.[15]

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[12] Constitution of Mongolia, (1992), art. 50.2.

[13] Ts. Sarantuya, Mongol Ulsiin Undsen khuuliin tsetsiin ontslog, erkh zuin kharitsuulalt, in J. Amarsanaa, *Mongol Ulsiin Undsen Khuuliin Tsets: uguulel, iltgeliin emkhetgel*, (Ulaanbaatar, 2007), Khuuli zuin undesnii tuv, 232.

[14] Law on Courts, (2012), art. 6.4.

[15] Constitution of Mongolia, art. 66.2.1.

The Tsets also has jurisdiction to settle constitutional disputes on whether the President, Chairman and members of the State Great Khural, the Prime Minister, members of the Government, the Chief Justice of the Supreme Court and the Prosecutor General have breached the law; as well as disputes on the grounds for removal of the President, Chairman of the State Great Khural and the Prime Minister and for the recall of members of the State Great Khural.[16] In addition to citizens who submit petitions and information to the Tsets, the State Great Khural, the President, the Prime Minister, the Supreme Court and the Prosecutor General can submit a request to the Tsets. The Tsets is required to initiate a dispute upon receiving a request while it can decline to initiate a dispute based on the information received from citizens. "Until 2016, the Tsets received nine requests: one from the General Prosecutor, six from the Supreme Court, and two from the President."[17]

Citizens can submit petitions and information to the Tsets. It is a form of "*actio popularis*, in which anyone is entitled to take action against a norm after its enactment, even if there is not personal interest; the individual suggestion, in which the applicant only suggests that the constitutional court control the constitutionality of a norm, leaving the decision to do so at the court's discretion."[18] In early 19907s, the Tsets received an average of 30-40 information and petitions a year. Today Tsets receives two to three information each day.[19] By April 5, 2016, the Tsets has received 2069 petitions, information and requests and issued 144 conclusions. The vast majority of these were received from citizens.[20]

The design of relationship between the Tsets and the State Great Khural theoretically target cooperation and dialogue. However, it does not always work in such a mode. Sometimes, the State Great Khural's attitude do not seem cooperative. It eventually influences the legitimacy of the Tsets in a visibly negative way. The dialogue between the two, for example, has undoubtfully politicized Tsets's decisions. Notwithstanding

[16] *Ibid*. art. 66.2.3, 4.

[17] UNDP, Assessment of the Performance of the 1992 Constitution of Mongolia (UB 2016).

[18] European Commission for Democracy through Law, Study on Individual Access to Constitutional Justice (Council of Europe Publishing, 2010), 4.

[19] Ochirbat Mongol Ulsiin Undsen Khuuli: kheregjilt (2017), 349.

[20] *Ibid*.

these factors, the establishment of Tsets has been in the heart of the constitutionalism and has served well for the consolidation of constitutional democracy in Mongolia.

V. Composition of the Constitutional Tsets

The legitimacy and independence of the Tsets rests with its composition. A balanced and professional composition of the Tsets will make it the most important institution in our scheme of constitutional democracy. A qualified composition invites trust from the public. If the Tsets is seen to side with one particular interest group or a certain political party, the legitimacy and independence of the Tsets will be endangered and it cannot effectively carry out its duty to limit and prevent the arbitrariness of the state authorities.

The qualifications of the members are important to ensure that the Tsets is competent and independent. The State Great Khural appoints nine members of the Constitutional Tsets for a term of six years upon the nomination of three by the State Great Khural, three by the President, and the remaining three by the Supreme Court.[21] This might be a reflection of the legislature's intention to create a balanced composition including judges, law professors and other lawyers. However, contrary to the expectation, out of the 30 persons who served as members of the Tsets, only a handful of them appear as career judges or law professors. [22] The vast majority of the members are often politicians. The purpose of entitling three different institutions to nominate three candidates each is perhaps to give more legitimacy to Tsets and a balanced composition.

Article 65.2 provides for the qualifications of the members of the Tsets to be a citizen of Mongolia, who has reached forty years of age and has a high political and legal qualification. The requirement of "high political and legal qualification`` has been interpreted in two different ways over the years. It used to be interpreted as a requirement that the candidate must have only one of these two qualifications. This resulted in the appointment of candidates, who do not possess a law degree. A geologist, two historians, and an engineer were appointed as members of the Tsets under this interpretation.

The other interpretation requires the candidates to possess both of the qualifications. This effectively excluded many law professors and career judges and practicing lawyers

[21] Constitution of Mongolia, (1992), art 65.1.

[22] Ochirbat, Mongol Ulsiin Undsen Khuuli: kheregjilt (2017), 349.

from serving as a member of the Tsets as they do not often have a high political qualification. Mongolian constitutional law scholars had variable interpretations for the same provision on the qualifications of the members of the Constitutional Tsets. Doctor G. Sovd explained 'high political and legal qualification' as a requirement that a member of Tsets must first be majored in law. He continued by asserting that a candidate should have both a law degree and relevant education and experience in politics.[23] Professor Ts. Sarantuya said a lawyer who had many years of experience in practicing law will not be qualified to become a member of Tsets unless he or she also has some education in politics. Apparently, this provision requires amendements in order to overcome increasing ambiguity and arbitrary interpretations.

Tsets has long been criticized for not including the legal grounds and explanation for its written decisions. This is sometimes attributed to the lack of qualifications by the members of the Tsets.[24] Professor B. Chimid criticized the Tsets that it only writes in the decision two words constitutional or unconstitutional, offering no detailed explanation and a well-elaborated legal logic.[25]

Another unique feature about the composition of Tsets is that its members are divided into two groups: full-time and part-time members. In 1992, State Small Khural's Resolution 34 stated that "the Chairman of the Constitutional Tsets and two other members will be full-time members of the Tsets and the remaining six members will be part-time members."[26] Since then, subsequent legislation had kept this policy. The part-time members of the Tsets worked without salary until 2009 and with half of the salary of a full-time member from 2009 to 2013. Beginning from 2014, they received the same salary as the full-time members.[27] The Resolution of the State Small Khural which is

[23] G. Sovd, *Mongola Ulsiin Undesn Khuuliin Tailbar,* (2000), 255.

[24] Munkhsaikhan O. Undsen Huuliin Tsets ba Undsen Erkhiin Hamgaalalt, *NUM Law Review*, 2018, Special issue 2, 148.

[25] Chimid B, *Turiin Khuulias Irgenii Khuuli Ruu lektsiin temdeglel,* http://forum.mn/pdf/public_meeting/TuriinKhuuliasIrgeniiKhuuliRuu20070111.pdf, 16, [accessed on May 8, 2019].

[26] State Small Khural Resolution 34 on `Some measure to implement the Law on Constitutional Tsets`, May 15, 1992.

[27] Ochirbat Mongol Ulsiin Undsen Khuuli: kheregjilt (2017), 342.

clearly in violation of the Constitutional provision that provides for nine members of the Tsets,[28] is yet a valid resolution.

VI. Conclusion

More than 27 years passed since the adoption of the democratic Constitution and the Law on Constitutional Tsets. The establishment of the Tsets enabled faster transition period from socialism to democracy. The Tsets played fundamental role in consolidation of democracy and protection of human rights in Mongolia. However, there are issues that need to be addressed with respect to the relationship between the State Great Khural and the Tsets. This relationship was designed to be one of cooperation and dialogue. However, it did not always work as intended. Sometimes, the State Great Khural's attitude has been not very cooperative and that has influenced the legitimacy of the Tsets negatively. The dialogue between the two needs to be re-considered so that the Tsets makes the final decision without the State Great Khural's approval. Individual citizens should have the opportunity to file complaints to the Tsets concerning violations of their fundamental rights guaranteed in the Constitution. Apart from these improvements, the Tsets facilitated the peaceful transfer of powers in the past 27 years and has been the guarantee for the strict observance of the first democratic Constitution in Mongolia.

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【Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

Korean Constitutional Court and Democracy

KOKUBUN Noriko*

Abstract

In Korea, the Constitution was amended in 1987 (generally referred to as the Constitution of the 6th Republic), heralding Korea's era of democratization. After the democratization, the Constitutional Court of Korea is working very actively and attracting attention globally.

In this article, the following topics are discussed: 1) The history of the constitutional review system after the founding of the Republic of Korea, 2) An overview of the present Constitutional Court, and 3) The problem of 'political judicialization' that has appeared in the court cases.

The Constitutional Court of Korea basically models the German Constitutional Court. However, unlike in Germany, there are some very Korean characteristics. From the viewpoint of its organization, the Korean Constitutional Court has nine judges who passed the exam for the legal profession. Three of the nine judges must be nominated by Parliament, three by Chief Justice of Supreme Court, and three by President. While this is believed to be in consideration of the separation of powers, in reality, the influence of the President is relatively significant.

From the viewpoint of its function, unlike the German Constitutional Court, the Constitutional Court of Korea has no authority for abstract normative control, and concrete normative control is done only for laws. The reason for no abstract normative control is that the Constitutional Court does not have to take a position over the Parliament. On the other hand, since the Constitutional Court's decision has the power to invalidate the law, it still has a significant influence on legislation. For this reason, the Constitutional Court has made judgments to allow room for legislative discretion by using various judgment methods called 'transformation decisions' in consideration to the legislature. However, its positive activities have created the phenomenon of 'politicization of justice' or 'judicialization of politics'.

It is examined in this article, how the Constitutional Court can be positioned for democracy and political processes through analysis of the role of the Constitutional Court from the relationship with the political sector.

* Professor, Faculty of Law, Hosei University, Japan

Contents

I. Introduction

Since its establishment in 1948, the Republic of Korea has implemented a system of constitutional review. However, under dictatorship rule, this system did not function well. It was not until after the nation's democratization and the introduction of a new Constitutional Court system under the present Sixth Republic Constitution that constitutional review came to be actively used. Today, the Korean Constitutional Court is attracting attention as a representative example of the constitutional review system in Asia.

Activities by an active Constitutional Court are generally highly valued in Korea[1], however, situations are also occurring that are forcing us to question how we should consider the position of the Constitutional Court within the nation, and consequently ask 'what is constitutionalism?' In particular, in recent years, the 'judicialization of politics' has become a theme frequently taken up in Korea. After presenting: 1) The history of the

[1] According to an annual survey by JoongAng Ilbo, the Constitutional Court has been known for its position of the 'Most trusted State Organ'.

constitutional review system after the founding of the Republic of Korea, 2) An overview of the present Constitutional Court, and 3) The problem of 'political judicialization' that has appeared in court cases, this report examines what kind of position the Constitutional Court might have in a democracy.

II. History

First, let us revisit the history of Korea's constitutional court system.

A system of constitutional review was introduced at the time of the founding of the Republic of Korea in 1948. At the time of establishing the Constitution, there was a debate about the kind of constitutional review system that should be introduced. There were two schools of thought: adopting a constitutional review system through ordinary courts (from now on referred to as the American type) or adopting a system that authorized a Constitutional Committee that was separate from the regular court system (hereinafter referred to as the Continental type). In the end, the system that was established was chaired by the vice president and gave the Constitution Committee, consisting of five Supreme Court judges and five congressional members, the right to review the constitutionality of the law.

At this time, in the explanatory memorandum to the 1948 South Korean Constitutional Assembly, it was explained that the courts were empowered to request a review of the constitutionality of the law, and the authority to conduct such a review was given to the Constitution Committee, a special review body that was separate to the court, to take into consideration the balance between judicial and legislative powers.

A Constitutional Court system that is similar to the present system, was subsequently introduced in the Second Republic (1960 Constitution) that was established after the April Revolution (4.19 Democratic Revolution) overthrew the Syngman Rhee regime. However, the Second Republic collapsed before this system was realized, and in the Third Republic (1962 Constitution) during which Park Chung-hee held power, an American constitutional review system was implemented. During the Fourth Republic (1972 Constitution) and the Fifth Republic (1980 Constitution) a Continental constitution committee system was adopted. A system in which constitutional review was conducted by the Constitutional Court was realized for the first time under the current 1987 Constitution (the Sixth

Republic). While the Constitution Committee was stipulated under the 'Court' chapter in the previous Constitution, the present Constitution has a separate chapter 6 on 'Constitutional Court.' Based on the 1987 Constitution, the Constitutional Court Act was promulgated on 5 May 1988.

This description may suggest that Korea's constitutional review system has undergone a considerable transition. Still, except for the Third Republic, the nation has continued to adopt a Continental constitutional review system. Further, Korea's distinctive system for considering the constitutionality of laws separately from the constitutionality of orders, rules, and dispositions has been consistently followed since the establishment of the First Republic Constitution, including during the Third Republic.[2]

When the current Constitution of 1987 was established, there was a debate as to whether to give the power of constitutional review to the Supreme Court or to create a Constitutional Court. The reason why the German Constitutional Court system was chosen has not been clarified, but according to the compilation of the Constitutional Court, it was asserted that during the deliberations around the introduction of the Constitutional Appeal System, the German-type would guarantee the protection of human rights.[3]

Before 1987, the constitutional review system under dictatorships did not function. For this reason, even when the Constitutional Court came into being after the nation's democratization, there was little hope for it to function well. However, the Constitutional Court had gained the trust of the public over time as an organization that contributed to democratization by determining that laws established under dictatorship rule were unconstitutional.

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[2] According to the 1987 Constitution, article 107 provides that:

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

Furthermore, even in the third republic, which adopted the US-style constitutional review system, the constitution provides that the constitutional review of law is the separated from the review of orders, rules, and dispositions, as described in article 102 in the 1962 Constitution:

Article 102 When the constitutionality of a law is at issue in a trial, the Supreme Court shall have the power to make a final review of the constitutionality thereof.

(3) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

In Korea, the constitution committees of the 1st, 4th, and 5th republics are also limited in terms of their authority to conduct a concrete review of norms, and an abstract review of norms was not permitted.

[3] *The First Ten Years of the Korean Constitutional Court 1988-1998* (Constitutional Court of Korea., Seoul 2001), p.17.

III. Overview of the current Constitutional Court

1. Function

What are the current functions of the Constitutional Court?

Article 111 (1) of the Constitution defines five powers: 1. Adjudication on the constitutionality of statutes, 2. Adjudication on impeachment, 3. Adjudication on the dissolution of a political party, 4. Adjudication on competence disputes, 5. Constitutional complaint. The first of these powers is the equivalent of the German 'concrete review of norms'. There is no power to conduct an 'abstract review of norms', and the concrete review of norms can only be carried out against laws created by the National Assembly.

The absence of the power to conduct an abstract review of norms is thought to be in consideration of the legislative powers of the National Assembly under the separation of powers. On the other hand, the fact that the Constitutional Court can only conduct a concrete review of norms during a constitutional review of laws, and regular courts make decisions on orders and rules, constitutional review of laws is considered to be a different domain to that of ordinary judicial affairs. While distinguishing itself from ordinary judicial matters, when conducting a constitutional review of laws, the power of the Constitutional Court, which requires the existence of legal disputes to be subject to trial, can also be referred to as 'political judiciary.'

The validity of the Constitutional Court's decision is defined by the Constitutional Court Act as being broadly binding to all state agencies. For this reason, it can be said that the Constitutional Court recognizes that the Constitution has persuasive authority over all state institutions that extends beyond the separation of power. However, the members of the Constitutional Court are not directly chosen by the public. In this respect, the Constitutional Court has customarily created a judgment style that emphasizes the discretionary powers of the legislature in examining the laws created by the National Assembly, as representatives of the people. This judgment style is called 'modified decisions'. There are currently three forms of this style, which are described as follows[4]:

[4] Ibid, pp.87-93.

(1) Nonconformity to Constitution (nonconformity decision)

In several cases, the Constitutional Court stated that there is a general need for 'nonconformity decisions' because a simple choice between unconstitutionality and constitutionality prevents the Court from taking a flexible and resilient approach to a reasonable interpretation of the laws that regulate the complex social phenomena; it may cause the vacuum in or confusion about the law, destabilizing the legal system; and it can restrict the legislature's policy-making privilege. The Court made it clear that this nonconformity decision is simply a mutated form of the decision of unconstitutionality provided in Article 47 (1)[5] of the Constitutional Court Act; and, therefore, naturally has the binding force on all other state institutions.

This is not a simple declaration of nonconformity to the Constitution, but one that gives provisional legal effects to the unconstitutional statute until the legislature cures its defect in accordance with the Court's decision.

(2) Limited Constitutionality and Limited Unconstitutionality

The Constitutional Court issues a decision of limited constitutionality, using the expression '[the law] is not unconstitutional as interpreted,' and in the decision of limited unconstitutionality, using the form '[the law] is not constitutional as interpreted'. The Court explained that, although the statute in question had unconstitutional aspects, if it could also be interpreted in ways consistent with the Constitution, the Court could deliver "the decision of constitutionality/un-constitutionality as interpreted or applied" as could be naturally be derived from the doctrine of preference for constitutionality in statutory interpretation[6]. Specifically, in expressing his concurring opinion of this case, the first President Cho Kyu-kwang elaborated that if the text and the legislative intent of the statute have room for both the decisions of constitutionality and unconstitutionality, the Court must choose the preferred, constitutional version of the statutory interpretation. In doing so, the Court can use both 'unconstitutional as interpreted' and 'constitutional as interpreted' as proper forms. As the two forms are different only in expression but the same in essence and for all practical purposes, the choice between them is merely a

[5] Constitutional Court Act, Art.47 (1): Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments.

[6] CC 1989.7.21, 89 Hun-Ma38.

matter of choosing the appropriate means.

In any of these methods of decision making, the Constitutional Court may take the legislative power of the National Assembly into consideration, urge the legislature to reconsider, rather than invalidate laws enacted by the National Assembly, or interpret the content of the laws in a way that conforms to the Constitution. However, since these methods of decision making are not stipulated in the Constitutional Court Act, but rather are methods developed by the Constitutional Court itself, there is criticism that using such methods is, in itself, illegal.

2. The method for selecting Constitutional Court judges

Nine judges conduct a Constitutional Court trial. Under the Constitution, the President appoints nine judges. Among them, the National Assembly and the chief of the Supreme Court each nominate three members, taking into account the separation of power. However, among the three members nominated by the National Assembly, one is recommended by the ruling party, one by the opposition party, and one is by recommendation of the ruling and opposition party by consensual decision. Further, the Chief of the Supreme Court, who nominates three judges, is to be appointed by the President upon the consent of the National Assembly.[7] Given these constraints, it is said that presidential influence on the overall nomination process is substantial. In addition, although the term of a Constitutional Court judge is six-years, with the possibility of re-appointment, since most judges resign at the end of their six-year term, if the President of the same party were to continue for more than two terms (the term of the President is five years), the Constitutional Court might strongly reflect the influence of that party.

Currently, all candidate judges are to appear before a National Assembly hearing. This is important in terms of giving democratic legitimacy to their appointments. However, there is the problem that these hearings may be used as a political dispute tool, with actual cases where candidates have been subjected to harsh interrogation over their political position and consequently declined their nomination.

More recently, a political issue arose when President Moon Jae-in appointed two judges without waiting for a hearing report, which has led to the alarming speculation that the

[7] The 1987 Constitution, Article 104, Article 1

Constitutional Court will become nothing more than a subordinate agency of the executive office.[8]

IV. Constitutional Court decisions and political issues

Above, I have touched on the Constitutional Court's consideration of the legislative power of the National Assembly and political issues relating to the appointment of a judge. However, the authority of the Constitutional Court, as envisaged by the Korean Constitution, possesses a very close relationship with politics. For this reason, in recent years, problems such as the 'judicialization of politics' have become a topic of discussion. Below, we will look at some representative cases.

1. A case of dispute over authority

This case involves a dispute over authority raised by opposition lawmakers regarding the revision procedures for the Draft Law Relating to Media at the second plenary session of the 283rd National Assembly (extraordinary session) on 22 July 2009 under the Lee Myung-bak administration (Act on the Freedom of Newspapers, etc. and Guarantee of their Functions, the said partial revised Broadcasting Act and the proposed partial revisions to the Act on Internet Multimedia Broadcasting Business).[9] The outline of the case is as follows.

The government and the ruling party held that the integration of broadcasting and communications must improve broad and unbalanced regulations that do not conform to the rapidly changing media environment due to technological development and submitted a bill that would remove the clause that prohibited the concurrent operation of newspaper and broadcast businesses, and newspapers and large companies from holding terrestrial broadcast shares. In response, opposition parties, broadcasters, and labor unions strongly opposed this revision, arguing that it was intended to curb criticism of the administration by the broadcasters and aimed at the control of the broadcasters by the three major newspaper companies and large conglomerates close to the Lee Myung-bak administration. Their

[8] Chosun Online 2019/4/20 http://www.chosunonline.com/site/data/html_dir/2019/04/20/2019042080007.html [accession date: May 3, 2019]

[9] 21-2(B) KCCR 14, 2009 Hun-Ra8/9/10 (consolidated), October 29, 2009. English summary of the decision: http://search.ccourt.go.kr/xmlFile/0/010400/2009/pdf/e2009r8_1.pdf [accession date: March 31, 2020]

opposition resulted in fierce and ongoing trading of insults that escalated into a brawl. Finally, the Speaker of the National Assembly attempted to use his authority to table the Bill in the plenary session. Still, the opposition members blocked the entrance, preventing the Speaker from entering the plenary hall. The Speaker consequently delegated the proceedings to the Vice-Speaker. The Vice-Speaker used the authority of the Speaker and declared that Bill would be tabled at once, that the examination report and the Bill explanation, would replace the minutes and meeting materials, and that no questioning or debates would be held. The ballot was to be held electronically, and the result displayed on an electronic board. However, in the decision relating to the amendment of the broadcast law proposed by the ruling Grand National Party, after the Vice-Speaker declared the end of the ballot the following figures were recorded: National Assembly Members: 294 people, Members Present: 145 people, Members in Favor: 142 people, Members in Opposition: 0 people, Members Abstained: 3 people. In response to this outcome, the Vice Speaker referred the said Broadcasting Act to a revote, saying that "the bill proposed by Kang, Seung-kyu and other 168 assemblymen shall be voted again, [and] it will be revoted because of the failure of a vote due to the lack of presence quorum."[10] A second ballot was held, and on this occasion, the voting board showed 150 approval votes, zero opposite votes, and three abstention votes, out of an enrollment of 294 members and the presence of 153 members of the National Assembly.[11] In this way, the Bill was passed, as were several others.

On the other hand, concerning the series of procedures, opposition lawmakers filed a lawsuit in the Constitutional Court seeking confirmation of the invalidation of the law on the grounds that their right to ballot had been violated by the government for reasons including: the Speaker cannot authorize the tabling of an item; the proceedings carried out by the Vice-Speaker, which did not allow for explanations and debate, violated appropriate procedure; and the verdict of the draft amendments violated the principle of not deliberating the same measure twice.

In this case, the Constitutional Court did not recognize the invalidation of the promulgation of the draft law. Five out of nine judges recognized the illegality of the violation of the principle of not deliberating the same measure twice. Still, they did not

[10] Ibid, p. 354.

[11] Ibid,

reach the number necessary for determining unconstitutionality (six out of nine). In addition, although they acknowledged that the rights of the claimants to deliberate and vote had been violated, it was deemed that there was no problem with the act of declaring the promulgation itself, and the establishment of the law promulgated on this occasion was considered valid.

There has been an argument among the media and citizens, both supporting and opposing the decision. In particular, many commentators and intellectuals took the 'dual stance' of the Constitutional Court – where it found that the act was illegal, but not severe enough to invalidate the promulgation – as a significant problem and coined the term 'judicialization of politics'.

One of the by-products of the National Assembly's rivalry, which is represented by this case, is the National Assembly Advancement Act. The National Assembly Advancement Act is the general name for the National Assembly Act revisions that took place in 2012. Before this, the Speaker of the National Assembly designated the period for committee examination of items, and if this examination did not end within the set period, the Speaker had the authority to refer it to another committee immediately after the designated period or to submit it to the plenary session. However, due to the confrontation between the government and the opposition over matters including the proposed Budget, the US-ROK FTA and the case discussed above, the government used its authority to table the Bills, which in turn triggered a violent response. Consequently, in the May 2012 amendment of the National Assembly Act, the powers of the Speaker to exercise his or her 'official authority' to fast track the tabling of legislation were limited to: 1) the event of a natural disaster; 2) the event of war, incident or similar situation that triggers a national emergency; or 3) any other situation where the Speaker and the representatives of the factions agree (noting that even in the case of 1) or 2), consultation between the Speaker and the representatives of the factions is necessary). The amendment provided that in order to be designated as an 'expedited processing case', a motion by a majority and approval by three-fifths of National Assembly members would be required.

Similarly, introduced under the 'National Assembly Advancement Act' was an 'unlimited debate' (filibuster) system. This meant that the Speaker was required to permit an unlimited debate if a request form signed by one-third or more of the registered members was submitted for a matter assigned to the plenary session (however, the number

of statements allowed was only one per member). In order to conclude an unlimited debate by decision required the submission of a closing motion by more than one-third of the registered members and a vote by secret ballot 24 hours after submission of the closing motion. The secret ballot required the approval by more than three-fifths of registered members.

This revision was a pledge by the ruling Saenuri Party during its election campaign, and it was made with the agreement of the ruling and opposition parties. The result, however, was the creation of a situation in which deliberation within the National Assembly stalled, and it became challenging to re-amend the National Assembly Act itself. Consequently, the view arose that this issue could not be resolved by anything other than the Constitutional Court.[12] Under such circumstances, on 30 January 2015, 19 members of the *Saenuri* Party claimed that "the provisions of the National Assembly Act violated the deliberation and voting rights of the National Assembly members" and filed for a Constitutional Court trial against the Speaker of the National Assembly and the chairman of the Planning and Finance Committee over a dispute of authority. However, for reasons including the exceeding of the prosecution period, the case was dismissed.[13]

2. The case of party dissolution

The Korean Constitution contains a provision for the dissolution of a political party, stating that "if the purposes or activities of a political party are contrary to the democratic basic order, the Government may bring an action for its dissolution in the Constitutional Court, and the political party may be dissolved by decision of the Constitutional Court".[14] There is controversy within Korea regarding the understanding of this clause. While there is a view that it is the influence of the German *Streitbare Demokratie* (Fortified Democracy), there is also a view that the Constitutional Court conducts a review to prevent the government from arbitrarily disbanding political parties, as had happened under past

[12] See for example: Chosun Ilbo Online Edition chosun.com 31 October 2015 Editorial, the Constitutional Court, the National Assembly Advancement Act, and the Constitutional Appeal Decision – what can we gauge from this? http://news.chosun.com/site/data/html_dir/2015/10/29/2015102904826.html?Dep0=twitter&d=2015102904826 [accession date: March 30, 2020]

[13] 2015 Hun-Ra1, May 26, 2016. English summary of the decision:

http://search.ccourt.go.kr/xmlFile/0/010400/2016/pdf/e2015r1_1.pdf. [accession date: March 30, 2020]

[14] The 1987 Constitution, Article 8, Paragraph 4.

dictatorships. Under the 1987 Constitution, there had been no case of party dissolution until 2014, when the Unified Progressive Party was dissolved by the Constitutional Court, a decision that attracted significant attention[15]. The direct cause of the case was that during an emergency, the National Assembly members of the Unified Progressive Party had conspired with North Korea to destroy state-owned facilities in South Korea. Members of the party were arrested and prosecuted for the crimes of plotting insurgency and civil unrest, and violations of the National Security Act. In this case, it became a question of whether the activities of their group could be viewed as the activities of the Unified Progressive Party itself. The Constitutional Court found that three members of the National Assembly were present at a secret meeting and that many other attendees were leading members of the Party.

Further, one member in a key position within the Unified Progressive Party actively advocated their assertations of innocence. However, based on the fact that the participants at the meeting were nominated as candidates for public office, the Constitutional Court concluded that the sabotage plot was indeed the activity of the Unified Progress Party. Furthermore, the concept of 'progressive democracy,' which was contained within the mission statement of the Unified Progress Party, was regarded as contrary to the fundamental democratic order, as it was considered an idea of a socialist state based on a class-like world view that denied national sovereignty. The Unified Progress Party was subsequently dissolved by the decision of the Constitutional Court, a decision that also disqualified five National Assembly members from the legislature (including regional representatives).

Following this Constitutional Court decision, these National Assembly members were found guilty by the Supreme Court under the criminal code for violation of the National Security Act. However, the charge associated with the crime of plotting insurgency was not recognized.[16] Consequently, many voiced doubt about the decision of the Constitutional Court, and despite no clear stipulation regarding the divestment of office for the National Assembly members, the Party was dissolved, and the National Assembly qualifications were revoked from five members, including those who were district elected members, acts

[15] 2013 Hun-Da1, Dec.19, 2014. English translation of the decision: http://search.ccourt.go.kr/xmlFile/0/010400/2014//pdf/e2013d1_2.pdf. [accession date: March 30, 2020]

[16] The Supreme Court Verdict, Jan. 2, 2015, 2014. do 10978

which drew criticism.

3. Impeachment

"The President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act" may be subject to impeachment.[17] There have been two cases in which the Constitutional Court examined impeachment under the 1987 Constitution. The cases of President Roh Moo-hyun in 2004 and President Park Geun-hye in 2017 are the two examples of impeachment targeting the nation's president.

(1) The case of President Roh Moo-hyun[18]

The main reasons for the impeachment of President Roh Moo-hyun were the facts that the president had acted in favor of his political party before the National Assembly election, and that he made remarks to disrespect the constitutional institutions, which amounted to a breach of the order of the national laws. Articl 9 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter 'The Public Officials Election Act') at that time provided that

> A public official or a person who is required to maintain political neutrality (including an agency or organization) shall not exercise any unreasonable influence over the election or perform any act likely to have an effect on the election.

At a press conference before the National Assembly elections, President Roh Moo-hyun made multiple statements indicating that he supported the ruling party at the time, 'The Yeollin Uri Party', including: "I expect that the people overwhelmingly support the Uri Party", and "I would like to do anything that is legal if it may lead to the votes for the Uri Party"[19], which were deemed to have violated the Public Officials Election Act. Also, the President expressed regret over the decisions of the National Election Commission (which

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[17] The 1987 Constitution, Article 65.

[18] 16-1 KCCR 609, 2004 Hun-Na1, May 14, 2004. English translation of the decision: http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=12077&eventNo=2004%ED%97%8C%EB%82%981&pubFlag=0&cId=010400 [accession date:2020/3/30]

[19] Ibid. p161.

is a constitutionally stipulated body) that required the compliance of electoral neutrality obligations to such presidential speeches, and he further denigrated the current election law as the 'vestige of the era of the government-power-interfered elections.'[20] These comments were considered to have violated Article 40 of the Constitution, which provides that legislative power shall be vested in the National Assembly, and Articles 66 and 69, which stipulate the President's obligation to comply with the Constitution.

In this decision, the criteria for the president's impeachment trial were explicitly stated. That is, "a decision to remove the President from office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people."[21] As mentioned above, this decision for impeachment, which was the first impeachment case, cites the essence of the impeachment and gives a reasonably detailed explanation for determining the adjudication. Concerning impeachment, the purpose and the function of the impeachment process are to reinforce "the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties."[22] In particular, the fact that a president, who is directly elected by the people, can also be subject to the preservation of the Constitution demonstrated that even the "political chaos that may be caused by a decision to remove the President from office should be deemed as an inevitable cost of democracy in order for the national community to protect the basic order of free democracy."[23]

In this decision, the Constitutional Court acknowledged that the law had been violated. However, it was considered that the question of whether there was a 'grave violation of law' or whether the 'dismissal was justifiable' should be determined through balancing the degree of the negative impact on or the harm to the constitutional order caused by the violation of law and the effect to be caused by the removal of the respondent from office. In this case, it was not considered a 'grave' violation of law sufficient to justify the removal of a public official from office, and the President was therefore not dismissed.

[20] Ibid. p173.

[21] Ibid. p.182.

[22] Ibid. p.159.

[23] Ibid.

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(2) The impeachment of President Park Geun-hye[25]

In this case, which became worldwide news, the President was accused of having leaked official secrets to friends and allowed them to intervene in government affairs and the hiring of staff. It was further alleged that they also benefitted financially from the business world.

Here, although many unconstitutional and illegal acts were explicitly indicated, the main reason for dismissal is cited as having betrayed the people's trust through these acts. Three contributing reasons are cited for this betrayal of confidence: that the violation of the law was grave, that Park violated the President's obligation to serve the public interest, and that Park's will to safeguard the Constitution was not recognized.

Following a close examination, in this case, all eight judges (of the nine, the chief judge resigned during the trial) unanimously decided to remove the President, concluding that;

> …the respondent's acts of violating the Constitution and law are a betrayal of the people's confidence, and should be deemed grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office overwhelmingly outweigh the national loss that would be incurred by the removal of the President.[26]

(3) Public confidence as a basis for determining impeachment

In the case of President Roh Moo-hyun, the Constitutional Court presents 'the balance between "the seriousness of the violation of the law" and "the effect of a dismissal decision"' as the standard for dismissing the President. The latter is considered to be tied to "direct democratic legitimacy" and "the public interest in continuity of performance of

[24] Ibid. p.180.

[25] 2016 Hun-Na1. English translation of the decision: http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=48728&eventNo=2016%ED%97%8C%EB%82%981&pubFlag=0&cId=010400

[26] Ibid. p.63.

presidential duties".[27] This standard has also been followed in the case of President Park Geun-hye. However, it should be noted here that the relationship between the president and the people in the two cases was very different. In the case of President Roh Moo-hyun, many of the people were sympathetic to him. The effect of a dismissal decision for a president who possesses both a serious violation of thelaw and direct democratic legitimacy is, for the people who support the president, a symmetrical argument that can be considered reliable. However, the people's stance towards the case of President Park Geun-hye was different. It was a situation in which the majority of people wished the president to step down before impeachment proceedings had commenced. It is said that under the current Constitution, in which the incumbent president is not allowed to resign directly, impeachment is the only possible means for removing a president. Under these circumstances, it can be said that the above two concepts did not become counterbalancing forces for President Park Geun-hye, as had been the case for President Roh Moo-hyun.

In this aspect, looking once again at the Constitutional Court in the Roh Moo-hyun case, one may question whether the seriousness of the violation of the law and the effect of a dismissal decision always, in fact, stand in opposing positions in terms of balance. The Constitutional Court stated that;

> … A grave violation of the law from the viewpoint of protection of the Constitution [is]… an act that threatens the basic order of free democracy that is an affirmative act against the fundamental principles constituting the principles of the rule of law and a democratic state, [and that] 'act of betrayal of the public's trust' is inclusive of other patterns of the act than a 'violation of law significant from the standpoint of protection of the Constitution.'[28]

Of the above two points, the issue of 'the public's trust,' that is, 'direct democratic legitimacy,' relates to the effect of a dismissal decision. However, considering that an 'act of betrayal of the public's trust' is deemed to be an extension of 'an act that threatens the basic order of free democracy', what can be the final standard for dismissal is whether or not there was a 'betrayal of the public's trust'. Of course, this must be premised on the existence of a violation of the Constitution or other acts as defined in Article 65 (1) of the Constitution. In this sense, it may be fair to say that impeachment is not a political

[27] Supra. Footnote 18, p.181.

[28] Ibid. p.181-182.

responsibility but a legal responsibility. However, as the final deciding criterion, 'betrayal of the public's trust' is a highly political issue, determining whether or not to dismiss is intertwined with an element of political judgment.

V. Conclusion

The Constitutional Court is considered to be, in principle, within the domain of the judiciary as one wing of the separation of powers in Korea. However, as political issues are regularly brought to the Constitutional Court, a phenomenon called 'judicialization of politics' has occurred. This kind of problem is not only emerging in Korea but also in many countries with constitutional courts. Particularly in the case of the Korean Constitutional Court, which possesses the powers of party dissolution and impeachment, confronting political issues is what was originally intended under the Constitution, and therefore 'judicialization of politics' can perhaps be considered a natural consequence.

The role of the Constitutional Court is primarily to defend constitutionalism. However, democracy is included in the basic principles of the Constitution. What can be seen from the party dissolution and impeachment cases is a system in which the Constitutional Court – the Guardian of the Constitution – must set foot into the substance of democracy.

Why has such strong Constitutional Court authority been maintained? This is due to the existence of public trust in the Constitutional Court. In the democratized Korea, the Constitutional Court has maintained its status as the 'most trusted state organ in Korea'. The judicialization of politics may be viewed as being highly trusted by the political sector also. However, the judicialization of politics also leads to the politicization of the judiciary, and there is a risk that trust in the neutrality of the Constitutional Court will be lost. This risk, in conjunction with the demand for the democratic legitimacy of the appointment of judges, is an important issue.

In a country with a constitutional democracy, the extent to which institutions other than the political sector can answer the central question 'what the democracy envisaged by the Constitution is' is a fundamental issue to be considered within the context of the relationship between democracy and the Constitutional Court.

【Special Features：The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

Adoption of the Constitutional Council towards the Rule of Law State and Democratization in Vietnam

PHAN Thi Lan Huong*

Abstract

Since the introduction of the *Doi Moi* in 1986 for transferring from centrally-planned economy to the open market with socialist orientation, Vietnam has made a significant effort in building comprehensive legal framework to promote socio-economic development as well as moving towards rule of law state and democratic society. However, the low quality of the current legal system presents a key obstacle to Vietnam's achievement of its development targets. The Vietnamese legal system faces many problems such as statutory contradictions and inconsistency which raise serious challenges in implementing legislative reforms. Under the current system, only the National Assembly holds the power to review the constitutionality of acts issued by the competent agencies. The Supreme Court can only recommend to competent agencies to review laws and regulations in the course of administrative case settlements. The Ministry of Justice holds the authority to review regulations issued by other state authorities of ministerial and lower level. For example, there were 5639 illegal documents issued by ministerial agencies and local governments at provincial level in 2017 as reported by the Ministry of Justice. There still remains no mechanism allowing individuals or organizations to request for constitutional review when legal documents are unconstitutional or illegal and violating individual rights. During the process of drafting the Constitution 2013, legislative members and researchers in Vietnam raised concerns about adopting the Constitutional Council as a specialized model for constitutional review; however, the Constitutional Council has not been established yet under the 2013 Constitution of Vietnam. Consequently, human rights cannot be protected effectively due to the lack of an adequate and specialized institution for constitutional review. The question remains: does Vietnam need to establish the Constitutional Council as a critical instrument of rule of law and democracy? Studying foreign experience in creating specialized institutions for constitutional review is essential for Vietnam. This paper will examine current issues of constitutional review for human rights protection

* Lecturer, Hanoi Law University.

and the need for establishing the Constitutional Council in order to implement the rule of law and create a truly democratic society in Vietnam.

Contents

I. Introduction

Since the establishment of the Democratic Republic of Vietnam in 1945, it has promulgated several constitutions including the 1946, 1959, 1980, 1992 and 2013 constitutions. The 1946 and 1959 constitutions were promulgated during the period of Resistance War Against America. After unification in 1975 and establishing the socialist state, Vietnam enacted the 1980 Constitution which introduced a mono-party system based on democratic centralism, centrally-planned economy and socialist legality principle. Notably, most of the concepts, including laws appeared as the Soviet transplants. Since the *Doi Moi* reforms in 1986, which is a Vietnamese prototype of the Soviet *perestroika*, the 1992 Constitution introduced free market economy with socialist orientation. The 1992 Constitution was amended in 2001 and 2013. The most significant constitutional challenges appeared in 2013. Particularly, a possibility to establish the Constitutional Council came out as the issue that most sparked an interest of domestic and international scholars.

In general, development of constitutionalism in Vietnam can be divided into three periods: constitution under the French and American war periods, including 1946 and 1954 constitutions; post-unification constitutionalism (1980 Constitution); and constitutionalism under transformation period from central-planned economy to opened market with socialist orientation (1992 Constitution). This article will explore the development of

constitutionalism in post-unification of Vietnam as a representative of the modern and fundamental legal ideologies of contemporary Vietnam.

The 1980 Constitution drew upon the constitution of the former Soviet Union since Vietnam heavily relied on the support of the Soviet Union during the American war and after its unification in 1975. During and after the American war, a number of Vietnamese scholars went to the former Soviet Union to study law; and their legal ideologies were almost certainly influenced by socialist law. Consequently, legal system of Vietnam generally followed the legal ideology of the socialist country. In other words, the legal system of Vietnam had features of socialist law transplanted from the former Soviet Union.[1] The 1980 Constitution adopted the Soviet political ideology through three principles including: socialist-legality, democratic-centralism, and the collective-mastery.[2] The central government played a dominant role in decision making while local governments functioned as subordinate organs of the central government. The central government made important decisions related to economic development through a system of state-owned enterprises (SOEs). "Vietnam used to be a closed socialist country with a command economy".[3]

Due to the collapse of the former Soviet Union, the Communist Party had to find a new strategic development for Vietnam by introducing Doi Moi Policy (Renovation policy). Doi Moi was a turning point for reforming political policy and legal system of Vietnam. Vietnam needs to reform its legal system to respond to the changes in the country's economic development. Consequently, the 1992 Constitution replaced the 1980 Constitution with a renewed focus on socialist oriented open market economy.

"The 1992 constitution represents a step forward in Vietnam's constitutional history, it is aimed at strengthening state management of society through the rule of law, building

[1] Ngoc Son Bui, "Law of China and Vietnam in Comparative Law," *Forham International Law Journal* 41, no. 1, accessed May 6, 2019, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2688&context=ilj.

[2] Hualing Fu et al., *Socialist Law in Socialist East Asia* (Cambridge University Press, 2018), 16.

[3] Gail Fay, *Economies Around the World* (Raintree, 2012), 30.

socialist democracy and enhancing socialist legality, so that the superstructure can well enhance its role in paving the way and accelerating socio-economic development."[4]

Notably, during the time of amendment of the 1980 Constitution, there was strong advocacy for the separation of powers model which upheld the principle of separation of powers and checks and balances principles for organization and operation of state bodies and was popular in other countries; however, the Communist Party and central government resolved to follow the democratic-centralism.

Vietnam has entered into transactional period from central planned economy to the open market economy under socialist-oriented market economy since 1986. By doing so, Vietnam has developed a legal system reflective of various aspects of its society.[5] For example, regarding economic aspects, collective ownership has played a dominant role in economic development. However, an open market economy requires the recognition of business freedom and private ownership. Together with state owned enterprises, the private sector and foreign investment are guaranteed by the 1992 Constitution. For example, the 1992 Constitution, Article 25 confirms the full protection of foreign investment through guaranteeing the right to lawful ownership of funds, property and other interests of foreign organizations and individuals.

However, institutional regulations only contained some minor changes under the 1992 Constitution. The main features of the socialist legal model have remained. One was the democratic-centralism principle for organization and operation of state bodies. For example, the National Assembly (legislative organ) is the highest organ of state power while the executive and judicial branches depend on the National Assembly as the subordinate organs.[6] Vietnam does not have principles of separation of powers and checks and balances.

Vietnam has gained positive result in economic development since promulgation of the 1992 Constitution. However, there remained a need to amend the 1992 Constitution to better

[4] David. G Marr et al., *Vietnam and the Rule of Law: Proceedings of Vietnam Update Conference, November 1992* (Canberra: Australian National University, 1993), 91, http://catalog.hathitrust.org/api/volumes/oclc/29968358.html.

[5] Bui, "Law of China and Vietnam in Comparative Law," 159.

[6] Marr et al., *Vietnam and the Rule of Law*, 52.

adapt to the standards of globalization and integration. Vietnam revised the 1992 Constitution in 2001. Significantly, the amended Article 2of the Constitution in 2001 defined that "the Socialist Republic of Vietnam State is a law-governed socialist State of the people, by the people and for the people". Hence, rule-by-law state principle requires to develop comprehensive legal system to respond to the needs of managing the country by laws. Within four years from 1986 to 1990, the National Assembly passed 24 laws and 33 Decrees issued by the State Council.[7] Notably, there is different interpretation of the term law-governed socialist State (*Nhà nước pháp quyền xã hội chủ nghĩa)* such as the rule of law or rule by law state. However, in the Vietnam's context, rule of laws is explained as pollical party using laws as instruments of political control; therefore Vietnam lacks inherent qualities of rule of law state.[8] Vietnam also amended the 1992 Constitution in 2013; those amendments focused on the distribution of functions among the legislative, executive and judicial branches under Article 2 (3) as follows: "The state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers." According to this article, Vietnam maintains the concentration of power principle in which executive and judicial branches are independent organs and under the control of the National Assembly. Significantly, new concepts were introduced in the 2013 Constitution such as control [of] one another in exercise of the legislative, executive and judicial powers and human rights are considered as a step to reach the rule of law standards. However, the legal system of Vietnam still contains several issues such as inconsistency, or fragmentation due to many state agencies holding law-making powers. Decrees or circulars issued by executive organs have played a dominant role in the legal system. In other words, substantive laws cannot be enforced without guidelines issued by the executive organs. However, Vietnam lacks an independent mechanism for constitutional review.

Notably, judicial review and constitutional review remain controversial issues in Vietnam which must be studied continuously by Vietnamese scholars and law-makers.

[7] Marr et al., 7.

[8] Bui, "Law of China and Vietnam in Comparative Law."

Hence, the question remains as to whether Vietnam needs to establish the Constitutional Council as one element of rule of law state.

II. Current mechanism of constitutional review in Vietnam

To some extent, there is a need to distinguish the differences between judicial review and constitutional review in the context of Vietnam. In general, judicial review differs from country to country depending on a state's political system. The judicial review refers to the control of constitutionality of legislation promulgated by the Parliament. There are two popular models of constitutional review applied around the world: the model applied by the US and the model applied by European countries.[9] In America, constitutional judicial review refers to the power of the court to reviewing both public and private conduct in consistence with the constitution.[10] All courts hold constitutional judicial review powers while the Supreme Court makes final decision whether any provision is inconsistent with the federal constitution. In comparison, the European model of constitutional judicial review is a specialized Constitutional Court. The Constitutional Court is an independent institution which holds power to review constitutionality of legal norms.[11] In France, constitutional review is under jurisdiction of the Constitutional Council. The Constitutional Council reviews the institutional laws before promulgation, or at the request of a competent person, such as the President of Republic.[12] Constitutional review can also be conducted by different state organs. For each model of judicial review, jurisdiction of the reviewing agency differs as follows:

[9] Albert H. Y. Chen, Hongyi Chen, and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press, 2018), 2.

[10] Theunis Roux, *The Politico-Legal Dynamics of Judicia Review: A Comparative Analysis* (Cambridge University Press, 2018), 15.

[11] Chen, Chen, and Harding, *Constitutional Courts in Asia*, 3.

[12] Constitution of France, Article 61, https://www.constituteproject.org/constitution/France_2008.pdf?lang=en accessed on May 5, 2019.

> "Whereas the Austrian model only provided for limited jurisdiction of certain disputes, the German model introduced the device of the constitutional complaint, in which any individual could complain about the constitutionality of a statute or government action, even without a specific case or controversy."[13]

Unlike US and France, Vietnam has not yet established an independent model such as the Constitutional Court/Council or the principle of constitutional judicial review. The democratic-centralism principle ensures the concentration of state power. The National Assembly is the highest organ of state; therefore, there is no institution that has control over the National Assembly. Under the 1992 Constitution as well as the amended Constitution of 2013, only the National Assembly and its Standing Committee hold the power to review the constitutionality and legality of the legal documents including laws, ordinances, decrees, and circulars issued by competent agencies. Notably, legality requires the conformance of legal documents issued by different agencies. Under democratic centralism principle, Vietnam's legal system is a hierarchy requiring legal documents issued by lower agencies to correspond to legal documents issued by higher system which requires the legal documents issued by the lower competent agencies to conform with the legal documents issued by the higher state organs. For example, a Ministry's circular must comply with a Government's decree as ministry is under the control of Central Government.[14] In other words, the top down model of administrative system creates the hierarchy of legal system.

In brief, Vietnam does not have an independent mechanism for judicial review or constitutional review. The National Assembly, as the highest state organ, holds powers to enact Constitution and Laws as well as to review constitutionality of these documents. The National Assembly holds the power to review the constitutionality and legality of legal documents issued by the organs at central level including Standing Committee of the National Assembly, Government, Supreme People's Court, Supreme People's Procuracy,

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[13] Tom Ginsburg & Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" *University of Chicago Law School*, 2013, 6, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5621&context=journal_articles.

[14] Bui, "Law of China and Vietnam in Comparative Law," 160.

National Election Council, State Audit Office, and other agencies established by the National Assembly;[15] The Standing Committee of National Assembly also holds power to supervise the implementation and to suspend the implementation of the legal documents issued by the competent organs at the Central and Provincial level in case of contradict to the Constitution and Laws enacted by National Assembly.[16]

When a law or legal document is determined to be unconstitutional, only the National Assembly can annul such a law or legal document based on the proposal of the Standing Committee of the National Assembly. In addition, the Standing Committee has authority to suspend or annul the legal documents issued by the executive branch. Significantly, the court only reviews constitutionality and legality of legal documents issued by executive organs when dealing with administrative disputes. For example, during process of handling an administrative case, if a court finds that the legal ground for making administrative decision is illegal or unconstitutional, then the court only can recommend to the competent agency to examine, amend or suspend those legal documents.[17] For example, Article 6 of the Law on Administrative Court Proceeding provides that: during the time of settlement of an administrative case, the court may recommend competent agencies and individuals to examine, amend, supplement or annul legal documents when detecting that such documents are contrary to the Constitution, laws or legal documents of superior state agencies.[18]

The Supreme People's Court does not exercise constitutional judicial review power as seen in the America model. In 1996, Vietnam established the administrative tribunal under the People's Court system, which reviews the legality of the administrative decisions or actions which are unlawful and violate the rights/legitimate interests of citizens.[19] In this context, judicial review is quite narrow concept in comparison with other countries such as the US and Japan. The court only reviews the legality of decisions or actions of the executive

[15] National Assembly, Constitution of Vietnam, dated 28, November 2013, Article 70 (2).

[16] National Assembly, Constitution of Vietnam, dated 28 November 2013, Article 74 (3&4).

[17] National Assembly, Law on Administrative Lawsuit, Article 6.

[18] National Assembly, Law on Administrative Lawsuit, No.95/2015/QH13, Article 6.

[19] Nguyen Van Quang, "Grounds for Judicial Review of Administrative Action: An Analysis of Vietnam Administrative Law," Discussion Paper, Cale Discussion Paper (Nagoya Universi ty Center for Asian Legal Exchange, 2010), 9.

organs. Hence, individual citizens have no access to an institution where they can request constitutional. The judicial branch only holds power to recommend amendment, or annulment of legal documents in the course of settlement of the administrative cases. For example, Chief justices of district-level courts can only recommend amendment, supplementation or annulment of legal documents of state agencies at the district level or lower level or report to chief justices of provincial-level courts for proposing the Chief Justice of the Supreme People's Court to recommend amendment, supplementation or annulment of legal documents of central state agencies.[20]

Notably, the Law on Administrative Lawsuits 2015 created a new jurisdiction of the People's Court at all levels in reviewing legal documents; however, the People's Court is only authorized to recommend amendments or annulments of illegal or unconstitutional legal documents to competent agencies. Hence, the jurisdiction of the court in constitutional review remains limited because it does not hold power to judge the legal document's constitutionality and legality. For example, when Da Nang People's Council issued Resolution No.23/2011, which limited the rights of citizens in resident registration, the people living in Da Nang province could not declare the decision unconstitutional as it was not under jurisdiction of the Provincial People's Court of Da Nang City. Nevertheless, this resolution was ultimately determined to be unconstitutional by Ministry of Justice.[21]

Vietnam's Ministry of Justice is authorized to review legal documents including law, decree, circular and decisions issued by the competent agencies as prescribed by the Law on Promulgation of legal documents (Law on laws, 2015). In reviewing process, Ministry of Justice in cooperation with relevant Ministries such as Ministry of Finance, Ministry of Home Affairs to check the necessity of legal document, its consistency with Constitution, Laws and related documents before submitting to competent organs for enactment.[22]

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[20] National Assembly, Law on Administrative Procedure (on settlement of administrative lawsuit), No.93/2013/QH13, dated 25 November 2015, Article 112.

[21] NLD.COM.VN, "Đà Nẵng hạn chế nhập cư là trái luật," https://nld.com.vn, March 1, 2012, https://nld.com.vn/20120229112858818p0c1002/da-nang-han-che-nhap-cu-la-trai-luat.htm. accessed 8 May 2019. (Strict citizen's registration of Danang is illegal).

[22] National Assembly, Law on Promulgation of Legal Document, No.80/2015/QH13, dated 22, June 2015, Article 39.

Although Vietnam has not yet adopted the independent model of constitutional review, it has carried out constitutional review through its own distinct mechanism.[23] The constitutional review is conducted during the drafting of legal documents and also after promulgation by three organs including: Ministry of Justice (executive branch of the Central Government); the Supreme People's Court (judicial branch); and the Standing Committee of the National Assembly (legislative branch). For example, in 2017, the legal documents reviewed by the Ministry of Justice included 5639 illegal documents resulting from violation of jurisdictions, procedures, or general confliction with other laws;[24] Still, this distinctive mechanism is considered ineffective and inefficient.

It is undeniable that judicial review and constitutional review play important role in promoting democratic values and controlling state powers. Although Vietnam aims to build a rule of law state and a democratic society, it still lacks an independent mechanism for implementing constitutional review. Rule of law is closely related to human rights and democracy, and the quality of rule of law depends on the economic and political conditions of a country. Democratization is a process which requires a country to adopt rule of law standards. However, the standards of rule of law are consistent with divergent of economic systems.[25] Vietnam is struggling to develop a comprehensive, consistent legal system. As a result, the adoption of Constitutional Council for constitutional review has remained as a controversial issue in process of amending Constitution since 1992.

III. Vietnam's approach to the adoption of a Constitutional Council

Notably, it is essential to have a specialized institution for reviewing constitutionality and legality of the legal documents. However, Vietnam has not yet focused on constitutional review at the time of amendment of the 1980 Constitution. Adopting a Constitutional

[23] "Cần Hay Không Hội Đồng Hiến Pháp?" accessed April 21, 2019, http://duthaoonline.quochoi.vn/DuThao/Lists/TT_TINLAPPHAP/View_Detail.aspx?ItemID=1009.

[24] VCCorp.vn, "Hơn 5.600 văn bản trái pháp luật được ban hành trong 2017," VnEconomy, August 9, 2018, http://vneconomy.vn/news-20180809065123316.htm.

[25] Randall P. Peerenboom, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Psychology Press, 2004).xviii.

Council first appeared as a debate in the process of amending the 1992 constitution in 2001, and again in 2013. The type of constitutional review model that is most suitable for Vietnam remains at the center of the debate among politicians, legislators, and legal scholars. In his discussion on possible establishment a Constitutional Court in Vietnam, Vu Van Cuong argued that a law passed by the National Assembly must comply with Constitution and other Laws, because there is no official institution with jurisdiction over the legislation's legality. However, there is a possibility of a law which is unconstitutional.[26] He further argued that Vietnam cannot establish a Constitutional Court, as it is simultaneously bound by two principles that are not always interrelated: (1) the Constitution as the supreme body of law and (2) the National Assembly as the highest organ of state. Therefore, adoption of constitutional council is a possible solution for Vietnam.[27]

Constitutional review is a topic of both legal and political concern. In 2005, the Resolution No.48-NQ/TW of the Politburo on the Strategy to Build and Perfect Vietnam's legal system by 2010 with orientation to 2020 raised the issue of renewing the constitutional regime. A Constitutional Council was included in the draft amendment to the 1992 Constitution and has been actively discussed by lawmakers and legal professionals. The majority of Vietnamese scholars agree that there is no possibility of adoption of Constitutional Court or constitutional judicial review by the Supreme Court like other countries which have the separation of powers and check and balances principles. However, Vietnam has also introduced the distribution of functions including legislative, executive, and judicial functions. In principle, the National Assembly is the highest legislative organ, and the government (executive branch), and Supreme Court (judicial branch) are under the control of the National Assembly. No institution has the power to review laws enacted by the National Assembly, as it is defined as the highest state organ. Hence, there is no independent institution which can pass judgement on the National Assembly, making a Constitutional Council a suitable option for Vietnam. A Constitutional Council model should

[26] "Cần Hay Không Hội Đồng Hiến Pháp?"

[27] "Cần Hay Không Hội Đồng Hiến Pháp?"

conform with the political conditions of Vietnam, as well as follow democratic-centralism principle. Consequently, the Constitutional Council was adopted in the draft version of the amendment 1992 Constitution in 2013.[28]

During the process of collecting public comments on the amended draft, it became clear that establishing a Constitutional Council was a highly contentious issue. In the draft for public comments, Article 120 defines the Constitutional Council as an agency established by the National Assembly, consisting of the President, Vice President and Members. The Constitutional Council shall have power to examines the constitutionality of legal documents and to propose to the National Assembly to review constitutionality and legality of legal documents.[29]

According to this article, the Constitutional Council would only hold the power to examine the constitutionality of legal documents issued by competent agencies at the central level. Therefore, Constitutional Council does not have jurisdiction to annul legislation because it holds a lower position than the National Assembly. In other words, there remains no institution with jurisdiction to annul laws promulgated by the National Assembly. Unlike other countries' models, such as France, the term of Constitutional Council members is not prescribed by the Constitution. Under the French Constitution, the members serve a term of nine years with three members to be appointed by the President of Republic, three by the President of the National Assembly, and three by the President of the Senate.[30] The draft includes only a general article on Constitutional Council, therefore there were comments stating that the draft should include provisions on the terms of the members and subject to request for constitutional review.[31]

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[28]Bui Ngoc Son, "Tạp Chí Cộng Sản - Triển Vọng Của Hội Đồng Hiến Pháp ở Việt Nam," accessed April 21, 2019, http://www.tapchicongsan.org.vn/Home/du-thao-sua-doi-nam-1992/2013/23845/Trien-vong-cua-Hoi-dong-Hien-phap-o-Viet-Nam.aspx.

[29] "Dự Thảo Hiến Pháp Sửa Đổi Năm 2013," accessed April 21, 2019, http://chinhphu.vn/portal/page/portal/chinhphu/congdan/DuThaoVanBan?_piref135_27935_135_27927_27927.mode=detail&_piref135_27935_135_27927_27927.id=748.

[30] Constitution of France, Article 56.

[31] Bui Ngoc Son, "Tạp Chí Cộng Sản - Triển Vọng Của Hội Đồng Hiến Pháp ở Việt Nam."

Vietnam demonstrates the needs for adopting Constitutional Council as a new model for implementing constitutional review. However, the amended 2013 Constitution draft did not include any provisions on the Constitution Council. In the course of legal reform, Vietnam made effort to develop a comprehensive legal system for responding to the rule of law principle and democratization.

The current constitutional review mechanism reveals many problems. First, the Ministry of Justice lacks the capacity to review all legal documents issued by the central government and provincial level organs. Second, the People's Supreme Court only reviews legal documents within the settlement of an administrative case. Even so, the number of laws and legal documents issued by state agencies has increased, especially those decisions issued by the State President, Prime Minister, Minister and the head of the local governments. In addition, thousands of regulations are issued by the local governments and this significantly complicates the operation of Vietnam's legal system.[32] Consequently, Vietnam's legal system is described as a "jungle of law"[33] because there are many competent agencies that hold the power to enact substantive laws (decrees and circulars) without any effective mechanism for constitutional review or judicial review. In addition, there is a significant need for providing guidelines for the implementation of laws enacted by legislative organs. In other words, the laws cannot be implemented without guidelines issued by executive organs such as government and ministries. In reality, administrative regulations provide various conditions and administrative procedures which may limit the rights of citizens.[34] However, there is no effective mechanism for reviewing these legal documents. Consequently, legal reform has not yet met standards of rule of law state; therefore, the Central Politburo issued the Conclusion No.01-KL/TW dated 04 April 2016 on the Continuous implementation of the Legal reform strategy for 2016-2020 period. Hence,

[32] Bui, "Law of China and Vietnam in Comparative Law," 162.

[33] "Reforming How Laws Are Made in Vietnam," accessed February 27, 2020, https://www.cba.org/Sections/International-Initiatives/News/2014/Decembre/Reforming-how-laws-are-made-in-Vietnam.

[34] Bui, "Law of China and Vietnam in Comparative Law," 165.

Vietnam still needs to develop a model for reviewing the legality and constitutionality of legal documents as one of condition of a rule of law state.

VI. Conclusion

Socialist Asian countries such as China, Laos, and Vietnam face challenges in democratization. Supervising and guaranteeing effective implementation of constitution is crucial factors in building a rule of law state and a democratic society. "As more countries have democratized since the 1980s, more constitutional courts have been established around the world."[35] Adoption of a constitutional review model is a key factor in ensuring the constitutionality and legality of modern state's legislation. Constitutional Court or Constitutional Council contributes to legal reform and democratic development. Significantly, reviewing legislation's constitutionality and legality is crucial important in Vietnam, as the legal system remains inconsistent. Particularly, the executive branch has played important role in providing guidelines for implementation legislation. In addition, the enormous number of decisions issued by the local government are the main challenges to implement constitutional review in Vietnam. The current mechanism for implementing constitutional review through Ministry of Justice, Supreme People's Court, and the Standing Committee of the National Assembly is ineffective because there remains a need of specialized institutions for this purpose such as Constitutional Council or Constitutional Court in other countries. The study of constitutional council remains important and relevant to the progress of legal reform in many countries which have not yet adopted a constitutional review model. Hence, Vietnam still needs to learn from experiences of other countries in developing an effective mechanism for constitutional review.

[35] Chen, Chen, and Harding, *Constitutional Courts in Asia*, 30.

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【Special Features：The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

Evaluation of the Attitudes Between the Constitutional Tribunal and the Parliament in Myanmar

MAKINO Emi*

Abstract

This paper examines the role of the Constitutional Tribunal of the Union, Republic of the Union of Myanmar (hereafter, the Tribunal), primarily focusing on parliamentary interactions and independence in political deliberations. The Tribunal was established in 2011, and it was the first independent organization for constitutional review in Myanmar.

After half a century of the military authoritarian regime and in the circumstances of complicated transition, the newly established Tribunal has been expected to adjust the power among three branches of power; executive, legislative and judicial. A closer look at the Tribunal's recent activities and progress in adjudicating political issues and acting as an independent referee between relevant political actors reveals this body's inability to perform adequately the role it has been assigned.

In 2012, the parliament widely opposed the Tribunal's decision and initiated the impeachment of all nine members. In 2013, the parliament also amended the Constitutional Tribunal Law which limited the effectiveness to apply the decisions of Tribunal only to all cases transferred from ordinary courts. The amendments increasingly weakened the scope of the Tribunal and eventually, questioned whether it might play any positive role in the democratization of Myanmar as stipulated by the 2008 Constitution.

After the impeachment of all members, the Tribunal has been facing the lack of judicial independence and cannot function as a referee among the political actors. The Tribunal could deal with only a limited number of cases since its establishment in 2011, and is apparent that it is highly reluctant to reject initiatives of the current regime. Indeed, there are some incidents when the Tribunal issued unconstitutional judgments, which could prove positive in terms of the regional legislation powers and protection of minority rights. However, the trends of distrust against the Tribunal is widely recognized after the NLD (National League for Democracy) regime came into power. In such circumstances, when the Tribunal acts as a support agent for one political actor against others, the role of the Tribunal in future democratization becomes highly controversial.

* Assistant Professor, Center for Asian Legal Exchange, Nagoya University.
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Contents

I. History of Constitutional Review

Myanmar established the Tribunal in 2011 under the Constitution of the Republic of the Union of Myanmar (hereafter, the 2008 Constitution) under the slogan of a state-controlled democracy and peaceful transition from a military to civilian rule. It was the first time in the constitutional history of the state when policymakers vested the power of constitutional review to an independent institution.

Until 1948 Myanmar remained as a British colony. After gaining independence in January 1948, it adopted the parliamentary democratic system stipulated by the Constitution of the Union of Burma (hereafter, the 1947 Constitution). The 1947 Constitution authorized the Supreme Court to exercise the highest judicial power[1], and the Supreme Court could declare opinions on constitutional questions by the requests of the President[2]. From 1948 to 1964, 41 cases have been dealt with at the Supreme Court regarding constitutionality[3].

After the *Coup d'etat* by the General Ne Win in 1962, Myanmar set up the government with a strong military component at the top of its political system.

[1] Section 136(1) of the 1947 Constitution.

[2] Section 151(1) of the 1947 Constitution.

[3] This information is based on the author's interview with the Tribunal officials in April 2019 (Nay Pyi Taw, Myanmar).

Furthermore, this government adhered closely to the socialist ideology. The Constitution of the Socialist Republic of the Union of Burma (hereafter, the 1974 Constitution) was adopted in 1974. According to the 1974 Constitution, people represented the sovereign powers of the State, and the People's Assembly, a single chamber legislative organ represented by people, exercised such sovereign power and, additionally, delegated organs of state power[4]. Analogically to other socialist states, the People's Assembly could exercise constitutional interpretation and determine the validity of the acts of executive authorities[5]. The newly adopted 1974 constitution stipulated relevant provisions on constitutional control.

The military government established a dictatorial rule in 1988 amid forced oppression of public movement for the country's democratization. The 1974 Constitution was suspended in 1988, and the military seized all the power. The multi-party general election was held in 1990 and the National League for Democracy (NLD) led by Aung San Suu Kyi, a pro-democracy activist, got about 80 percent of votes, while the military-backed party won only 10 seats out of 485. However, the military junta refused to transfer the power to the NLD and insisted that the country's prioritized political task was to prepare the constitution. The military government set up the National Convention to draft the new constitution in 1993. It worked over the draft about 15 years with a long interval between 1996 and 2004 caused by the NLD boycott. Despite the undemocratic drafting process, the government announced that the 2008 Constitution was adopted with 92.48% of people's consent by the national referendum in May 2008. Eventually the new constitution came into force in January 2011.

In March 2011, almost after the half-century of the military regime, President Thein Sein formed a civilian government. This initiative came as a pseudo-democratization, as Thein Sein had a long military career. Furthermore, the Union Solidarity and Development Party (USDP), the military-backed party, occupied the Parliament seats. In addition to the USDP parliament members, the 2008 Constitution allocates 25 percent of seats for the military members. The recent Myanmar's political

[4] Section 12 of the 1974 Constitution.

[5] Section 200 of the 1974 Constitution.

landmark is the 2015 general election, a first openly competitive election since 1988 in which the NLD won a supermajority of seats at the parliament. The non-military president Htin Kyaw was elected, and the NLD regime started in March 2016.

The 2008 Constitution states that the country aims genuine, disciplined multi-party democratic system[6], and the legislative, the executive and the judicial branch are separated and exert reciprocal control, checks, and balances among themselves[7]. Hence, after half a century of the authoritarian military regime and in the circumstances of complicated transition, the newly established Tribunal has been expected to adjust the power among three branches.

II. Functions and Duties of the Tribunal

The Tribunal related provisions appear within the 2008 Constitution's Chapter on Judiciary. This chapter also includes the provisions for ordinary courts and Courts-Martial. The Constitutional Tribunal of the Union Law (hereafter, the Tribunal Law) was promulgated in 2010 based on the 2008 Constitution, and it came into force on the day when the 2008 Constitution came into effect. According to the Section 322 of the 2008 Constitution, the primary functions and duties of the Tribunal are; to interpret the provisions of the Constitution, to scrutinize the constitutionality of laws promulgated by the union and regional level parliaments, and the actions of the executive authorities of the union and regional governments[8]. The Tribunal is also entitled to decide on constitutional disputes and disputes related to the rights between the Union and regional authorities, and among regional authorities. The Tribunal only deals with enacted laws and does not examine bills before enactment, and subordinate laws, such as rules, regulations, and notifications. The Tribunal has the power to conduct both abstract and concrete constitutional review.

[6] Section 7 of the 2008 Constitution.

[7] Section 11 of the 2008 Constitution.

[8] The Union constitutes seven regions, seven states, and union territories. The Regions are the areas predominantly resided by the ethnic Burmese, and the States are the areas dominated by ethnic minorities with their ethnic names, such as Kachin, Kayah, Kayin, Chin, Mon, Rakhine, and Shan (Section 49 of the 2008 Constitution). Myanmar introduced the quasi-federal system, and the Regions/ States are conferred the autonomy to some extent under the 2008 Constitution.

Generally, constitutional review systems are considered as the continental law product. Since the British colonial rule in the 19th century, the legal system of Myanmar has been influenced by the British Common Law system. As a result of the socialist and military authoritarian regimes impact, Myanmar obtained hybrid aspects from both the continental and common law systems.

Only a limited number of public actors can submit petitions for constitutional review to the Tribunal directly, namely, the President, the Speaker of the Union Parliament (*Pyidaungsu Hluttaw*), the Speaker of the House of Representatives (*Pyithu Hluttaw*), the Speaker of the House of Nationalities (*Amyotha Hluttaw*), the Chief Justice, and the Chairperson of the Union Election Commission[9]. Additionally, the Chief Ministers of regional executive bodies, the Speakers of regional legislature, the Chairperson of the Self-Administered Area, and more than ten percent of the Union level parliament representatives can access to the Tribunal indirectly[10]. Constitutional Tribunal does not stipulate *actio populais*. Therefore, individuals cannot directly lodge their petitions to the Tribunal and thus, cannot quash public actions and statutes. It is only the Supreme Court which has authority to forward cases to the Tribunal[11].

III. Judicial Independence Crisis on the 'Union Level Organization' case

The first three cases submitted in 2011 and 2012 touched upon the unconstitutionality in the area of the executive authority. In the Submission No. 1/ 2011, the critical issue was the constitutionality of the judicial power conferred to the sub-township administrative officers to adjudicate minor criminal cases by the Ministry of Home Affairs, which was exercised in the previous military regime. The Tribunal agreed to the Supreme Court's claim that the judicial power is only vested in the judiciary. In the Submission No. 2/ 2011, the Tribunal decided that unequal status for Ministers of the National Affairs at regional level entitled to the emoluments, allowances, and insignia was unconstitutional and they should be treated equally to other ministers in the Regions and States. The President requested to review this

[9] Section 325 of the 2008 Constitution.

[10] Section 326 of the 2008 Constitution.

[11] Section 17 of the Tribunal Law.

decision; however, the Tribunal rejected it since the resolution was final and conclusive which found itself in the Submission No. 2/ 2012. The Tribunal opposed the executive power to play an essential role as check and balance at the early stage.

The incident threatening judicial independence occurred in 2012, so-called the 'Union Level Organization' case. According to the 2011 set of laws on Union Parliament, the House of Representatives and the House of Nationalities (hereinafter, the Union level legislature),[12] each house of the Union level legistature is eligible to establish the committees, commissions and bodies to actively carry out legislative activities under own authority. The Union level legislature claimed their status as the 'Union Level Organization' which have greater authorities such as the right to submit the bills to the Union level legislature[13], and to attend and take part in discussions at parliamentary sessions with the permission of the Speakers[14]. President Thein Sein submitted the petition to the Tribunal to clarify whether or not such Committees have the 'Union Level' status. The 2008 Constitution mentions about the 'Union Level Organization' several times; however, it does not provide any clear definition. The Tribunal decided that the 'Union Level Organization' should be appointed by the President with the approval of the Union Parliament. Simultaneously, the Tribunal ruled that those actors who were not appointed by the President, but merely established under the parliament by its own will, could not be considered as the 'Union Level Organization'. Subsequently, the legislature widely opposed the Tribunal's decision, and initiated impeachment of all nine members. This step came out following the legislature's opinion that the Tribunal intended to restrict its power. President Thein Sein and the military representatives in the parliament opposed to the impeachment, and the Tribunal members finally resigned voluntarily in September 2012.

This incident has arisen from a political conflict between the President and the legislature. The result could be a victory of the legislature, however, it caused a severe infringement of judicial independence. The parliament uses the means of impeachment

[12] The Union Parliament consists of the House of Representatives (a lower house with 440 seats) and the House of Nationalities (an upper house with 224 seats).

[13] Section 100(a) of the 2008 Constitution.

[14] Section 77(c), Section 112(c) and Section 144 of the 2008 Constitution.

against the Tribunal members' unsatisfied decision. It implicates risks that the Tribunal members cannot decide cases independently.

IV. Losing the Tribunals Competence through the Amendment of Constitutional Tribunal Law

The Tribunal consists of nine members. Three of the members chosen by the President, three by the Speaker of the House of Representatives, and three by the Speaker of the House of Nationalities, with the subsequent approval of the Union Parliament[15]. Term of the members of the Tribunal is five years, which makes it the same as the term of the Union Parliament[16] and the President[17]. Such term is relatively short compared to other countries. In particular, the risk of such short term is related to the politically motivated appointments of members and highly possible influence on them by the ruling party.

The candidate members must have legal practice experiences such as judge, prosecutors or advocates for certain period prescribed in the 2008 Constitution. However, if the President considers the candidate as a suitable jurist, he or she can be nominated as a member[18].

The President should nominate the Chairperson of the Tribunal among the nine candidates[19]; however, the first amendment of the Tribunal Law in 2013, requires such negotiation with the Speakers of the House of Representatives and the House of Nationalities to take place beforehand. In the hearing process, the attendance of the Chairperson is mandatory[20], and the decisions of the Tribunal would be passed by the majority vote, including the Chairperson[21]. The Chairperson has great authority and influence upon the decisions. The 2013 amendment is the outcome of the 'Union Level

[15] Section 321 of the 2008 Constitution.

[16] Section 335 of the 2008 Constitution.

[17] The President shall be elected right after the parliaments have been formed.

[18] Section 333(d)(iv) of the 2008 Constitution.

[19] Section 327 of the 2008 Constitution.

[20] Section 20 of the Tribunal Law.

[21] Section 22(d) of the Tribunal Law. To pass the interpretation and opinion of the Tribunal, it dose not require the Chairperson's consent as long as it is approved with majority vote (Section 22(c) of the Tribunal Law).

Organization' case, as a result of which the Union Parliament gained more influence on the nomination of the Chairperson of the Tribunal. The Tribunal initiated re-amendment of the Tribunal Law in 2014, to nominate the Chairperson solely by the President without the consultation with the legislature; however, such attempt failed[22]. The 2014 amendment only included some clarification on procedure, and technical and terminological modifications.

The 2013 amended law also stipulates that the Tribunal members should report the performance of their functions and duties to the President, Speakers of the House of Representatives and the House of Nationalities who have been elected members. The Tribunal members should not be controlled by anybody, otherwise this amendment can be considered as an infringement of judicial independence. Hence, this amendment has limited certain Presidential competency regarding the Tribunal.

The decisions of the Tribunal are final and conclusive[23]. When the Tribunal declares law as unconstitutional, the relevant law becomes invalid upon the prescribed procedure and immediately expected to be amended. However, not all laws are amended after they are declared as unconstitutional because the legislative branch might not be satisfied with the decisions. Additionally, the first amendment of the Tribunal Law in 2013, Section 25 which stated that "the decisions of the Tribunal shall have an effect on the relevant Government departments, organizations, and persons or the respective region" was deleted in favor of the provision stating that "only those cases sent from the ordinary courts shall be applicable to all cases"[24]. This amendment resulted in the degradation of the competency of the Tribunal's judgments.

V. The Tribunal's Reaction to Union-Regional Disputes and Minority Rights

It does not mean that the Tribunal is totally useless in terms of the Constitutionalism in Myanmar. Myanmar is a multi-ethnic state which introduced a quasi-federal system to protect minorities' rights based on the 2008 Constitution.

[22] Khin Khin Oo, "Judicial Power and the Constitutional Tribunal: Some Suggestions for Better Legislation Relating to the Tribunal and its Role", in Andrew Harding & Khin Khin Oo (ed.), *Constitutionalism and Legal Change in Myanmar*, Hart Publishing, 2017, p. 201.

[23] Section 324 of the 2008 Constitution and Section 24 of the Tribunal Law.

[24] Section 23 of the Tribunal Law.

Indeed, the Tribunal has an experience of dealing with some cases relevant to the union and regional disputes, and ethnic minority issues.

As mentioned above, the unequal treatment to the National Races Affairs Ministers of the Region or State was declared as unconstitutional (Submission No. 2/ 2011), and the related law was amended to adjust inequality. In the Submission No. 1/ 2014, it was examined whether or not the appointments of National Races Affairs Ministers for Lisu and Rawan races in Kachin and Shan State were in conformity with the Constitution. The national races which constitute more than 0.1 percent of the population in the Union and have not obtained the State or Self-Administered Area, can elect one representative at the regional parliament and such appointee can serve as the National Races Affairs Minister[25]. The Tribunal supported the decision of the Union Election Committee which allowed one elected representative for Lisu and Rawan races, and they decided that the appointments were in conformity with the Constitution.

Submission No. 3/ 2012 is known for scrutinizing the legislative jurisdiction of the Union and regional legislature. The Mon Development Committees Law promulgated by the Mon State Parliament contradicted to the Union leveled 1993 Development Committees Law which, in turn, was enacted before the 2008 Constitution came into force. The 1974 Constitution adopted the centralized state structure under the philosophy of socialism; however, in the 2008 Constitution Myanmar introduced the union system, which enables the regional authorities to practice certain executive and legislative functions. The 2008 Constitution provided the legislative power of the Union and regional legislature in Schedule I and II respectively. The Tribunal declared that the Mon Development Committees Law, which is related to the development affairs, was under the jurisdiction of regional legislature according to the 2008 Constitution. The 1993 Development Committees Law is still valid because the transitional provisions in the 2008 Constitution stipulated that existing laws remain in operation until repealed or amended by the Union Parliament if it is not contrary to the Constitution[26]. The Tribunal advised the Union Parliament to invalid the 1993

[25] Section 161(c) of the 2008 Constitution.

[26] Section 446 of the 2008 Constitution.

Development Committees Law and ruled the Mon Development Committees Law was not in conformity with the Constitution. The Tribunal's decision, which supported the regional parliaments' legislation against the Union laws may be considered as a novelty considering the actual situation with constitutional review in Myanmar.

The constitutional petition usually guarantees to the parliamentary minorities a standing to bring cases to the constitutional court to protect their rights. However, the opposite case happened in Myanmar. In the Submission No. 1/ 2015, the Tribunal stated that the National Referendum Law which targeted whether to amend the constitution or not was indeed found as unconstitutional. In particular, this law granted a right to vote at the referendum to the holders of the temporary registration cards known as the white cards[27]. They had participated in all military-orchestrated elections held in Myanmar from 1936 to 2010, and voted for their representatives to the parliaments and state assemblies. They also had the right to vote in the 2008 referendum for the adoption of the 2008 Constitution[28]. White cards holders are mainly Rohingya Muslim people, who reside in a border area with Bangladesh. The 1982 Citizenship Law provides that the full citizen is an individual who had settled in Myanmar territories before 1823 when the British rule started. The ethnic problem has been derived from the British 'divide and conquers policy' towards Burmese and non-Burmese people. Authorities in Myanmar do not consider Rohingya people as citizens of Myanmar and, therefore, issues them white cards which automatically makes them stateless, and thus highly vulnerable. The Tribunal decided that the white card holders are not citizens of Myanmar, and therefore, must not have voting rights.

The Constitutional Courts are often designed as the mechanism for protecting the rights of the minority. This case clearly shows that the Tribunal in Myanmar does not function as such. Indeed, the 2008 Constitution grants the rights to vote only to the citizens. However, similarly to the case of Mon State Development Committees Law, the Tribunal could consider the case in line with the past customs which would have eventually allowed Rohingya minorities to participate in the political affairs and even recommend the legislature to correct the 1982 Citizenship Law.

[27] Their holders are those who reside in Myanmar but do not have full citizenship rights.

[28] Nural Islam, Rohingya and Nationality Status in Myanmar, in Ashley South Marie Lall, *Citizenship in Myanmar: Ways of Being in and from Burma*, Chiang Mai University Press, Thailand, 2018 p. 267.

Notably, the 2008 Constitution integrates three basic principles; the non-disintegration of the Union; the non-disintegration of national solidarity; and the perpetuation of sovereignty. Hence, one may observe that national integration is the most prioritized mandate in Myanmar, whereas the protection of minority rights is an ignored principle under the Myanmar-styled Constitutionalism.

VI. Analyzing the Tribunal's Performance

Since the establishment of the Tribunal in 2011, the Tribunal produced a small number of cases. In particular, the Tribunal initiated only 15 cases within the last nine years. It is a very limited number, especially taking into consideration the fact the NLD considers itself as the first 'democratic' government after half a century of military rule. It is believed that the role of Tribunal increases if the democratization progresses; however, up to date Myanmar demonstrates a totally opposite effect. The NLD considers that a separate body like the Tribunal poses a threat to democracy, whereas the Supreme Court can be better trusted to exercise judicial review[29].

Because of the NLD's distrust, the Tribunal produced only four cases under the NLD government. The first case was related to the appointment of the Tribunal members (Submission No. 1/ 2016). The President can appoint a person who is, in his opinion, 'an eminent jurist'. After two of the members recommended by the Speakers of House of Representatives and House of Nationalities did not meet the criteria for being nominated as Tribunal members, the Speakers decided to nominate them under the title of 'an eminent jurist'. Notably, the Tribunal Law stipulates that only the President can select 'an eminent jurist' even if the candidates do not meet the qualification. In this regard, the NLD government insisted that the President could eventually apply 'an eminent jurist' to all nine judges after obtaining the list of nominees. The Tribunal dismissed the case by pointing that it was a result of conflict between the Constitution and the Tribunal Law.

There were two cases in 2019, and both of them touched upon the constitutional amending process. The Joint Committee on Amending the 2008 Constitution (hereafter,

[29] National League for Democracy, Analysis and Recommendations for the 2008 Constitution (June 2014), as cited in Dominic Jerry Nardi "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis" in Andrew Harding & Khin Khin Oo (ed.), *Constitutionalism and Legal Change in Myanmar*, Hart Publishing, 2017, p. 187.

the Joint Committee) was established in February 2019 under the Notification No. 15/ 2019, and was comprised of 45 members. The main task of the Joint Committee was to review the 2008 Constitution, submit the report with their findings to the Union Parliament, and prepare amendment bills after the Union Parliament approve their report[30]. Another committee named the Joint Committee to Scrutinize the Second Bill Amending the Constitution (hereafter, the Scrutinizing Committee) was established on the same day under the Notification No. 14/ 2019 to review and scrutinize the Second Amendment Bill submitted by the 143 parliament members including USDP representatives. In the first case (Submission No. 1/ 2019), it was submitted whether or not the Second Amendment bill should be discussed with the Joint Committee's upcoming bills. In the second case (Submission No.2/ 2019), the Tribunal examined the constitutionality of establishment of the Joint Committee. The critical issues of both cases refer to the interpretation of Section 435 of the 2008 Constitution, which provides that bills submitted by more than 25 percent of the total number of the Union Parliament should be considered at the Union Parliament. The Tribunal dismissed both of the cases, and supported the NLD's opinion to continue the Joint Committee's duties.

In general, constitutional courts are established to limit or balance the activities of the executive and the legislative branches, and expected to work as neutral arbitrators among the two branches. Under the Thein Sein era, the Tribunal was primarily a forum for dialogue between the president, the legislature and members of parliament from ethnic political parties[31]. Under the Thein Sein government, there was tension between the President and the legislature and conflicts were often brought to the Tribunal. Most of parliament members viewed constitutional review as a threat to the Union Parliament's law-making authority[32].

Constitutional designers are interested in governing models after the adoption of a new constitution, and they seek to design institutions that maximize their ability to

[30] The Joint Committee submitted two bills to the Union Parliament on January 23, 2020, and it was revoked on January 28, 2020, as it completed its duties.

[31] Melissa Crouch, Dictators, democrats, and constitutional dialogue: Myanmar's constitutional tribunal, *International Journal of Constitutional Law*, Vol. 16, No. 2, p.423.

[32] Dominic Jerry Nardi, "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis", in Andrew Harding & Khin Khin Oo (ed.), *Constitutionalism and Legal Change in Myanmar,* Hart Publishing, 2017, p. 188.

govern under the new constitutional order. Constitutional court can act as an insurance for electoral losers, and Ginsburg calls it as 'the insurance model of judicial review'[33]. In Myanmar, this theory is not applicable. The term of the Tribunal member is the same as the President and the Union Parliament. Between 2011 and 2016, some cases were filed as unconstitutional; however, the Tribunal never opposed the NLD government. Especially after the constitutional crisis caused by the 'Union Level Organization' case, it is difficult for the Tribunal to act as a checks and balances institution, particularly when it comes to the interactions with the legislative branch of power. If the Tribunal issues the judgments to which the parliament disagrees, the parliament can take an impeachment action against the Tribunal's members. The Tribunal cannot decide cases independently, and the trends of ignoring the Tribunal spreads among the opposition parties at parliaments, especially after the NLD government took power in 2016.

The NLD has introduced a position of a state councilor for its leader Aung San Suu Kyi, which *de facto* gave her supreme political power. It eventually raises many justified concerns and critics among parliament members regarding the contradictions with constitutional provisions and inability of the Tribunal to adequately react to the matter. In such circumstances, when the Tribunal acts as a support agent for one political actor against others, the role of the Tribunal in future democratization is very unclear.

VII. Conclusion

Since 1962 when the military junta took power, the constitutional review mechanism has been absent, and no mechanism was in place to perform the functions of the checks and balances towards the executive and legislative power. For a long time under the authoritarian regime, the separation of powers was denied, and the judicial body could not control the actions conducted by the executive and legislative bodies. The 2008 Constitution introduced the Tribunal as an independent body for the first time in the constitutional history.

[33] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asia, Cambridge University Press, 2003, pp. 24-25.

One of the critical factors of constitutionalism is to limit the executive and legislative authorities, according to the constitution. At the early stage, the Tribunal opposed the executive authorities; however, the 2012 crisis between the President and the legislature yielded the judicial independence infringement. Their independence has been weakened, and they could not be considered as 'the insurance model' to hold the political power after the political changes.

Furthermore, the vital role of the Constitutional Courts is the protection of citizens' rights. The cases brought to the Tribunal are mainly disputes among the political elites. The drafters of the 2008 Constitution viewed the Tribunal predominantly as a forum to resolve intra-elite disputes, but not to protect fundamental rights or to constrain government power[34]. The Tribunal deals with the constitutional disputes among the political elites, and elites are not concerned about the citizens' rights. It is difficult to assert that the Tribunal can act effectively to protect the rights of minorities.

It can be concluded that the Tribunal acts as the supporter of the current political actors, and cannot perform functions of a mechanism which would contribute to the development of the democracy and protection of fundamental rights in Myanmar.

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[34] Dominic Jerry Nardi, "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis", in Andrew Harding & Khin Khin Oo (ed.), *Constitutionalism and Legal Change in Myanmar*, Hart Publishing, 2017, p. 184.

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個別論題

Thematic Papers

【Article】

Interface of Patent and Trade Secret Protection for Artificial Intelligence in Personalized Medicine

LEE Nari*

Contents

I. Introduction

Personalized medicine is a developing field that carries a great potential for future healthcare applications, for prediction, diagnostic and treatment. Personalized medicine allows targeted treatment of different subgroups of patients, making it possible to tailor the treatment to the best-responding patients, while avoiding non-responders who are likely to

* Professor of Intellectual Property Law, Hanken School of Economics, Helsinki, Finland. This paper is based on the chapter submitted for publication in, Jens Schovsbo, Timo Minssen and Thomas Riis (eds), 'The harmonization and protection of trade secrets in the EU – an appraisal of the EU Directive' (forthcoming, Edward Elgar).

suffer adverse effects. Data that allows identification of the applicable patient group and correlating them to underlying conditions is crucial in the research for personalised medicine. As commercial opportunities expand and develop without heed to legal categories, every new technological disruption such as personalized medicine and artificial intelligence (AI) may raise claims of inadequacy of intellectual property (IP). Over and under protection and fragmentation or overlaps in exclusivity may harm efficient use of resources. While the need to share personal and private genetic information to advance research and industrial development is acknowledged, there are fundamental moral and ethical discomfort against exclusive control of an individual right holder over genetic data.

Trade secret protection seems to provide a perfect solution to this problem.[1] Trade secret protection could include most subject matters of intellectual property as well as other ineligible subject matters, such as raw data, information and knowledge. In the new technologies, trade secrets protection may indeed become a substitute for other types of IP, especially when greater restrictions are imposed on traditional subject matters. Arguably, when the US Supreme Court imposed stricter subject matter requirements for patents in software and biogenetic technology,[2] businesses have migrated to protect data or algorithm directly using trade secret law.[3] Moreover, as expressive works or methods may also be protected by trade secrets, works such as computer program codes produced by Artificial Intelligence (AI), as well as algorithms for AIs may be protected as trade secrets even though their protectability under copyright may be more uncertain. As regulations on public disclosure for public access to information treat trade secrets differently from other types of information,[4] trade secret protection may be considered a versatile tool to avoid public

[1] Jerome H. Reichman, Legal Hybrids Between the Patent and Copyright Paradigms, *94 Columbia Law Review 2432-2558* (1994)

[2] *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014); *AMP v Myriad Genetics*, 133 S.Ct. 2107 (2013).

[3] See for example, Dan L. Burk, Patents as Data Aggregators in Personalized Medicine, *21 Boston University Journal of Science and Technology Law 233* (2015) at 242-245; Jacob S. Sherkow & Christopher Thomas Scott, The Pick-And-Shovel Play: Bioethics For Gene-Editing Vector Patents, 97 *North Carolina Law Review* (forthcoming 2019)

[4] For example, the US Freedom of Information Act exempts trade secrets categorically from its scope. 5 USC § 552(b)(4). See for a comparative study, Sharon K. Sandeen and Ulla-Maija Mylly, Trade Secrets and the Right to Information: A

scrutiny over sensitive information.

Restricting patenting of algorithms for fear of depriving the public of the basic research tools, simultaneously creates incentive to protect them with other means such as trade secret, which then would be used as a way to deprive the public of the access to the information. Indeed scholars have already started to notice the switch and warned of the impact on incentives and competition.[5] Burk, for example noted that while patents in personalized medicine may fail to provide necessary incentives for innovation and yet could be used as to aggregate and re-capture valuable sub-patentable data which the companies may protect with trade secret protection.[6] Likewise, Sherkow and Scott documented a problematic trend among the vector developers for gene editing technology - what they call a 'pick and shovel' play, using secrecy as a way to sell gene editing equipment.[7]

This paper explores the interface of patent and trade secret protection of AI algorithm and data in Europe.[8] The paper first examines current status of using AIs in personalised medicine and explores if patent or trade secret protection would be better suited to deal with the problems faced by use of AI on personalised medicine. From the policy perspective, patents that allow disclosure may be a better choice. Although concurrent use may be allowed, this chapter argues that trade secrets misappropriation may limit such uses, and concludes

Comparative Analysis of EU and US Approaches to Freedom of Expression and Whistleblowing (August 26, 2019). *North Carolina Journal of Law and Technology*, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3442744

[5] William Nicholson II Price, Expired Patents, Trade Secrets, and Stymied Competition (December 22, 2016). 92 *Notre Dame L. Rev.* 1611 (2017)

[6] Dan L. Burk, Patents as Data Aggregators in Personalized Medicine (April 22, 2015). 21 *Boston University Journal of Science and Technology Law* 2:233-255 (2015) at 244-245.

[7] Jacob S. Sherkow and Christopher Thomas Scott, The Pick-and-Shovel Play: Bioethics for Gene-Editing Vector Patents (June 27, 2019). *North Carolina Law Review, 2019*, vol. 97, pp. 1497–1552.

[8] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance) OJ L 157, 15.6.2016, p. 1–18 [hereinafter Trade Secrets Directive], Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)OJ L 119, 4.5.2016, p. 1–88 [hereinafter GDPR] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ L 213, 30.7.1998, p. 13–2; Agreement on a Unified Patent Court, Document no. 16351/12. (11 Jan. 2013) [hereinafter, 'UPCA']. Convention on the Grant of European Patents of 5 Oct. 1973, as revised [hereinafter 'EPC'].

that it may have become necessary to introduce additional regulatory measures to require disclosure of AIs algorithm for public interest. However, such measure needs to take both technical solutions to make AI more understandable if not transparent into consideration and regulatory solution to preserve the secrecy of AI information.

II. Regulatory Challenges in the Use of AI in Personalised Medicine

AI is a combination of theories, techniques and applications that make machines behaving 'in ways that would be called intelligent if a human were so behaving.'[9] AI thus may include various different technologies using different methods of making machines behave 'intelligently' - sense, read and understand things around them, collect text and image data that they so gathered and analyse, and make decisions. The essence of AI's 'intelligence' is when such decision-making seems autonomous of human agents' instructions or interferences, and machines may appear to be sentient and learning autonomously - so called 'Machine Learning' (ML). The idea of sentient machine has been around for some time. But, the investments and interests in AIs have increased dramatically with the reports of successful AI and ML, resulting from better and more computing power and digital computing tools (code libraries), developments in communication and network technology, emergence of new learning algorithms (deep neural networks) and availability of training data (big data).

Using AI in personalized medicine marries two uncertain and yet exciting disruptive technologies - digital computing and bio-genetic medicine. In both fields, technologies seem to promise much possibilities and opportunities to increase efficiency in health care and yet, at the same time, present complex uncertainties, which may invite regulators' scrutiny. Personalized medicine and smart digital technology have brought on both promises and concerns for society that to the degree that one author declared the end(s) of law.[10] Despite foreboding predictions and fanatic enthusiasms brought on by private and public sector

[9] J.McCarthy, M.L.Minsky, N. Rochester, & C.E. Shannon. A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, August 31, 1955. *AI Magazine*, 27(4), 12. (2006) https://doi.org/10.1609/aimag.v27i4.1904

[10] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law*, Cheltenham: Edward Elgar (2015)

financing, personalized medicine or precision medicine have yet to deliver a panacea in health care.[11] Benefits from personalized medicine, which promise to deliver targeted and tailored healthcare have yet to be fully materialized and at the same time, problems that an extreme personalised medicine have already been noted.[12] Gene editing using CRISPR-Cas system,[13] which promises ultimate personalization[14] has raised several difficult question of rights fragmentations[15] as well as question on genuine inventorship.[16] Experimentation on human genome using the technology,[17] resulted in scientists' call for moratorium on the use of the technologies on heritable genome editing.[18]

Similarly, use of AI in medicine created unique problems and challenges. For regulators, using AI in decision-making raises questions of transparency and accountability that are

[11] See for example, Liz Szabo Are We Being Misled About Precision Medicine? *New York Times*, 11 September 2018 https://www.nytimes.com/2018/09/11/opinion/cancer-genetic-testing-precision-medicine.html,

[12]See for example, Shubha Ghosh, Decentering the consuming self: personalized medicine, science, and the market for lemons, *Wake Forest JL & Pol'y* 5 (2015): 299.

[13] Martin Jinek et al. A- programmable dual-RNA–guided DNA endonuclease in adaptive bacterial immunity, *Science* Vol 337 Issue 6096 (2012): 816-821.

[14]Anjana Ahuja, Beyond 'superbabies': how CRISPR is revolutionising medicine, *Financial Times* Jan 14. 2019, https://on.ft.com/2Rpf1iu

[15] Jorge L Contreras and Jacob S. Sherkow, CRISPR, Surrogate Licensing, and Scientific Discovery. *Science,* Vol. 355, Issue 6326 (2017) 698-7000

[16]See EPO CRISPR opposition decision of 17.1.2018 revoking EP 2771468 (2018) https://register.epo.org/application?documentId=E1N2PXYP4751DSU&number=EP13818570&lng=en&npl=false US PTAB Decision (2017)- CAFC appeal actually is pending (30.4.2018 oral hearing) 13818570. See for a good review of the conflicts among the patenting priorities, Timo Minssen, and Esther van Zimmeren, and Jakob Wested, Clearing a Way Through the CRISPR Patent Jungle (May 8, 2018). *Life Sciences Intellectual Property Review (LSIPR),* No. 8/5 2018, (2018). Available at SSRN: https://ssrn.com/abstract=3359717

[17] See David Cyranosk, CRISPR baby scandal. The CRISPR-baby scandal: what's next for human gene-editing, *Nature* 566, 440-442 (2019) doi: 10.1038/d41586-019-00673-1. Technology was not mature enough and as a result, it is expected that babies' mortality is high. See Xinzhu Wei & Rasmus Nielsen, CCR5-Δ32 is deleterious in the homozygous state in humans, *Nature Medicine,* volume 25: 909–910 (2019).

[18] See Adopt a moratorium on heritable genome editing Eric S. Lander, Françoise Baylis, Feng Zhang, Emmanuelle Charpentier, Paul Berg, Catherine Bourgain, Bärbel Friedrich, J. Keith Joung, Jinsong Li, David Liu, Luigi Naldini, Jing-Bao Nie, Renzong Qiu, Bettina Schoene-Seifert, Feng Shao,Sharon Terry, Wensheng Wei & Ernst-Ludwig Winnacke, *Nature* 567, 165-168 (2019) doi: 10.1038/d41586-019-00726-5, See arguments that these are not novel problems: John J. Mulvihill, Benjamin Capps, Yann Joly, Tamra Lysaght, Hub A. E. Zwart, Ruth Chadwick, The International Human Genome Organisation (HUGO) Committee of Ethics, Law, and Society (CELS), Ethical issues of CRISPR technology and gene editing through the lens of solidarity, *British Medical Bulletin*, Volume 122, Issue 1, (June 2017), Pages 17–29, https://doi.org/10.1093/bmb/ldx002. W. Nicholson Price II Black-box medicine. 28 *Harv. JL & Tech* 419 (2014).

embedded in the practice of medicine and pharmacology.[19] In medical practice, there are established process of peer review on the safety and efficacy of the process as well as verification of the validity of data that the medical professionals rely on to come to various health care related decisions. AIs, notability uses black box like decision-making process, and may not be able to provide explanation for its decision.

III. Trade-offs in the Use of AI in Personalized Medicine – Patents or Trade Secrets

Trade-off between patents and trade secrets in personalized medicine illustrates the interconnectedness of the policy agendas – the incentives through exclusive rights need to be coordinated to the transparent and accountable use and developments of the technology. For the regulatory goals of accountability, and transparency, disclosure and communication and explanation would play a big part. Other exclusive rights such as copyright over the codes for AIs, over training data are also important incentives for creation and investments and yet, publication and disclosure of codes or data will not affect their copyrights. In contrast, patent and trade secrets occupy opposite ends on the impact of disclosure as patent requires disclosure for protection and disclosure destroys trade secret protection. Moreover, there is underlying question concerning the status of personal data – health (including genetic) data that AI uses, if they may be made subject matters of exclusive rights at all.

1. AI as a Subject Matter of Patent or Trade Secret

AI includes various elements – algorithm and training process, training data, parameters including parameter weights, application, computer or other hardware devices. Application and implementation themselves could be computer programs and codes. As AIs are based on various techniques,[20] to state that all AIs can be categorised as (1) *algorithms and models* at

[19] Frank Pasquale, *The Black Box Society*. Harvard University Press (2015). See also Hildebrandt, supra n 10.

[20] For example, EPO Examination guidelines states that AI includes, computational models and algorithms for classification, clustering, regression and dimensionality reduction, such as neural networks, genetic algorithms, support

varying degree of abstraction (abstract algorithms, software, inference models, training process), (2) *data* (training data as well as intermediate data and data sets such as weights), and (3) *hardware* (computer, robots, cars, sensors, storage medium, other devices) would be a gross simplification. However, these three forms are useful in conceptualizing protection of AI through intellectual property because they are the basis of existing categories of patentable subject matters. Patent laws protect inventions of technology and yet excludes certain subject matters and distinguishes tangible hardware from software, and abstract algorithms from concrete computer implemented software, and abstract data from concrete data.[21] As copyright attaches to original works of expression and although flexible threshold, it does not protect underlying idea or functionality, facts nor raw data without originality. To conceive a copyright protection, whether these categorical elements of AIs (algorithm, data and hardware) can be expressed as original work (coded expression, original data or shapes) or not (algorithms, raw data, functionality) is an important exercise.

Such exercise would be unnecessary for trade secret protection. As the definition of trade secrets in the TRIPs Agreement and the article 2(1) of the Trade Secrets Directive provide,[22] a trade secret is information that is *secret, has commercial value due to secrecy* and has been subject to *reasonable steps* of keeping it secret. These elements of *secrecy, value and reasonable steps* – are commonly found in national laws.[23] Arguably, the reasonable steps of keeping the information secret and value are two strong requirements for the protection and factually difficult to prove.[24] However, as the definition of trade secret is information, all

vector machines, k-means, kernel regression and discriminant analysis. (EPO Guideline G-II.6 at 3.3.1) <http://documents.epo.org/projects/babylon/eponet.nsf/0/2A358516CE34385CC125833700498332/$File/guidelines_for_examination_2018_hyperlinked_showing_modifications_en.pdf>

[21] EPC Art 52. Alice Corp. v. CLS Bank International, 573 U.S. 208 (2014)

[22] TRIPS Agreement Article 39.2. Also Art 2(1) of Trade Secrets Directive.

[23] EU member state practice survey before the adoption of the EU Directive. Study on Trade Secrets and Confidential Business Information in the Internal Market, (2013). European Commission. Last visited 5 March 2018, http://ec.europa.eu/growth/content/study-trade-secrets-and-confidential-business-information-internal-market-0_en See also for example, US's DTSA in 18 USC§ 1839 (3). Japanese Unfair Competition Prevention Act (UCPA) Art 2(6) requires secrecy (not known), kept secret and commercial utility.

[24] For example, M. Risch, Why Do We Have Trade Secrets, 11 *Marq. Intell. Prop. L. Rev.*1 (2007). See also Bone Robert G, Trade secrecy, innovation and the requirement of reasonable secrecy precautions, IN Rochelle C. Dreyfuss and

aspects of AI – inference models, algorithms, all types of data (training data, intermediately produced data, nods, weights, finally produced data and the like), computer program codes as well as specific hardware for particular aspects of AI are inherently eligible for protection, if they are not known (secret), valuable and can subject to secrecy measures.

The qualitative difference for eligibility makes a strong case for why trade secret could be a flexible choice when formal IP right based protection is uncertain. As personalized medicine using AI marries two such contested subject matters, they may seem to be a perfect candidate for trade secret protection. Not only trade secret would allow protection of contested subject matters or sub-patentable elements, it may be useful in dynamically protecting the inputs as well as the intermediate or final outcomes of AIs. AIs classifies, infer and make decisions, which means generation of more algorithms, codes, weights and data sets and information while using them. These elements may not be fixed or stable enough to generate claims to a registrable right such as patents, but may be protected as trade secrets under secrecy measures against misappropriation, as long as their value lasts, without extra formalities of application and registration.

2. Patent Infringement vs Trade Secret Misappropriation

Patents has *erga omnes* effect and it is a right that may be enforced against anyone who are making, using or selling patented invention. Patents have obvious strengths in the enforcement over trade secrets. The objective construction of direct patent infringement liability makes patent based protection more attractive. In addition, there are particular aspects of patent protection that are often highlighted - potential protection against reverse engineering and product by process claim afforded to process invention to protect direct results of using a process. These are examined vis-à-vis protection afforded for trade secrets in the Trade Secret Directive.

Katherine J. Strandburg (eds) *The Law and Theory Of Trade Secrecy: A Handbook Of Contemporary Research*, Edward Elgar Publishing (2011): 46-76.

(1) Objective Patent Infringement and Subjective Trade Secret Misappropriation

Primary liability in patent is often explained as strict liability, which 'requires no knowledge or intention on the part of the alleged infringer, whose state of mind is wholly irrelevant' to infringement.[25] Knowledge and intent are often considered subjective requirements often associated with secondary or third party liability. As patents are published and disclosed, ignorance of patent - good faith infringement- may not be a defense. Secondary liability for indirect patent infringement extends it to a broader range of subject matters (parts) by a broader class of actors, who have active with knowledge or intent of their wrongdoing.

In contrast, trade secret protection seems to be a form of compensation for broken promises. Often trade secret protection is provided in unfair competition law, which targets commercially dishonest conduct of unfair competition. Before harmonization, some EU jurisdictions provided civil law remedies whereas others protected trade secrets by criminal law.[26] Trade Secret Directive extends primary liability to unlawful acquisition i.e. '*unauthorised* access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced' or other forms of commercially dishonest acquisition[27] and use and disclosure of trade secrets, without the consent of the trade secrets holder by a person who either unlawfully acquired or against a duty of confidence or other duties limiting its use.[28] As such, trade secrets seem to be a defensive right against specific wrongdoers, who are given explicit or implicit notice of a duty of confidence or non-disclosure.

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[25] Citation is to UK's Supreme Court, Lord Neuberger, *Vestergaard Frandsen A/S and others v Bestnet Europe Limited and others* [2013] UKSC 31 at para 37. This type of statement is found in majority of patent textbook.

[26] See for EU member state practice survey before the adoption of the EU Directive. Study on Trade Secrets and Confidential Business Information in the Internal Market, (2013). European Commission. Last visited 5 March 2018, http://ec.europa.eu/growth/content/study-trade-secrets-and-confidential-business-information-internal-market-0_en

[27] Trade Secrets Directive, Art 4.(2)

[28] Trade Secrets Directive, Art. 4.3

(2) Reverse engineering of AI inference models in patent and trade secrets

As independent invention is not a defense to patent infringement, concurrent use of an invention by an independent inventor is still considered infringing working of the claimed invention[29]. Reverse engineering - a conduct of figuring out the underlying invention from openly available sources of information may well be covered by a patent protection, unless it could be excused from limitation and exceptions in patent law.

Although exceptions to patent right is not harmonized in Europe, UPCA provides a list of limitations and exceptions that are applicable to patents with unitary effect, if and when UPCA would go into effect.[30] While independent invention is still not a defense to patent infringement, Art 27 of the UPCA provides general exceptions for unitary and European patents to acts done privately and for non-commercial purposes; and acts done for experimental purposes relating to the subject matter of the patented invention.[31] Private use and experimental use exceptions are both widely present in national patent laws, although the scope on experimental use exception varies. By explicitly limiting the scope of experimental use exception to the 'purposes relating to the subject matter', the particular version of exception included in the UPCA makes its scope narrower than some of the national practices. Moreover, a new exception is inserted in consideration of right to reverse engineer[32] provided under Software Copyright Directive.[33] The text of the exception

[29] TRIPS Agreement Article 28

[30] UPCA is not yet in force and its taking effect in the near future is in serious doubt. Following Britain's withdrawal from the EU on 31 January 2020, UK has informed that despite their ratification in 2018, UK will not apply UPCA to Britain. Moreover Germany has still not ratified at the time of this writing, which is one of the required member states to ratify, as the seat of central division which include UK, Germany and France. On 13 February, 2020 German Federal Constitutional Court (Bundesverfassungsgericht) ruled that German Act on Unitary Patent was unconstitutionally legislated, based on procedural ground in the decision 2 BvR 739/17 (13.2.2020). Even if German parliament rectifies the situation by legislate the act and remedy the procedural errors, without UK, UPCA and the entire unitary patent package would require immediate revision.

[31] UPCA Art 27(a) and (b)

[32] UPCA Art 27(k) the acts and the use of the obtained information as allowed under Arts 5 and 6 of Directive 2009/24/EC, in particular, by its provisions on decompilation and interoperability.

[33] Directive 2009/24/EC of The European Parliament and of The Council of 23 Apr. 2009 on the legal protection of computer programs. OJ L 111, 5 May 2009 (hereinafter SW Directive).

however makes sure the right to reverse engineer is limited to particular types of reverse engineering (decompilation and interoperability). Thus it seems to be a narrower type of exception that could have been provided under the application of, for example, experimental use exception. In other words, reverse engineering to acquire the underlying knowledge of the claimed invention may be allowed under either the new exception or under the experimental use exception. However, application of the knowledge – for example, using it to create a competing product, that partially using the elements claimed in the patent invention would likely to fall outside the scope of the exception.

In contrast, as trade secret allows concurrent use of the same information, even in cases where the same information is used to create identical goods, if there is no unlawfulness in the acquiring, disclosing or using of the information. For example, in Art. 3(1)(a) and (b) of the Directive, it is provided that the independent discovery or creation and reverse engineering may be used lawfully to *acquire* trade secrets information.[34] Trade Secrets Directive provides in the article 3 as lawful the acquisition by 'independent discovery or creation and observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer'.[35] As the use and disclosure of such lawfully acquired information is not explicitly provided as lawful, member states may seem to some latitude in legislation.[36]

However, a closer look reveals that such allowed reverse engineering seem to be limited, as they may still be considered misappropriation[37] if they meet the definition of unlawful use or disclosure provided under the article 4.3(b) or (c), which is a use or disclosure in breach of a confidentiality or non-disclosure, or contractual or *other duty to limit the use*.[38] Thus, if the trade secret holder restricts such use of lawfully acquired information,[39] use and

[34] Trade Secrets Directive, Art. 3

[35] Trade Secrets Directive Art 3.1 (a) and (b)

[36] Trade Secrets Directive Art 3.2

[37] Art 4 (2) provides two types of unlawful acquisition – acquisition without authorization or commercially dishonest acquisition.

[38] Article 4 (3)

[39] Trade Secrets Directive, Art. 4.3(c).

disclosure of such information may also constitute basis for primary liability. While the duty of confidence/non-disclosure or contractual limit may be clearly understood, it is unclear when such 'other duty of limitation' may arise. Would it be sufficient when there is a unilateral notice of trade secret assertion sufficient to impose such duty? As there can be no ex ante notice of trade secret to the public, it would be crucial to narrowly interpret the cases where the duty of limitation arises, particularly in connection to the third party liability, in particular. As the Directive is a minimum directive,[40] member states at least provide these conducts as unlawful, and thus, in plain understanding of the text, if member states were to legislate use and disclosure of reverse engineering to be lawful, it would be allowed only in cases where there is no duty of confidence or limitation to the contrary.

Reverse engineering has been considered to be a weakness of trade secret protection for AI algorithms for example. For example, when an AI algorithm is used in a personalized medicine end user product - such as diagnostic kit, and patents cover only the product and algorithm is kept secret, reverse engineering may reveal the underlying AI algorithm. Arguably, if AI algorithms (such as inference models) are only protected with trade secrets and not patent, then reverse engineering could be used to identify the inference model. However, as we have seen in the above, it is entirely possible for a member state define a commercial use of reversely engineered trade secrets information unlawful.[41]

Moreover, the new liability that allows tracing of misappropriation via trading of infringing goods seem to shift trade secrets toward in rem like right. The EU Trade Secrets Directive provides secondary liability for third parties. In Article 4(4), the liability of third parties extends not only to the acquisition, but also to *use and disclosure* of the trade secrets, subject to actual or constructed knowledge requirement.[42] More importantly, a new type of liability is now imposed. Article 4(5) imposes liability on the knowing traders of 'infringing goods', defined as 'goods, the design, characteristics, functioning, production process *or*

[40] Article 1(1)

[41] See Art 6.2 SW Directive takes this position on the reversed engineered SW codes. The Directive however provides for a first sale exhaustion doctrine for distribution right, which may function as a general good faith purchaser's exception.

[42] Art 4(4) of Trade Secrets Directive.

marketing of which *significantly benefits* from trade secrets unlawfully acquired, used or disclosed.'[43] As the significant benefit is not tied to technical benefits, there is a theoretical possibility that the scope of protection could go beyond what is provided under the secondary liability for patent infringement (i.e. essential elements of the claimed invention).[44] While indirect patent infringement liability similarly extends liability to partial knowing users, it is limited to third parties who provides means relating to *essential* elements for putting the protected invention into effect.[45] The test for determining when a product is infringing for patents thus always require objective analysis, whilst the test for trade secret misappropriation is mostly subjective.

In sum, the scope of the lawful reverse engineering Trade Secret Directive seems to be aligned with patent exceptions envisioned under the UPCA Art 27(k). Moreover, with the new infringing goods liability imposed on the knowing trader, trade secret seems to be able to provide similar level of protection, as patents at least in cases where there are tangible goods used in personalized medicine. Such protection, as seen below, may be more efficient than relying on patent protection through product by process claim, directed to AI algorithms and processes.

(3) Product by Process in Patent and Trade Secrets

Theoretically, any automated data or information processing could result in a processed data sets or information that could be considered to be directly obtained by the process. If AI uses deep neural network (a form of machine learning algorithm), dynamic weights and nodes are formed where intermediary data are produced and processed. Whether patents

[43] Art 2(4) of Trade Secrets Directive, emphasis added. See for a discussion of various versions of the Directive, Tanya F. Aplin, A Critical Evaluation of the Proposed EU Trade Secrets Directive (July 18, 2014). King's College London Law School Research Paper No. 2014-25. Available SSRN: https://ssrn.com/abstract=2467946 or http://dx.doi.org/10.2139/ssrn.2467946

[44] UPCA Article 26(1).

[45] See UPCA, which provides in Art. 26: 'A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply … with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.'

could extend to these intermediate data sets have been disputed and generally they would not have been considered a 'product obtained by the process.' As we have examined above, if interim data structures, data sets, or information that are produced by AIs would make patent protection of AI algorithm more efficient than trade secret. In EPC, the article 64.2 of EPC and at least a theoretical possibility to extend that to information an intermediate datasets or other types of 'products' exists. Indeed, if such interpretation is possible, patent claims to AIs would be able to be used to cover not only data and information produced by the AIs, but paintings, or patentable inventions that may be made by AIs.[46]

Ultimately, this is a question of scope of granted patents and without UPCA in effect, contracting states of EPC's national law would interpret this in light of their national equivalent clauses. Recent German interpretation is illustrative in this regard. In 2010, for example, the district court of Düsseldorf seemed to view that a process claim to perform a genetic rest for a dog does not cover the test result is viewed a pure information.[47] In contrast, in a case which involved question of method of encoding and decoding of video according to the MPEG-2 standard, where medium that contained the encoded data was shifted, while leaving the data intact and the German Federal Supreme Court ruled that the data may be the product directly produced by a process when 'it displays technical features and by its nature can be suitable subject matter of a patent.'[48] Applying these to medical diagnostic technology, the Court in 2016 ruled that the representation of a test result obtained by means of a patented

[46] In the example above, drug discovery done by EVE, on the new medical indication for tricslosan, may be covered by the claims to core of EVE algorithm.

[47] *Landgericht Düsseldorf* of 16 February 2010, Case 4b 0 247/09—Hunde-Gentest, available at: <https://www3.hhu.de/duesseldorfer-archiv/?p=813> (accessed 10 September 2016). Drexl argued that Court may be showing a policy consideration for free flow of data as the test was done in outside the country of patent grant, while only the result was communicated to the country of patent grant. See Josef Drexl, Designing Competitive Markets for Industrial Data – Between Propertisation and Access, (2017) 8 *JIPITEC* 257 at 270.

[48] MPEG-2-Videosignalcodierung" ("MPEG-2 video signal encoding"), Decision of the Federal Supreme Court (Bundesgerichtshof), Judgement of 21 August 2012, X ZR 33/10.

method is a presentation of information and thus is not covered by product by process protection in German law.[49]

The case concerned a method of diagnosing leukemia by detecting presence of mutation in FLT3 gene. The claimed process in the disputed was not explicitly directed to the AI method. However, there are already similar patents on genetic analysis using AI,[50] such as those offered by Sophia Genetics[51] as well as Watson for Oncology, which are in the market. The defendants practiced the each step of the invention dividedly- one processed the samples first and forwarded them to another defendant located in Czech Republic who then tested them and communicated the result of the analysis to the clients as well as other defendants. The court ruled that the product by process claim protection is afforded to 'a result is obtained that itself is in principle capable of being the subject matter of a patent…not falling within the scope.. are...results of pure work methods from which no new thing is created but a thing is merely affected by not change, for instance when the thing is tested, measured or transported.'[52] In distinguishing this from the case of MPEG-2 video data, the Court noted that…due to its *data structure and thus due to its technical characteristics*, the data were generally susceptible of patent protection…and not distinguished by a special technical type of representation nor does it display any other technical characteristics that have been given by the invention itself.'[53]

As seen in the above, the logic of the German court seem to be to denying the data or information that are the outcome of the process used if they do not show technical character or using the technical teaching of the invention. This may also mean that if the outcome uses the core of the technical teaching or the result has a technical means of presenting the information (i.e. information displayed on a device) there may be still a possibility to read the product by process claim differently.

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[49] Receptor Tyrosine Kinase II (2016) Decision of the Federal Supreme Court (Bundesgerichtshof), 27 September 2016. Case No. X ZR 124/15 Reported in IIC (2018) 49:231-236.

[50] EP1222602 (9.12.2015)

[51] https://www.sophiagenetics.com/home.html, last visited on 30.8.2019.

[52] Receptor Tyrosine Kinase II (2016) Supra note 49, at para 17

[53] Receptor Tyrosine Kinase II (2016) Supra note 49 Para 21 and 24 (bb)

If the method of data analysis was trade secret, outcome of the analysis may be subject to a separate trade secret protection. However, as the outcome needs to be communicated to the client, it may not be subject to secrecy measures and thus may not receive protection of trade secret. However if the result is communicated using tangible goods, knowing trading of such goods would fall under the Art. 4(5) of the Trade Secret Directive. The 'infringing goods' is defined as 'goods, the design, characteristics, functioning, production process *or marketing* of which *significantly benefits* from trade secrets unlawfully acquired, used or disclosed.'[54] This definition of infringing goods makes it necessary to determine what such a 'significant benefit' would be in the case of directly or indirectly obtained trade secrets. Moreover, as 'marketing' is included in the definition of the benefit, the notion seems to go beyond technical features that are directly derived from the trade secret, and includes business secrets. For example, a diagnostic kit could very well be a mixed good embodying technical secrets only in some part. There may be cases where marketing efforts are made using business secrets only in part, or to market perfectly legal products. These cases of mixed goods require a kind of proportionality analysis for technical or business significance of trade secrets in comparison to other factors.[55]

Comparatively, in countries where similar wrongs exist, the wrongs are limited to strictly technical secrets, and there are strong good faith defenses. Indeed, exceptions or defenses for the good faith purchasers of tangible goods may in effect function as a trade secrets exhaustion doctrine for both technical and business secrets. For example in Japan, third party liability for the importers and exporters of products that result from trade secrets is limited to technical information, and the legislative history shows that the liability originally meant to cover object code of digital products produced by using secret source code.[56] The Japanese

[54] Art 2(4) of the EU Trade Secrets Directive, emphasis added. See for a discussion of various versions of the Directive, Tanya F. Aplin, A Critical Evaluation of the Proposed EU Trade Secrets Directive (July 18, 2014). King's College London Law School Research Paper No. 2014-25. Available SSRN: https://ssrn.com/abstract=2467946 or http://dx.doi.org/10.2139/ssrn.2467946

[55] For a concerned comment on the infringing goods misappropriation, see Richard Arnold, Lionel A. F. Bently, Estelle Derclaye, and Graeme B. Dinwoodie, The Legal Consequences of Brexit Through the Lens of IP Law, 101 *Judicature* 65 (2017).

[56] Japanese Unfair Competition Prevention Act, Art.2(1)10

statute also limits its scope by the expression 'produced by' which implies that liability is limited to direct results of the use of the trade secret, and good faith purchasers of the goods are explicitly excused.

The combined reading of Art. 2(4) and Art. 4(5) suggests that the liability for the traders of infringing goods could be quite broad. With the liability under Art. 4(5), trading of any tangible good (genetic diagnostic kit connected to central AI databank, server with AI, for example) that utilizes trade secret AI algorithm or data sets, or data structure that significantly benefits the kit, would fall within the scope of misappropriation. Although the information that is produced by using the trade secret algorithm may not be protected as trade secret as it has to be disclosed to the clients, who requested the analysis, trading of the kit or device that may present such information would fall under this liability. In other words, trade secret protection would not only extend to the direct products produced by process i.e. tangible goods embodying the technical secrets, but also those that may significantly benefit from the use of the process i.e sale of kits, including tangible goods that may display the outcome of the trade secret process.

IV. Conclusion

The above discussions have shown that AI holds great promises for advancing personalized medicine. However, real world applications have not been always successful due to technological immaturity, poor data quality and opaque decision making process that hinders validation of technology against the risks. In addition to these challenges, comparison of protectable subject matter and doctrines for infringement and misappropriation in patent and trade secret law show that there could very well be cumulative protection.

The comparison reveals that patents and trade secrets may overlap over the same subject matters of AI algorithm and data. Under the EPC, a tendency to shift from patents to trade secrets may become real, in particular with regard to AI algorithms and data used in training an intermediate or final outcome of AI algorithms, due to their uncertain status as patentable invention. Moreover, their inclusion as elements of the claimed invention, as we have seen in the above may not receive the protection of product-by-process claims. In contrast, thanks

to flexible definition of trade secrets, algorithms and data may very well be protected as trade secrets. While patents and trade secrets both may allow acquisition of algorithm using reverse engineering, patent protection would clearly protect against commercial use of acquired algorithms or inference models for AI. While the trade secret directive is silent on the use and disclosure, as seen in the above, unlawful use and disclosure against a duty of limitation would be considered to be a misappropriation of trade secrets. Thus there is a little latitude for member states to allow commercial use and disclosure of reversely engineered trade secrets against the expressed intent of the trade secret holder. Patent protection may not reach to the information or data that are produced by AI algorithm, if they are not patent eligible as such. Yet, with additional liability for those who are trading infringing goods under the Trade Secrets Directive, trade secrets over the AI algorithm may still be used effectively to prohibit the trading of products, such as sale of diagnostic kit, that may otherwise be outside the scope of patent protection.

The confluence of developments such as restrictive patent protection, strong personal data protection and expansive trade secret protection show that three main policy perspectives – (1) incentivising technological maturity and (2) quality in data and (3) the goal of making AI's decision making process more transparent - may be thwarted. In particular, stronger trade secret protection which may be enforced against knowing traders of tangible goods without connection to the trade secrets holder, seems to elevate the status of trade secrets to near in rem rights. Patents not only incentivise investments in a particular technological prospects, but also stimulate follow on inventions based on disclosure.

Shifting protection to trade secrets may result in both under-use and over-protection of AI algorithms and data, as disclosure is necessary to ensure data validation i.e. safety, effect and efficacy of the AI used in the personalised medicine. To ensure such disclosure, goal-oriented and concentrated efforts, such as those seen in re-defining medical AI as medical device subject to medical device regulation, should ensure that such disclosure would not amount to the loss of secrecy status.

Disclosure may be necessary to guarantee that automated AI driven decision-making are in compliance with data protection regulations, such as GDPR. When AIs routinely processes

private medical data, it is further imperative to make sure that such algorithm based decision-making is morally unbiased and ethically correct. Hence the disclosure of the algorithm may be necessary, or at least the possibility to be interpreted or explained, to make sure that it does not contain biases. In addition, technological solutions to make decision making less opaque should be considered. Despites the claims how AI cannot be explained and may obfuscate the biases hidden both in the data as well as in the machine learning algorithms used, there are claims that at least by design it is possible to build explainability or human interpretability. Such technical efforts may still be agnostic and the inference models and the models that it uses may still be irrelevant. However, it is important to continue with such efforts, since it would allow human agents to interpret the decision made by the AIs. This would increase the transparency of the algorithmic decision making without risking the disclosure of trade secrets.

【資料】

翻訳：カンボジア・憲法院規則

Translation: Internal Regulation of the Constitutional Council of Cambodia

ミアン・ピッチダビナー*
MEAN Pichdabina

傘 谷　祐 之**
KASAYA Yushi

目次

* 名古屋大学大学院法学研究科博士後期課程
** 名古屋大学大学院法学研究科特任講師

Ⅰ．はじめに

1993 年に制定されたカンボジア王国憲法は、憲法が最高法規であり、「法律及び国家機関の決定は全て、絶対に憲法に適合しなければならない」と規定する（第 152 条）。法律や決定の憲法適合性を審査するのは、同憲法下で新たに設置された憲法院である（第 136 条ないし第 144 条）。

憲法院に関する主要な法律として、1998 年 4 月に公布された「憲法院の組織及び運営に関する法律」（以下、「憲法院法」という）がある[1]。憲法院法は、憲法院の構成員や事務総局などの組織について、および、憲法適合性審査や選挙争訟に関する手続きについて定める。しかし、一部の事項の詳細については、「憲法院は、その規則を定めなければならない」（第 12 条第 1 項）、「……懲戒は、憲法院規則で定めなければならない」（第 37 条後段）というように、憲法院の規則に委任している。

憲法院法の制定後、憲法院は、1998 年 6 月 26 日に「憲法院規則」を、7 月 8 日に「憲法院において適用される手続きに関する規則」（以下、「憲法院手続規則」という）を、それぞれ制定した。憲法院規則は、憲法院の会議の招集・運営方法や、憲法院構成員の懲戒の種類や手続きについて定めており、憲法院手続規則は、憲法院が憲法適合性審査を行うための手続および国民議会（下院）議員選挙・元老院（上院）議員選挙に関する争訟を処理するための手続を定めている。本稿は、この 2 つの規則のうち、憲法院規則を翻訳したものである。

憲法院規則は、1998 年 6 月に制定された後、同年 7 月 28 日、2007 年 8 月 7 日、2017 年 8 月 30 日の 3 回にわたって改正されている。1998 年の第一次改正は、第 27 条の 2 を新設し、憲法院構成員を罷免しようとする際の当該構成員による弁明手続を定めた他、第 5 条および第 9 条の文言に若干の変更を加えた。2007 年の第二次改正は、元老院を新設したことに伴う文言の変更（第 6 条）、議事定足数の「7 名」から「過半数」への引き下げ（第 12 条第 2 項）、書記団の構成員および憲法院の秘密会に関する規定の整理（第 13 条第 2 項・第 3 項）、憲法院規則の改正に関する議決定足数の「3 分の 2」以上から「過半数」への引き下げ（第 18 条・第 29 条）とそれにより条文番号に変更があったことに伴う修正[2]を行った（第 26 条）。2017 年の第三次改正は、兼業禁止の範囲に労働組合の正副代表者を加えつつ、文言を整理し（第 4 条）、それにより条文番号に変更があったことに伴う修正を行った（第 7 条・第 8 条）。

翻訳にあたっては、憲法院のウェブサイトで公開されている、1998 年 6 月制定当時の憲

[1] 憲法院法については、その 2018 年改正後の翻訳として、ミアン・ピッチダビナー=傘谷祐之「翻訳：カンボジア・憲法院の組織及び運営に関する法律」『Nagoya University Asian Law Bulletin』第 4 号（2018 年）43-56 頁、を参照のこと。

[2] カンボジアでは、法令の改正によって条文が改められたときは、当該条文番号の後ろに、1 度目の改正ならば「新しい(ថ្មី)」、2 度目の改正ならば「新しい（2）(ថ្មី (ពីរ))」等と記すことが多い。2007 年の第二次改正では、第 18 条の文言を改めるとともに、その条文番号を「第 18 条」から「新しい第 18 条」に変更した。それに伴い、第 26 条の文言も「……この規則の第 18 条および第 19 条に規定する……」から「……この規則の新しい第 18 条および第 19 条に規定する……」（下線は翻訳者による）に改めた。ただし、この翻訳では、原文で条文番号の後ろにある「新しい」「新しい（2）」は省略し、代わって丸括弧（）内にその条文が改められた年（条文が複数回にわたって改められている場合は直近の改正の年のみ）を記した。一方で、条文中に「新しい第〇条」とある場合は、「改正第〇条」とした。

法院規則[3]、それを改正する同年 7 月 28 日の規則[4]、「憲法院規則の改正に関する憲法院決定 2007 年第 24 号」[5]、そして「憲法院規則の第 4 条、第 7 条及び第 8 条を改正する憲法院決定 2017 年第 38 号」[6]をもとに傘谷が下訳した。その下訳をミアン・ピッチダビナー（ビナー）をはじめとするカンボジア人留学生有志で組織する勉強会で検討し、決定稿とした。翻訳した条文中で、項番号①・②……の数字は訳者が付したものであり、亀甲括弧〔〕内は訳者が補足した部分である。また、「はじめに」はビナーが下書きし、傘谷が加筆修正した。

Ⅱ．翻訳

憲法院規則

第 1 章　憲法院の第 1 回会議

第 1 条[7]　①　憲法院構成員は、就任する前に、宣誓をしなければならない。

②　憲法院構成員は、〔その憲法院構成員を〕任命する勅令[8]〔の施行〕の日から 7 日以内に正当な理由なく宣誓をしなかったときは、憲法院の組織及び運営に関する法律第 10 条第 1 項[9]に従い、これを懲戒に処しなければならない。

第 2 条　憲法院の第 1 回の〔会議の〕招集及び〔その〕会議体の指導は、憲法院院長を選出する目的で、〔第 1 項の〕宣誓をした者であって、且つ〔第 1 回の会議に〕出席する〔予定の憲法院構成員のうちで〕最年長の憲法院構成員が、これを行う。

第 2 章　憲法院構成員の品位

第 3 条　憲法院は、自己の権限を独立且つ中立に行使する機関である。憲法院構成員は、自身の職務の尊厳、独立又は中立を損なう行為をしてはならない。

第 4 条（2017 年改正）　現にその任にある憲法院構成員は、〔次の各号に掲げる事項を〕してはならない。

〔一〕　政党又は労働組合の代表者又は副代表者となること、及び前条の規定と合致しな

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[3] http://www.ccc.gov.kh/detail_info_kh.php?_txtID=373（最終アクセス：2019 年 1 月 7 日）。
[4] http://www.ccc.gov.kh/detail_info_kh.php?_txtID=374 （最終アクセス：2019 年 1 月 7 日）。
[5] http://www.ccc.gov.kh/detail_info_kh.php?_txtID=377 （最終アクセス：2019 年 1 月 7 日）。
[6] http://www.ccc.gov.kh/detail_info_kh.php?_txtID=850 （最終アクセス：2019 年 1 月 7 日）。
[7] 「条」は、原語では「原則（ប្រការ）」。カンボジアでは、「法律（ច្បាប់）」の場合の「条（មាត្រា）」にあたるものを「規則（បទបញ្ជា）」では「ប្រការ」という。ただし、この翻訳では、「ប្រការ」も「条」と訳した。
[8] 「勅令（ព្រះរាជក្រឹត្យ）」は、カンボジアの立法の一形式であり、大臣会議の提案に基づき、国王またはその代理として国家元首代行（ប្រមុខរដ្ឋស្តីទី）が制定する（カンボジア王国憲法第 21 条、第 28 条）。
[9] 「憲法院は、その構成員がこの法律の……第 7 条に違反したとき……は、当該構成員を罷免することができる」（憲法院法第 10 条第 1 項）、「憲法院構成員は、就任する前に、宣誓をしなければならない」（同法第 7 条第 1 項）。

い活動を行うこと。

〔二〕　公刊されうる資料において、及び、公的又は私的な活動のすべてに付随して、憲法院構成員としての自己の役割について評価されるのを許すこと[10]。

第 5 条（1998 年改正）　憲法院構成員は、憲法院外での自身の活動における専門職を含む職業[11]に生じうる変更[12]について、〔憲法院〕院長に知らせなければならない。

第 6 条（2007 年改正）　国民議会〔下院〕議員の候補者又は元老院〔上院〕議員の候補者として立候補することを希望する憲法院構成員は、選挙の公示日の 7 日前までに特別な休職許可を願い出なければならない。この願い出は、許可される[13]。

第 7 条（2017 年改正）　憲法院は、必要があるときは、一般的な義務のいずれかを果さなかった〔憲法院〕構成員、特に、この規則の第 3 条又は改正第 4 条に定める義務を果たさなかった〔憲法院〕構成員を評価する[14]。

第 8 条（2017 年改正）　前条の場合においては、憲法院は、無記名投票[15]により〔憲法院の〕総構成員の過半数の意見（5 票以上）に基づいて決定しなければならない。

第 9 条（2007 年改正）　〔憲法院の〕事務総局の職員は、「立法機関職員の規律に関する法律」に従って事務に従事しなければならず、別に法律の定めがある場合を除き、国家の定める祝日に伴う休暇を取得しなければならない。

第 3 章　議事日程

第 10 条　憲法院院長は、会議体の議事日程案を作成する。〔憲法院〕院長に〔議事日程案を作成〕することができない事情があるときは、〔会議に〕出席する〔予定の憲法院構成員のうち〕最年長の〔憲法院〕構成員がこれを作成しなければならない。

第 11 条　議事日程は、次の順序とする。

一　憲法院が緊急であると決定したすべての問題

二　憲法院に申し立てられたすべての問題

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[10] この第 4 条第 2 号は、憲法院の事務総長を務めるタン・ロッタナー（តាំង រតនា、Taing Ratana）氏によれば、憲法院構成員が論文をはじめ著作物を公表したり口頭で意見を発表したりする際に「憲法院構成員」という肩書きを使用してそうすることを禁止する趣旨である、という。プノンペンにおいて 2019 年 3 月 5 日に行ったロッタナー氏へのインタビューによる。

[11] 「専門職を含む職業」と訳した「**វិជ្ជាជីវៈ ឬ មុខរបរ**」のうち、前半部分の「**វិជ្ជាជីវៈ**」も後半部分の「**មុខរបរ**」も、一般的には、「職業」を意味する。ロッタナー氏によれば、ここでは、後者の「**មុខរបរ**」が職業一般を意味するのに対し、前者の「**វិជ្ជាជីវៈ**」は法律職や医療職など高度な専門性を有する職業を意味する、という。前掲のロッタナー氏へのインタビューによる。

[12] この文節「**ការផ្លាស់ប្តូរ ដែលអាចកើតឡើង វិជ្ជាជីវៈ ឬ មុខរបរ...**」は、直訳では「……職業を生じうる変更」あるいは「職業が生じうる変更」であるが、いずれにしても文意が通じない。ここでは、文脈を踏まえて意訳した。

[13] この第 6 条後段は、ロッタナー氏によれば、憲法院はその構成員が選挙に立候補しようとするのを妨げることはできず、憲法院構成員が特別な休職許可を願い出たときは必ず許可を与えなければならない、という意味である、という。前掲のロッタナー氏へのインタビューによる。

[14] 「評価する（**វាយតម្លៃ**）」は、直訳では「価格を見積もる」「値をつける、（土地や家屋を）評価する」。ここでは「人事評価において低評価を与える」という意味か。

[15] 「無記名投票」は、言語では「秘密投票（**បោះឆ្នោតសម្ងាត់**）」。

第 4 章　会議[16]の〔招集及び運営の〕方法

第 12 条（2007 年改正）①　憲法院の会議は、憲法院院長が招集しなければならず、〔憲法院〕院長に〔招集〕することができない事情があるときは、〔会議に〕出席する〔予定の憲法院構成員のうち〕最年長の〔憲法院〕構成員が招集しなければならない。

②　憲法院の会議は、その〔総〕構成員の過半数が出席する場合にのみ、有効であるとみなすことができる。

③　憲法院構成員の席次は、勤続年数順としなければならない。勤続年数が等しいときは、席次は、年齢順としなければならない。

第 13 条（2007 年改正）①　〔憲法院の会議の〕招集は、議事日程案を添付し、且つ、緊急の場合を除き、会議予定日の遅くとも 2 日前までに〔憲法院〕構成員に送付される招集通知で行わなければならない。

②　憲法院の会議の書記団[17]の構成員は、〔憲法院の〕事務総長又は事務次長、及び 2 人又は必要に応じた人数の事務局員とする。

③　憲法院が秘密会を開くと決定したときは[18]、憲法院院長は、その会議を開く前に議場に部外者がいないことを書記団に確認させ、報告させなければならない。

第 14 条①　憲法院は、会議[19]が始まる前に、議事日程について、及び〔憲法院の〕事務総長又は事務次長とともに〔会議に〕出席する事務局員について、可決しなければならない。

②　会議は、憲法院が議事日程と異なる決定をしたときを除いて、議事日程に従って行わなければならない。

③　〔憲法院〕事務総長は、各々の会議[20]の際に、〔憲法院の〕事務局員の助けを得て、〔会議を〕欠席した憲法院構成員の名を記録し、及び会議体の議事録を作成しなければならない。

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[16] 憲法院規則では、「会議」を意味する語として「ប្រជុំ」「កិច្ចប្រជុំ」「ការប្រជុំ」などを用いている。この翻訳では、全て「会議」と訳した。

[17] 「書記団」の原語は、この第 13 条第 2 項では「**គណៈលេខាធិការ**」であるが、第 15 条第 2 項では「**គណៈលេខា**」という語を用いている。本稿では、両者は言い換えだと判断し、ともに「書記団」と訳した。

[18] 「秘密会を開く」の原語は「**ប្រជុំសម្ងាត់**」。憲法院法は、選挙争訟の一部について公開で審理しなければならないと定めている他（憲法院法第 26 条から第 26 条の 5 まで）、憲法院手続規則は、憲法院は「審理を公開することができる」と規定する（憲法院手続規則第 12 条）。

[19] ここで「会議」と訳した「**សម័យប្រជុំ**」は、国民議会や元老院について述べるときは「会期」の意味でも用いられる。たとえば、カンボジアの現行憲法の第 83 条第 2 項は、国民議会の常会について「各々の会期（**សម័យប្រជុំ**）は、3 か月以上の期間とする」と規定する。しかし、この憲法院規則第 14 条の「**សម័យប្រជុំ**」は、ロッタナー氏によれば、「会期」という意味はなく、後述する「会議の時間（**ពេលប្រជុំ**）」と同じ意味である、という。前掲のロッタナー氏へのインタビューによる。したがって、「会議の時間が始まる前に」とも訳せるが、文脈上、「の時間」を省いた方が日本語として自然に思われるので、この翻訳では単に「会議が始まる前に」と訳した。

[20] この「会議」の原語は「**ពេលប្រជុំ**」であり、直訳では「会議の時間」を意味する。したがって、直訳では、この第 14 条第 3 項は「各々の会議の時間において」であり、同様に、第 15 条第 1 項は「会議の時間を延期することができる」、同条第 4 項は「会議の時間において混乱があり」「会議の時間を延期することができる」であるが、脚注 19 で述べたものと同じ理由で、この翻訳では単に「会議」と訳した。

第 15 条①　〔憲法院〕院長は、〔会議を延期することが〕有益である又は必要であると考えたときは、会議を延期することができる。

②　全ての〔憲法院〕構成員は、予め〔憲法院〕院長の許可を得て、〔憲法院の会議の〕書記団が記入する順序に従って、発言しなければならない。〔憲法院〕構成員の一人ひとりは、1 回の発言につき 15 分以内で発言することができる。

③　他人の発言を遮って発言すること、個人を攻撃する発言をすること、〔又は〕秩序を損ねる種々の態度を示すことは、禁止する。

④　会議において混乱があり、且つ〔憲法院〕院長の禁止〔制止〕が聞き入れられないときは、〔憲法院〕院長は、議場から退出することにより、会議を延期することができる。

第 5 章　意見の表明

第 16 条　憲法院は、決定しなければならないすべての問題について、2 種類の方法すなわち挙手又は無記名投票で採決する。

第 17 条　〔憲法院の会議の〕書記団は、これら 2 種類の採決に際しては、挙手した〔憲法院〕構成員数を数え、又は投票用紙を数える。〔憲法院〕事務総長は、憲法院院長に〔採決の結果を〕報告しなければならず、〔憲法院〕院長は、〔報告された〕結果を会議体に宣言する。

第 18 条（2007 年改正）　憲法院による可決はすべて、〔その総構成員の〕3 分の 2〔以上〕の多数（6 票以上）で可決しなければならない憲法院構成員を罷免する決定を除いて、総構成員の過半数（5 票以上）で行わなければならない。

第 19 条　〔憲法院の〕総構成員の過半数による可決に際して、可否同数となったときは、憲法院院長の票が優先しなければならない[21]。

第 20 条　無記名投票の用紙は、次の 3 色である。

〔一〕　青票は、否を意味する。

〔二〕　白票は、可を意味する。

〔三〕　白及び青の縞柄の票は、棄権を意味する。

第 6 章　会議の欠席

第 21 条①　憲法院構成員は、〔憲法院〕院長の許可なく〔会議を〕欠席してはならない。

②　〔憲法院〕院長は、15 日以内の休暇を構成員に許可する権利を有する。15 日を超える休暇は、憲法院の会議体の承認を願い出なければならない。

[21] この点について、ビナー=傘谷・前掲論文 50 頁（脚注 26）、を参照のこと。ただし、同論文で翻訳した憲法院法の文言と、この憲法院規則第 19 条の文言とは若干異なる。

③　〔憲法院〕構成員は、連続して 5 日間〔以上〕病気であるときは、その根拠として、診断書を有していなければならない。

第 7 章　懲戒

第 22 条①　憲法院構成員は、憲法院の組織及び運営に関する法律の規定を尊重しないときは、刑事罰の有無に関わらず、これを懲戒に処しなければならない。

②　〔憲法院〕構成員は、憲法院規則を尊重しないときは、これを懲戒に処しなければならない。

③　憲法院に関する懲戒処分は、次に掲げるものとする。

一　憲法院院長による注意

二　〔憲法院〕院長による、記録[22]への記載を伴う第 2 回[23]の注意

三　書面による戒告

第 23 条　憲法院院長は、30 日以内に同一の過ち[24]を犯した〔憲法院〕構成員又はこの規則の第 15 条に違反して秩序を損ねた〔憲法院〕構成員に注意を与えなければならない。

第 24 条　いずれの〔憲法院〕構成員も、3 回にわたって注意を受け、にもかかわらず過ちをなしたときは、記録[25]に記載することにより注意を与えなければならない。この懲戒は、当該構成員の給与月額[26]の 4 分の 1 を減ずる。

第 25 条①　次に掲げる〔憲法院〕構成員はいずれも、戒告に処しなければならない。

〔一〕　議場内若しくは議場外で混乱を生じさせ、又は憲法院での職務に出席しないように多数の〔憲法院〕構成員を誘導した〔憲法院〕構成員

〔二〕　他の〔憲法院〕構成員を侮辱し[27]、他の〔憲法院〕構成員と諍いを起こし、他の〔憲法院〕構成員を脅し、又は別の〔憲法院〕構成員を唆して暴力を用いさせた〔憲法院〕

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[22] この第 22 条第 3 項第 3 号の「記録（**កំណត់ហេតុ**）」は、ロッタナー氏によれば、憲法院院長が管理する帳面を指す、という。前掲のロッタナー氏へのインタビューによる。

[23] 「第 2 回の」の原文は「**លើកទី២**」であり、これを直訳すると「第 2 回の」だが、ここでは「第 2 段階の、第 2 級の」という意味か。そう考えると、第 22 条第 3 項に規定された 3 つの懲戒処分のうち、第 1 号の「注意（**ក្រើនរំឮក**）」と第 23 条とが対応し、第 2 号の「第 2 段階」の注意と第 24 条とが対応し、第 3 号の「戒告（**ស្តីបន្ទោស**）」と第 25 条とが対応する、という理解が可能である。

[24] 「過ち」の原語は「**ខុស**」。

[25] この第 24 条の「記録（**កំណត់ហេតុ**）」は、ロッタナー氏によれば、憲法院事務総局が管理する帳面を指す、という。前掲のロッタナー氏へのインタビューによる。そうすると、この第 24 条の「記録」と、脚注 22 で述べた第 22 条第 3 項第 3 号の「記録」とは別のものということになるので、第 22 条第 3 項第 3 号と第 24 条とは対応する関係にはなく、脚注 23 で述べた推測は成り立たなくなる。

[26] 「給与月額」の原語は、この第 24 条後段では「**ប្រាក់ខែ**」であり、第 25 条第 2 項では「**ប្រាក់បំណាច់ប្រចាំខែ**」であって、若干異なる。しかし、ロッタナー氏によれば、両者の意味するところは同じである、というので、この翻訳ではともに「給与月額」と訳した。前掲のロッタナー氏へのインタビューによる。

[27] 「侮辱し」の原語は、第 25 条第 1 項の第 2 号および第 4 号では「**ប្រមាថមើលងាយ**」であり、第 3 号では「**មើលងាយ**」である。ロッタナー氏によれば、本来は同じ文言を用いるべきところ誤って第 3 号のみ「**ប្រមាថ**」を欠いて「**មើលងាយ**」のみを用いたものであり、いずれ憲法院規則を改正する機会があれば文言を統一したい、とのことであった。前掲のロッタナー氏へのインタビューによる。なお、フランスの起草支援により制定された 2009 年刑法では、フランス法の「侮辱（injure）」に相当する語として「**ប្រមាថមើលងាយ**」を用いている（第 307 条）。以上を踏まえて、この翻訳では全て「侮辱」と訳した。

構成員

〔三〕　憲法院又は憲法院院長を侮辱した〔憲法院〕構成員

〔四〕　国王を侮辱した〔憲法院〕構成員

② 戒告は、当該〔憲法院〕構成員の給与月額の 100 分の 50 を 2 か月間減ずる。

第 26 条（2007 年改正）　憲法院構成員は、この規則の第 23 条、第 24 条及び第 25 条に従って懲戒に処されるときは、その〔懲戒の〕事案に関する通知を受け取ってから 5 日以内に弁明しなければならない。憲法院は、この〔本条前段に〕定め〔る弁明の期間〕を超過したときは、当事者が弁明したか否かにかかわらず、この規則の改正第 18 条及び第 19 条に規定するように過半数で、懲戒に処することを決定する〔ことができる〕。

第 27 条①　いずれの憲法院構成員を罷免することも、憲法院の組織及び運営に関する法律の第 10 条に従って行わなければならない[28]。憲法院構成員が辞職を願い出ることは、当該〔憲法院〕構成員が憲法院に対して書面により通知し、〔憲法院構成員を〕任命又は選出する権限を有する機関が新しい構成員を任命又は選出した後に、はじめて可能となる。

② 憲法院は、本条〔第 1 項〕を適用するときは、その〔罷免される、又は辞職する憲法院構成員を任命又は選出した〕機関が新しい〔憲法院〕構成員を任命又は選出するために、任命又は選出する権限を有する当該機関に速やかに通知しなければならない。

第 27 条の 2①（1998 年新設）　いずれの憲法院構成員の罷免も、次に掲げる手続に従って行わなければならない。

一　憲法院院長は、罷免される〔憲法院〕構成員に対し、〔当該憲法院構成員が〕弁明書を作成するため〔の期間として〕、通知書を受け取った日から 14 日間の期間があることを通知しなければならない。

二　この期間を超過したときは、本人〔すなわち罷免される憲法院構成員〕が憲法院に弁明書を送付しなかったとしても、憲法院は、この事案について決定する審理を開くことができる。

② 本人〔すなわち罷免される憲法院構成員〕は、審理に際して、憲法院に出席して自らを防御することができ、又は自らを防御する代理人若しくは弁護士を指名することができる。

第 8 章　会議の安全

[28] 「憲法院は、その構成員がこの法律の第 5 条若しくは第 7 条に違反したとき、予告なく連続して 3 回以上会議に出席しなかったとき、又は、知的若しくは身体的能力を永久に失ったために将来に亘って職務を果たすことができないときは、当該構成員を罷免することができる」（憲法院法第 10 条第 1 項）、「憲法院構成員を罷免する決定は、憲法院の総構成員の 3 分の 2〔以上〕の同意を必要とする」（同条第 2 項）、「憲法院構成員は、軽罪又は重罪のために裁判所により拘禁刑を科されたときは、自動的に罷免されなければならない」（同条第 3 項）。

第 28 条　憲法院院長は、憲法院の内外に生じる危険を予防する職務を負う。憲法院院長は、この職務を果たすために、警察力を行使し、又は軍事力を介入させることできる。

第 9 章　憲法院規則の改正の提案

第 29 条（2007 年改正）　この規則は、憲法院構成員の 3 人以上が提案し、且つその総構成員の過半数で承認したときにのみ、改正することができる。

第 10 章　最終規定

第 30 条　この規則は、官報に掲載しなければならない。

第 31 条　この規則に反する内容を有するいずれの規定も、廃止しなければならない。

第 32 条　この規則は、憲法院の総構成員の 3 分の 2〔以上〕（6 票以上）の同意によりこれを可決し、憲法院院長が署名した日から施行する[29]。

[29] 「施行する（ដាក់ឱ្យអនុវត្ត）」は、直訳では「適用できるようにする」。法律を施行する際には、一般に、「効力あるものとして始まる（ចូលជាធរមាន）」という表現を「施行する」という意味で用いるが、ロッタナー氏によれば、この第 32 条の「適用できるようにする（ដាក់ឱ្យអនុវត្ត）」は「効力あるものとして始まる（ចូលជាធរមាន）」と同じ意味だというので、この翻訳では「施行する」と訳した。前掲のロッタナー氏へのインタビューによる。

【資料】

翻訳：ミャンマー・連邦憲法裁判所法
Translation: The Constitutional Tribunal of the Union Law in Myanmar

牧 野　絵 美*
MAKINO Emi

目次

Ⅰ．はじめに

本稿は、ミャンマー連邦（公布当時）において、2010 年 10 月 28 日に公布された「連邦憲法裁判所法（The Constitutional Tribunal of the Union Law）」の翻訳である。

ミャンマーの現行憲法であるミャンマー連邦共和国憲法（以下、「2008 年憲法」という）は、2008 年 5 月に行われた国民投票により承認され、2011 年 1 月 31 日に施行された。2011 年 3 月 30 日、テイン・セイン大統領が誕生し、軍事政権に終止符が打たれるとともに、国名もミャンマー連邦共和国に変更された。

これまで、ミャンマーにおいて憲法問題を専門に扱う特別裁判所は存在せず、2008 年憲法により初めて連邦憲法裁判所（以下、「憲法裁判所」という）が設置された。2008 年憲法

* 名古屋大学法政国際教育協力研究センター講師

は、第 6 章に司法に関する規定を定めており、第 293 条によれば、通常裁判所は、連邦最高裁判所（Supreme Court of the Union）、地域・州高等裁判所（High Courts of the Region/ State）、自治管区裁判所（Courts of the Self-Administered Division）、自治区域裁判所（Courts of the Self-Administered Zone）、県裁判所（District Courts）、郡裁判所（Township Courts）及びその他の裁判所により構成される。また、特別裁判所として、軍法会議（Courts-Martial）及び憲法裁判所が存在する。憲法裁判所に関しては、その機能及び職務、決定の効力並びに裁判官の資格要件、任命、任期及び弾劾などが、2008 年憲法法第 320 条から第 336 条に規定してある。

憲法裁判所の職務及び権限並びに提訴方法などの詳細を規定するために、2010 年 10 月、憲法裁判所法が制定された。2011 年 1 月 31 日の 2008 年憲法の施行とともに同法も施行され、2011 年 3 月、憲法裁判所が設置された。

2012 年 9 月、憲法裁判所の違憲判断を不服とした連邦議会が、憲法裁判所裁判官 9 名全員に対する弾劾決議を行い、その後裁判官らが自ら辞職するという事件が発生した。2013 年 1 月、連邦議会は、憲法裁判所法を改正し、大統領が 9 名の裁判官候補者から長官を選出する際に、人民院及び民族院議長と協議することが加えられたり（憲法裁判所法第 6 条）、裁判官は自らを選出した大統領、人民院議長又は民族院議長に遂行した職務の報告をすることが義務づけられたりした（同法第 12 条）。さらに同法 25 条を削除し、通常裁判所から移送された事件の決定のみすべての事例に適用されるとし、憲法裁判所の決定の適用範囲を限定した。弾劾事件は、大統領と連邦議会との軋轢により生じたが、連邦議会は憲法裁判所への介入を強め、司法の独立という観点からその存在が危惧されている。

2014 年 11 月、再び憲法裁判所法が改正されたが、本改正は、文言修正、手続の明確化及び不備の修正が中心であり、技術的な修正が加えられたのみである。

本翻訳は、ミャンマー法務長官府が作成した公定英語訳からの翻訳であり、憲法裁判所及び名古屋大学ミャンマー・日本法律研究センターの協力を得て翻訳した。なお、亀甲括弧〔〕内は訳者が補足した部分である。

Ⅱ．翻訳

連邦憲法裁判所法（国家平和発展評議会[1]2010 年法律第 21 号、2010 年 10 月 28 日制定、2013 年 1 月 21 日第一次改正、2014 年 11 月 5 日第二次改正）

前文

ミャンマー連邦共和国憲法第 443 条は、国家平和発展評議会は憲法を施行するために必要とされる準備作業を実施すると規定しており、連邦の立法、行政及び司法が円滑に機能し、様々な議会が設置されたときに実施されるべき職務が遂行され、法律にもとづき準備作業が実施されるよう、必要な法律を制定しなければならない。

国家平和発展評議会は、ミャンマー連邦共和国憲法にもとづき憲法裁判所を組織し、憲法裁判所の職務及び権限並びに憲法裁判所への提訴方法を決定するために、ここにミャンマー連邦共和国憲法第 443 条にもとづき、本法を制定する。

第 1 章　名称、施行及び定義

第 1 条

(a) 本法は、連邦憲法裁判所法という。

(b) 本法は、憲法が施行された日に効力を生ずる。

第 2 条　本法に含まれる用語は、以下の意味を有する。

(a) 憲法（Constitution）とは、ミャンマー連邦共和国憲法を意味する。

(b) 議員（Hluttaw Representative）とは、人民院議員（Pyithu Hluttaw representative）、民族院議員（Amyotha Hluttaw representative）並びに地域又は州議会議員（Region or State Hluttaw representative）を意味する。

(c)〔憲法〕裁判所（Tribunal）とは、憲法のもとに設置される連邦憲法裁判所（Constitutional Tribunal of the Union）を意味する。

(d) 長官（Chairperson）とは、連邦憲法裁判所長官を意味する。

(e) 裁判官（Member）とは、連邦憲法裁判所裁判官を意味する。

(f) 裁判所（Court）とは、連邦最高裁判所（Supreme Court of the Union）、地域・州高等裁判所（Hight Courts of the Region or State）、自治管区裁判所（Self-Administered Division Courts）、自治区域裁判所（Self-Administered Zone Courts）、県裁判所（District Courts）、郡

[1] 1988 年の民主化運動の激化にともない、治安回復を名目に国軍が政権を奪取し、国家法秩序回復評議会（State Law and Order Restoration Council : SLORC）が全権を掌握した。1997 年、SLORC は解散し、国家平和発展評議会（State Peace and Development Council：SPDC）がその職務を引き継いだが、現行憲法が 2011 年 1 月に施行されるまで、SPDC は軍事政権の最高決定機関として機能した。

裁判所（Township courts）及び法律により設置されたその他裁判所を意味する。

(g) 自治地域（Self-Administerd Area）とは、自治管区（Self-Administered Division）及び自治区域（Self-Administered Zone）を意味する。

第 2 章　憲法裁判所の構成、任命及び職務の配分

連邦憲法裁判所の構成

第 3 条　〔憲法〕裁判所は、長官を含む 9 名の裁判官により構成される。

第 4 条

(a) 大統領、人民院議長及び民族院議長は、議員または議員でない者の中から、以下の資格要件を満たす者をそれぞれ 3 名選出する。

(i) 50 歳に達した者。

(ii) 年齢要件を除き、憲法第 120 条に規定される人民院議員の資格要件を満たす者。

(iii) 人民院議員の被選挙権を失格とする憲法第 121 条の規定に違反しない者。

(iv) (aa) 地域・州高等裁判所裁判官として 5 年以上従事した者。

(bb) 地域・州レベル以上で、司法官（Judicial Officer）又は法務官（Law Officer）として 10 年以上従事した者。

又は

(cc) 法廷弁護士（Advocate）として 20 年以上の経験を有する者。

(v) 政治、行政、経済及び安全保障の見識を有する者。

(vi) 連邦及び市民に対して忠誠を誓う者。

(b) 大統領により選出された者のうち、本条(a)項(iv)に該当しない場合であっても、卓越した法律家であるとみなされる者。

(c) 憲法第 333 条(e)項に規定される通り裁判官は政党員であってはならず、(f)項に規定される通り議員であってはならないため、憲法第 330 条にもとづき選出された者が政党員であった場合、当該者は政党の活動に参加してはならず、議員であった場合、議員を辞職したものとみなす。さらに、公務員であった場合、公務員を辞職したものとみなす。

第 5 条　人民院議長及び民族院議長は、本法第 4 条にもとづき、それぞれが選出した裁判官の名簿を大統領に送付する。

任命及び職務の配分

第 6 条　大統領は、自らにより選出された 3 名、人民院議長により選出された 3 名及び民族院議長により選出された 3 名の全 9 名、並びに人民院議長及び民族院議長との協議により 9 名の中から長官として任命する者 1 名の候補者名簿を連邦議会に提出し、承認を

得る。(2013 年 1 月改正) [2]

第 7 条　連邦議会は、大統領が憲法裁判所の長官又は裁判官に任命し、職務を配分した者を、その者が憲法裁判所裁判官の資格要件を満たさないことを明白に証明できない限り、これを拒否する権限を有しない。

第 8 条　連邦議会は、候補者が本法第 4 条に規定される資格要件を満たさないと明確に証明することにより、本法第 6 条にもとづき大統領に指名された者を拒否する場合、大統領は拒否された者に代わる新しい候補者の名簿を再び提出する権限を有する。

第 9 条　本法第 8 条にもとづき新しい候補者の名簿を提出する際、連邦議会により拒否された候補者が大統領による選出の場合は大統領が、人民院議長による選出の場合は人民院議長が、民族院議長による選出の場合は民族院議長が、本法第 4 条、第 5 条及び第 6 条にもとづき、新しい候補者の名簿を再び提出する権限を有する。

第 10 条　大統領は、連邦議会で長官及び裁判官として承認を得た長官及び裁判官を任命し、職務を配分する。

第 11 条　長官又は裁判官のいずれかが政党員であり、〔長官又は裁判官として〕選出された個人又は特別に任命され職務を配分された市民が次期総選挙に立候補する場合、憲法第 120 条及び 121 条の規定に反しない限り、憲法第 38 条(a)項で付与された市民の被選挙権を喪失させないために、当該者は、連邦選挙委員会が選挙の実施を公表した日から、政党及び〔当該〕地方の機関の選挙活動に従事する権限を有する。

第 3 章　憲法裁判所の機能及び職務

第 12 条　憲法裁判所の機能及び職務は、以下の通りである。

(a) 憲法規定の解釈。

(b) 連邦議会、地域議会、州議会又は自治管区・自治区域指導組織が公布した法律が、憲法に適合するか否かの審査。

(c) 連邦、地域、州及び自治地域の行政機関による措置が、憲法に適合するか否かの審査。

(d) 連邦及び地域間、連邦及び州間、地域及び州間、地域間、州間、地域・州及び自治地域並びに自治地域間の憲法上の紛争の決定。

(e) 地域、州又は自治地域が連邦法を執行するにあたり、連邦及び地域・州・自治地域の権利及び義務に関して生じた紛争の決定。

(f) 連邦領に関して大統領により通知された事項の審査及び決定。

(g) 裁判所で審理中の事件に関して、憲法第 323 条及び本法第 17 条にもとづき提訴され

[2] 改正により、長官の任命に際して、大統領は人民院議長及び民族院議長と協議することが加えられた。

た紛争の決定。

(h) 連邦議会により制定された法律により付与された機能及び職務の遂行。

(i) 選出した大統領、人民院議長又は民族院議長に、自らの機能及び職務の遂行に関する報告。（2013 年 1 月追加）

第 4 章　憲法裁判所の解釈、決定及び意見を求めるための提訴

第 13 条　以下の者は、憲法裁判所に対して、解釈、決定及び意見を求めるために直接提訴する権限を有する。

(a) 大統領。

(b) 連邦議会議長。

(c) 人民院議長。

(d) 民族院議長。

(e) 連邦最高裁判所長官。

(f) 連邦選挙委員会委員長。

第 14 条　以下の者及び機関は、憲法裁判所に対して、解釈、決定及び意見を求めるために、本法第 15 条に記載される方法にもとづき、提訴する権限を有する。

(a) 地域又は州首相。

(b) 地域又は州議会議長。

(c) 自治管区指導組織又は自治区域指導組織議長。

(d) 人民院又は民族院議員総数の 10 パーセント以上の議員。

第 15 条　憲法裁判所の解釈、決定及び意見を求めることに関して、

(a) 地域又は州首相であれば、申立（2014 年 11 月文言修正）は、大統領を通じて憲法裁判所に提出される。

(b) 地域又は州議会議長であれば、申立（2014 年 11 月文言修正）は、連邦議会議長を通じて憲法裁判所に提出される。

(c) 自治管区指導組織又は自治区域指導組織議長であれば、申立（2014 年 11 月文言修正）は、当該地域又は州首相若しくは大統領を通じて憲法裁判所に提出される。

(d) 人民院又は民族院議員総数の 10 パーセント以上の議員であれば、申立（2014 年 11 月文言修正）は、当該議院議長を通じて憲法裁判所に提出される。

第 16 条

(a) 本法第 13 条又は 14 条に掲げる者が、憲法裁判所の解釈、決定及び意見を求めて提訴する際には、定められた方法にもとづき、有効な文書及び書面が明確かつ完全に付さ

れなければならない。

(b) (a)項にもとづき提出された申立には、解釈、決定又は意見のいずれを求めるためのものであるか、明確に記載されなければならない。（2014 年 11 月追加）

第 17 条　〔憲法〕裁判所により審理され、憲法に違反する又は適合する規定を含むか否かの〔判断が必要な〕紛争が生じ、かつ当該紛争に関して憲法裁判所が決定を下したことがない場合、当該裁判所は、審理を一時停止し、連邦最高裁判所長官に対して意見を付して速やかに移送する。連邦最高裁判所長官は、自らの意見を付して、憲法裁判所に提出する。

(a)(i) 第 13 条及び第 14 条に規定される者及び機関は、連邦議会、地域議会、州議会、自治管区指導組織又は自治区域指導組織により制定された規定が憲法に適合するか否かを審査し、意見を求めることが必要であると判断した場合、その事実に言及し、憲法裁判所に提訴することができる。（2014 年 11 月追加）

(ii) 申立に参照される文書及び書面は、完全に付されなければならない。（2014 年 11 月追加）

(iii) 憲法裁判所は、(i)にもとづき提訴された事項を審査する際、当該法案の審議に関する関係議会及び法案委員会の議事録を、連邦議会議長及び関係議会議長を通じて請求することができる。（2014 年 11 月追加）

(b)(i) 第 13 条及び第 14 条に規定される者及び機関は、連邦、地域、州及び自治地域の行政機関による措置が憲法に適合するか否かを審査し、意見を求めることが必要であると判断した場合、その事実に言及し、憲法裁判所に提訴することができる。（2014 年 11 月追加）

(ii) 憲法裁判所は、(i)にもとづき申立を受理する際、関係機関に対して、書面で各々の措置に関して説明する権限を付与する。（2014 年 11 月追加）

第 5 章　審査、審問、解釈、意見回答及び決定（2014 年 11 月改正）

審査

第 18 条　長官は、本法第 16 条、第 17 条、第 17 条(a)項及び第 17 条(b)項にもとづき提出された申立を審査するために、大統領により選出された裁判官 1 名、人民院議長により選出された裁判官 1 名及び民族院議長により選出された裁判官 1 名により構成される申立審査機関を設置。（2014 年 11 月改正）

第 19 条　各々の申立において、申立審査機関は、

(a) 〔申立の〕事実が本法第 12 条に含まれる機能及び職務のいずれにあたるか審査し、

関係する事実並びに有効な文書及び書面が、明確かつ完全に付されているか否かを審査する。審査の際に、不備があると判断された場合、所定の期間内に必要な〔文書及び書面〕を提出させる。所定の期間内に〔必要な文書及び書面〕が明確かつ完全に提出されない場合、申立を却下する。（2014 年 11 月改正）

(b) 再説明すべき又は当該申立が適用されるべき（2014 年 11 月追加）者、省庁又は組織が存在する場合、申立（2014 年 11 月文言修正）の写しにより通知し、関係する事実並びに有効な文書及び書面を、所定の期間内に提出する権限を付与する。

(c) すべての要件を満たした場合、憲法裁判所に審問のために〔申立を〕提出する。

審問

第 20 条　長官を含むすべての裁判官は、申立（2014 年 11 月文言修正）に関する審問及び決定を行う。その際、すべての裁判官が職務又はその他の理由により出席できない場合、本申立（2014 年 11 月文言修正）は、長官を含む少なくとも 6 名の裁判官により審問される。

第 21 条　憲法裁判所における審問の際、

(a) 審問の期日は、事前に通知される。

(b) 長官又は長官に指名された裁判官は、簡潔に審問の事項を読み上げる。

(c) 申立（2014 年 11 月文言修正）に関して関係者の意見を聴取することができる。

(d) 連邦の国家機密又は連邦の治安を害する可能性がある事項を除き、公開で審問を行う。

(e) 専門家を招請し、意見及び助言を得ることができる。

(f) （2014 年 11 月削除、第 37 条(a)項に関連条項追加）

(g) 可及的速やかに申立（2014 年 11 月文言修正）に関する審問を終了する。

(h) 申立（2014 年 11 月文言修正）に関する憲法裁判所の日常業務を記録し、長官又はその他の裁判官により署名し、保管する。

解釈、意見回答及び決定（2014 年 11 月改正）

第 22 条　憲法裁判所は、

(a) 審問後可及的速やかに解釈、意見（2014 年 11 月追加）及び決定を確定する。

(b) 解釈、意見（2014 年 11 月追加）及び決定を確定する期日を、事前に通知する。

(c) 過半数の裁判官の賛成により、憲法裁判所の解釈及び意見を確定する。（2014 年 11 月改正）

(d) 長官を含む裁判官の過半数の賛成により、憲法裁判所の決定を確定する。（2014 年 11 月改正）

(e) 本法第 12 条(a)項にもとづく申立に対する解釈、第 17 条(a)項及び(b)項にもとづく申立に対する意見並びに第 12 条(d)項、(e)項、(f)項及び(g)項による申立にもとづく決定に際して、憲法裁判所を代表して長官により署名し、長官又は長官に指名された裁判官により公開で読み上げる。（2014 年 11 月改正）

第 6 章　憲法裁判所決定の効力

第 23 条　本法第 12 条(g)項にもとづき、裁判所から提訴された事項に関する憲法裁判所の決定は、すべての事例に適用される。（2013 年 1 月改正）

第 24 条　憲法裁判所により確定された決定は、終局的かつ確定的である。（2014 年 11 月改正）

第 25 条　（2013 年 1 月削除）[3]

第 7 章　弾劾、任期、辞職、任務終了並びに空席の補充及び任命

第 26 条　長官及び裁判官の弾劾は、憲法第 334 条にしたがう。

第 27 条　憲法裁判所の任期は、連邦議会と同じく 5 年とする。ただし、その任期満了後も、既存の憲法裁判所は、大統領が新たな憲法裁判所を設置するまで、その職務を継続する。

第 28 条

(a) 長官は、任期満了前に、何らかの理由により自らの意思で辞職を希望する場合、長官は、大統領に書面による辞表を提出し、辞職することができる。

(b) (a)項に規定される通り、裁判官が辞職を希望する場合、裁判官は、長官を通じて大統領に書面による辞表を提出し、辞職することができる。

第 29 条　憲法第 334 条に規定される事由により長官又は裁判官が弾劾される場合、憲法第 302 条(b)項及び(c)項にもとづき審理され、連邦議会が当該者は長官又は裁判官として継続することが不適切であると決議した場合、大統領は、当該長官又は裁判官を解任する。

第 30 条　何らかの理由により長官又は裁判官が空席となった場合、大統領は、憲法及び本法の規定にもとづき、本法第 4 条に規定される資格要件を満たす新しい長官又は裁判官を任命することができる。

[3] 第 25 条「憲法裁判所の決定は、関係する政府省庁、組織、者又は各地方に効力が及ぶ。」が削除された。

第 8 章　雑則

第 31 条　本法が施行される前に本法施行のために行われた国家平和発展評議会による準備作業は、憲法にもとづいて行われたものとする。

第 32 条　憲法裁判所は、ネピドーに設置する。必要に応じて、長官は、その他の適切な場所に設置することができる。

第 33 条　長官又は裁判官が職務上誠実に行った行為に対して、いかなる民事又は刑事処分はなされない。

第 34 条　憲法裁判所は、必要に応じて、連邦法務長官を法廷助言者として招請することができる。連邦法務長官が出席できない場合、連邦法務長官府部長以上の適切な者を代理として出廷させることができる。

第 35 条　憲法裁判所の決定、解釈及び意見（2014 年 11 月追加）は、官報に掲載され、引用可能なよう、編纂され、公開される。

第 36 条　長官は、連邦政府の承認を得て、事務業務を担当する事務局を設置する。

第 37 条　本法は、ミャンマー連邦共和国憲法にもとづき設置された連邦議会により、改正、追加及び廃止される。

(a)　憲法裁判所は、本法に規定される機能及び職務を遂行するために、民事訴訟法典、刑事訴訟法典及び証拠法の関係する規定を適用することができる。(2014 年 11 月追加)

第 38 条　本法を施行するために、憲法裁判所は、必要な規則（rules)、通知（nortification)，命令（orders)、指示（directive）及び手続（procedures）を公布することができる。

Nagoya University Asian Law Bulletin 規程

2015 年 7 月 1 日
2016 年 6 月 1 日改訂
編集委員会

1. 目的

本誌は、アジア諸国の法律・政治、法整備支援、および社会科学領域における日本語教育に関する学術研究に寄与することを目的とし、これらの分野における研究発表および情報提供の機会を提供する。

2. 投稿資格

以下に掲げる者は、本誌に投稿することができる。

①法学研究科および法政国際教育協力研究センターの専任教員、特任教員、研究員
②CALE 外国人研究員、CALE 院生・ポスドク研究協力員
③法学研究科の大学院生（指導教員による掲載の承認を要する。）
④その他編集委員会が認めた者

3. 掲載の種類

本誌には、第 1 項の分野に関する「論説」、「研究ノート」、「判例評釈」、「書評」、「資料」および「紹介」等の研究成果を掲載する。

その他、名古屋大学「法整備支援の研究」全体会議等の記録を掲載する。

4. 使用言語

本文の使用言語は、日本語または英語とする。

5. 字数

(1) 和文原稿の場合、「論説」は 2 万字程度、「研究ノート」等その他の場合は 1 万字程度とする。英文原稿の場合、「論説」は 8 千語程度、「研究ノート」等その他の場合は 4 千語程度とする。（図表、注、参考文献を含む。）
(2) 「研究ノート」等その他の場合であっても、貴重な資料を紹介する等の理由により、内容の性質上必要であると編集委員会が認める場合は、和文原稿は 2 万字程度まで、英文原稿は 8 千字程度まで掲載できるものとする。
(3) 研究報告等の記録については、字数制限を設けない。

6. 英文要旨

「論説」および「研究ノート」には、本文の使用言語に関わらず、300 語程度の英文要旨を添付する。

7. 執筆要領

原稿の執筆に関わる事項については、執筆要領を別途定める。

8. 投稿

(1) 投稿希望者は、発行 3 ヶ月前までに、編集委員会にメールで原稿を送付する。
（送付先：cale-publication@law.nagoya-u.ac.jp）
(2) 投稿の 2 週間前までに、原稿のタイトル、掲載の種類（論説・研究ノート等）および字数について、編集委員会に連絡をしなければならない。
(3) 投稿原稿は、完成原稿であること、未発表であることを要する。

9. 審査

(1) 原稿は、編集委員会における一定の審査をおこなったうえで掲載する。
(2) 投稿原稿については、内容・テーマ等を考慮し、編集委員会が 1 名または 2 名の査読者を選任することができる。
(3) 編集委員会は、査読者の意見をふまえて、掲載の可否を決定する。掲載の可否は、メールで投稿者に通知する。

10. 校正

初校のみを著者校正とし、その時点での大幅な加筆・修正は原則として認められない。

11. 発行

(1) 本誌は、原則として年 2 回発行する。創刊号は 2016 年 6 月 1 日発行とする。
(2) 本誌は、PDF 版を法政国際教育協力研究センター（CALE）ホームページに掲載する。

以上

Nagoya University Asian Law Bulletin 執筆要領

2015 年 7 月 1 日
編集委員会

1. 本文の使用言語は、日本語または英語とする。それ以外の言語、特殊な文字・記号を使用する場合は、編集委員会に相談のこと。

2. 本誌は原則として、掲載時にはすべて横組みとする。

3. 文字数は、「論説」の場合は、和文 20,000 字程度、英文 8,000 語程度とする。その他の場合（「研究ノート」、「書評」等）は、和文 10,000 字程度、英文 4,000 語程度とする。いずれの場合も図表、脚注、文献表示を含む。半角英数字は 0.5 字と換算する。

4. 第 1 ページには、表題、氏名、所属を記載する。本文は第 2 ページから始める。

5. 見出し番号は、以下に統一する。
章　I、II、III、……
節　1、2、3、……
項　(1)、(2)、(3)、……
目　(a)、(b)、(c)、……

6. 原稿は、原則として、Microsoft Word で作成する。それ以外のソフトを使用する場合は、事前に編集委員会に問い合わせること。

7. フォーマットは、以下の通りとする。
(1) 用紙サイズ：A4
(2) 余白：上 35mm、下 30mm、左 30mm、右 30mm
(3) 1 ページの文字数：横 40 字、縦 35 行（日本語）、縦 32 行（英語）
(4) 文字の大きさ：10.5 ポイント（日本語）、12 ポイント（英語）
(5) 文字の種類：MS 明朝（日本語）、Times New Roman（英数字）

8. 注は、以下の通りとする。
(1) 脚注はページの末尾に挿入する。（文末脚注ではない。）
(2) 文字の大きさ：8 ポイント（日本語）、9 ポイント（英語）とする。
(3) 文字の種類：本文と同様

9. 参考文献の表記方法については、著者の使い慣れたスタイルで良い。ただし、編集の過程で、編集委員会が調整を行う場合がある。

10. 図および表を挿入するときは、別紙に記載して提出する。図および表の見出しには通し番号を付し、挿入場所を指定する。

11. 「論説」および「研究ノート」の場合は、別紙にて 300 語程度の英文要旨（Abstract）を提出する。

以上

Nagoya University Asian Law Bulletin – Rules for Paper Submissions

July 1, 2015
Revision, June 1, 2016
Editorial Board

1. Objectives of the Bulletin

The Bulletin aims to contribute to the development of academic research on topics related to law and politics of countries in Asia, legal and rule of law development assistance, and Japanese language for social sciences, creating opportunities for publishing research and sharing information in the relevant fields.

2. Eligible Submitters

Eligible submitters are confined to the following:

- Faculty members and researchers of the Nagoya University Graduate School of Law and Center for Asian Legal Exchange
- CALE visiting scholars, CALE post-doctoral researchers, and CALE graduate affiliates
- Graduate students affiliated to the Graduate School of Law (publication approval by the academic advisor is required)
- Others as qualified by the editorial board

3. Categories of Articles

The Bulletin publishes research findings related to the fields listed in section 1 above, in the forms of research articles, research notes, case analyses, book reviews, documentation and book introductions.

In addition, proceedings of annual conference on "Legal Assistance Studies" will also be published in designated columns.

4. Language

Articles may be published either in Japanese or English.

5. Length

(1) For submission in Japanese, a research article shall be of about 20,000 characters. A research note or other types of articles shall be of about 10,000 characters. For submission in English, a research article shall be of about 8,000 words. A research note or other types of articles shall be of about 4,000 words. (These lengths are inclusive of graphics, footnotes and bibliography)

(2) For reasons deemed by the editorial board to be substantively relevant to the revelation of valuable data or documents, a research note etc. may be published up to the length of 20,000 characters in Japanese or 8,000 words in English.

(3) There is no length limits for records or proceedings related to a research report.

6. Abstract in English

Notwithstanding the language of the submission, a research article or a research note must be accompanied by a 300 words abstract in English.

7. Instructions to Authors

Instructions to authors regarding the preparation of the manuscript are detailed in a separate notice.

8. Submission Process

(1) Authors are requested to submit the full paper to the editorial board (email address cale-publication@law.nagoya-u.ac.jp) three months before the publication date;

(2) Authors must notify the editorial board of the title and category of article (i.e., research article or research note, etc.) and the approximate number of characters/words two weeks before submission of the full paper;

(3) The full paper is required to be complete and not-yet published elsewhere.

9. Peer-Review Process

(1) The full paper will be published only after having gone through deliberations by the editorial board.

(2) The editorial board may decide to appoint either one or two referees to review the submitted paper, taking into consideration its contents and theme(s) etc.

(3) The editorial board will decide on acceptance or rejection of the submission based on any comments made by the referee(s). The final decision will be notified to the author by email.

10. Revisions

The author is allowed to revise only the first draft of the full paper. However, as a matter of principle, any major revisions or additions even to the first draft are not acceptable.

11. Publication

(1) The Bulletin is published twice every year (end of September and end of March). The first volume will be published on September 30, 2015.

(2) The Bulletin is published in PDF form on the website of the Center for Asian Legal Exchange.

Nagoya University Asian Law Bulletin – Instructions to Authors

July 1, 2015
Editorial Board

1. The articles must be written either in Japanese or English. In case other languages, characters or phonetic symbols need to be used, the author is advised to consult with the editorial board in advance.

2. In principle, the scripts to be published are written in horizontal alignment.

3. A research article must be of about 20,000 characters in Japanese or about 8,000 words in English, whereas other types of articles (such as a research note or book review, etc.) shall be of about 10,000 characters in Japanese or about 4,000 words in English. These lengths are inclusive of graphics, footnotes and bibliography. Numbers written in half-width alphanumeric form will be counted as 0.5 character or word.

4. The title of the paper, the full name and affiliation of the author should be written on the first page of the submission. The text should start from the second page.

5. Heading and subheadings are expected to adopt the following orders:

   Chapter – I, II, III, …
   Section – 1, 2, 3, …
   Paragraph – (1), (2), (3), …
   Clause – (a), (b), (c), …

6. The paper should be in principle written in Microsoft Word. In case of different software being used, the author must consult with the editorial board in advance.

7. The page layout of the article must conform with the following details:

   (1) Paper size: A4
   (2) Margins: 35mm (top) and 30mm (bottom, left and right)
   (3) Number of characters and lines: (For Japanese) horizontally 40 characters on each line and vertically 35 lines; (For English) 32 lines.
   (4) Word size: 10.5 pt (Japanese); 12 pt (English).
   (5) Word font: MS Mincho (Japanese); Times New Roman (English).

8. Notes should be set as follows:

   (1) Footnotes at the end of the relevant pages, not endnotes.
   (2) Word size: 8 pt (Japanese); 9 pt (English).
   (3) Word font: Consistent with the main text.

9. Authors should feel free to prepare the bibliography following the style which they are familiar with. However, the editorial board reserves the right to do adjustments as may be necessary in editing.

10. Graphics, pictures or tables should be submitted in a separate file. Captions for these graphics, pictures or tables should be properly numbered with specific indication of the place to which they are expected to belong in the final published version.

11. Authors are required to submit a 300-word abstract in English, in case the submission is a research article or a research note.

～ 編集後記 ～

この度、第 5 号が完成いたしました。第 4 号に引き続き、今回もかなり期間を空けての発刊となってしまい、深くお詫び申し上げます。

今号は、法政国際教育協力研究センター（CALE）も加盟しているシンガポール国立大学アジア法研究所（ASLI）ネットワークの年次総会（2019 年 6 月開催）において、CALE が企画したパネル「アジアのポスト権威主義国の民主化プロセスにおける違憲審査機関の役割の比較研究」での報告がベースとなった論文を特集として掲載しました。名古屋大学は、1990 年代後半からアジアの体制移行国より留学生を受け入れ、法整備支援事業に貢献してきました。パネル報告者の多くは、本学で学位を取得され、現在母国や日本の大学で研究者として活躍されています。かつての CALE の活動は、「支援」という側面が大きかったですが、20 年余りの活動を経て、名古屋大学を巣立った優秀な人材もメンバーに加わった「共同研究」の段階に入っております。今号の特集はこうした CALE の活動の新しい段階たる「共同研究」を象徴する成果でもあると考えております。

私は、2019 年 4 月に CALE のセンター長に就任しましたが、就任後、カンボジア、ベトナム、ウズベキスタンなどを訪問する機会がありました。母国へ帰国した留学生が、政府機関、大学、企業など様々な分野で活躍しているのを目の当たりにして、非常にうれしく思うとともに、CALE が継続して果たすべき役割の大きさを改めて実感いたしました。

CALE と CJL（日本法教育研究センター）の諸活動で培ったアジア法に関する研究成果の蓄積やそれにより構築された法律専門家の人的なネットワークが、私たちの大きな財産です。名古屋大学の修了生を中心とするアジア各国の専門家には、日本法に通じた学識ある法律専門家として、これまで以上に CALE の研究プロジェクトに参加していただくことに努めています。本誌は、これらの若い皆さんの研究の発信の場としても活用できればと願っております。引き続き、皆様からのご指導を賜りますよう、よろしくお願い申し上げます。

ALB 編集委員長

藤本亮（名古屋大学法政国際教育協力研究センター長）

Nagoya University Asian Law Bulletin　第 5 号

編集委員会　藤本 亮（委員長）／松尾 陽／佐藤 史人／
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Email：cale-publication@law.nagoya-u.ac.jp
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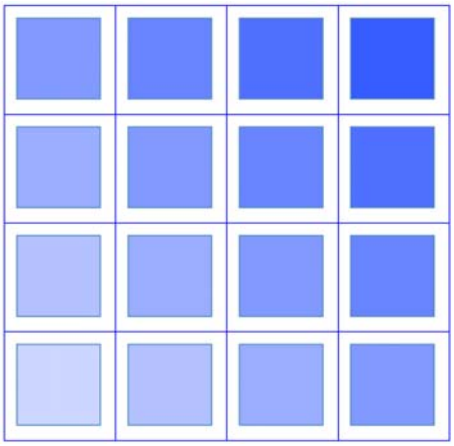

Center for Asian Legal Exchange