



4th Congress of the World Conference on Constitutional Justice

The Rule of Law and Constitutional Justice in the Modern World

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Session 4 - “The law and the individual”

Report by

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Presidents and judges, distinguished guests, ladies and gentlemen,

In this occasion, I would like to report the discussion on the sub-topic of the law and the individual. This report summarizes the keynote speaker paper, presented by Mr. Christoph Grabenwarter, the judge of the Constitutional Court of Austria, the comments of respondent, presented by Mr. Mogoeng Mogoeng, the Chief Justice of the Constitutional Court of South-Africa, and also comments by participants.

This sub-topic consists of four matters such as individual access to constitutional courts, access to ordinary and lower courts, other individual rights related to the rule of law, and the rule of law as a general concept in the absence of specific fundamental rights. The rule of law is determined not only by the relation between the law and the state, but also by the relation between individual and the law. The following explication sum up these four matters discussed during the congress.

Regarding the matter of individual access to constitutional courts, fundamental rights has an important role guaranteed by the constitution. There are two types of access to courts. The first type is individual direct access to the court. In this context, the individual application must be filed by victims whose personal rights are directly affected by the alleged laws. The second type is individual indirect access to the court. In this context, other institutions, such as the Supreme Court or the State Council, should filter the individual application in order to consider whether the application has a legal reason before the Constitutional Court. Whatever the type, the key element is individuals and entities can apply

the constitutionality of law and approach any courts including the Constitutional Courts to vindicate their constitutional rights. The Constitutional Court annul such laws in case the law is in breach of the constitution.

As regards constitutional and other matters of a civil nature, a statutory mechanism has been created for the assistance of an indigent individual. The organised legal profession, universities' law clinics, public interest litigation centers assist individuals to defend their constitutional rights. In addition, the Constitutional Court facilitate individuals' representation if they are deserving and financially under-resourced.

In the context of access to ordinary and lower courts, the right to a fair trial is one of the most fundamental rights. Here, the access to an independent and impartial court is an essential procedural aspect. Access to courts must be "practical and effective" and it is not "a theory". Examples from the questionnaires replied by many countries show that individual access to courts is a sensitive topic and this problem is not limited to a specific geographical region or legal culture. Limitations of access to court can occur in various form, but it should bear in mind that not all of limitations violate fundamental rights. For example, the imposition of court fees is not illegitimated in itself as long as there wouldn't be any obstacle for individuals for exercising their right of free access to a court.

Concerning the matter of other individual rights related to the rule of law, we recognize that the rule of law is a predominant factor for deciding cases. According to the observation in the rule of law checklist of the Venice Commission, the rule of law has become 'a global ideal and aspiration', with a common core valid everywhere. Related to this context, the importance of human and fundamental rights is occasionally set in opposition to the principle of rule of law. Based on the questionnaires replied by courts, the rule of law is necessary in the context of criminal law. The Constitutional Courts developed the principle of "Rechtsstaat" such as protection of legitimate expectations, proportionality, effective protection of legal interest, and independence of courts. Furthermore, the constitutional courts also developed the main principles of modern criminal law and individual rights at the same time such as *ne bis in idem*, *nullum crimen sine lege* and *nulla poena sine lege*. The Constitutional Courts often must deal with the lack of legal certainty of law. This overview demonstrates that the rule of law is implemented by courts in the world.

Regarding the matter of the rule of law as a general concept in the absence of specific fundamental rights, it can be understood that the rule of law might have a specific function in constitutional systems where fundamental rights are not fully codified. Nowadays, most constitutions contain a comprehensive list of fundamental rights where it is seldom necessary that the principle of the rule of law fill the gap of fundamental rights. Related to this context, fundamental rights are enshrined in the constitution itself. Therefore, it is not need to fall back to the more general principle of rule of law. So that it is comprehensible that

courts refer to written rights laid down in the constitution. However, there are courts which use the principle of rule of law as a tool for interpretation and further development of fundamental rights. The most important thing is the Constitutional Courts have a competence to interpret and refine existing fundamental rights written in constitutions.

From the discussion arisen during the congress, we can conclude that individuals may challenge any unconstitutional law on behalf of the public interest. The principle of the rule of law is a basic concept related not only to democracy, but also to individual fundamental and human rights. Whenever the fundamental rights are not protected sufficiently, the courts can implement the rule of law principle to guarantee fundamental rights and fill the gap. The idea is that the rule of law and fundamental rights are inseparable constitutional elements in the constitutions of countries in the world. The protection of fundamental rights is also important to ensure the peace and the development of a country.

The Constitutional Court has a key factor to make the balance between society, citizens, and state to protect human rights. Therefore, the independency of the Constitutional Court is essential in examining cases, including interpreting laws based on the constitution and the rule of law principle.

Finally, it is the end of my report in session 4 of the congress. Thank you very much for your kind attention.