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“The Rule of Law and Constitutional Justice in the Modern World”**

**Session 4 - “The law and the individual”**

**Key-note speech by**

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**I. Introduction**

The Rule of Law is determined not only by the relationship between the law and the state, but also by the relationship between the individual and the law. Access to legal material and the foreseeability of measures based on the law are two elements that have been consistently defined in the case law of the European Court of Human Rights over the last decades. When it comes to courts and in particular to constitutional courts, questions of access to a court and the independence of judges are of primary concern and interest. While the latter issue will be dealt with in the following session, access is the core question for session 4. It is against this background that I will discuss – guided by the answers to the questionnaire – various questions of access to a court and related individual rights before I will present some thoughts on the concept of the Rule of Law beyond individual rights.

**II. Individual access to constitutional courts**

In many countries, the constitutional court is a court which is specialised in legal questions of fundamental importance for the state. Many of the competences of a constitutional court relate to potential conflicts between state organs. But, as we all know, constitutional courts have become courts, which increasingly decide – whether directly or indirectly – cases of legal interest for individuals.

Fundamental rights play an important, if not the most important, role in this regard. The replies to the questionnaire sent out prior to our conference show sufficiently well that fundamental rights enshrined in the constitution establish a connection between the constitutional court of a country and its citizens or those subject to its jurisdiction. As a first example, I will mention the regulation of the constitutional complaint in Latvia: Among other

requirements for admissibility, an individual may contest only those legal norms that violate the fundamental rights of the respective individual. A second example is very illustrative: In South Korea, one must distinguish a constitutional review of statutes from a constitutional complaint. Adjudication on constitutional review of statutes deals with the question of whether the South Korean Constitution, including fundamental rights, has been violated. In contrast, when deciding constitutional complaints, the judges examine solely the question of whether or not fundamental rights have been violated. These two selected examples clearly indicate the genuine link between constitutional justice, fundamental rights and the status of the individual. In Germany, the Federal Constitutional Court is often referred to as a *Bürgergericht*, which means a court serving the citizens. Those among us who participated in the World Conference in Rio de Janeiro six years ago will remember that we dealt with this issue during our opening session there: One key element to effectively meet the requirements of such an attribution is individual access to constitutional courts.

Individual access – if there is one – may be organised in many ways. A comparative view reveals a variety of systems which cannot easily be placed in a few distinct categories. But, there are at least a few similarities which can be described as follows:

- First, it has to be emphasised that there are only a few examples of an *actio popularis* in the strict sense. One of these examples is Macedonia. Art 12 of the Rules of Procedure of the Constitutional Court reads as follows: “Anyone can submit an initiative for assessing the constitutionality of a law and the constitutionality and legality of a regulation or other common act assessment procedure”. A similar system can be found in Croatia. But, the scepticism towards an *actio popularis*-system is clearly predominant. In Hungary, the *actio popularis* was abolished in 2012. The Venice Commission examined this measure and concluded that removing the *actio popularis* should not be regarded as an infringement of the European constitutional heritage. As *Hans Kelsen* put it in his famous lecture on constitutional justice (*Staatsgerichtsbarkeit*) in 1929, *actio popularis* is the broadest guarantee for a comprehensive constitutional review, as any individual may petition the constitutional court. However, *Kelsen* concluded that an *actio popularis* did not provide a practical means to apply constitutional review, as it can attract abusive complaints.
- Secondly, there are only a few countries that do not provide for at least some kind of individual access to challenge the constitutionality of a norm or individual act.
- The third observation concerns the significance of the (ordinary) courts with regard to access of individuals to the constitutional court. One could speak of an intermediary role of the (ordinary) courts. In its Study on Individual Access to Constitutional Justice issued in 2011, the Venice Commission makes a distinction between

“normative constitutional complaints” and “full constitutional complaints”; the former are directed against the application of unconstitutional normative acts (laws), whereas the latter are directed against unconstitutional individual acts, whether or not they are based on an unconstitutional normative act.

“Normative constitutional complaints” exist in two different variations: If an ordinary court has doubts on whether or not a normative act applicable in a concrete case violates the constitution, it brings a request for the annulment of the law in question or a preliminary question before the constitutional court. In the first variation, the parties to the proceedings before the ordinary court may only suggest that a request for annulment be submitted to the constitutional court. This was the legal situation in Austria before 2015. In the second variation, the parties to proceedings before the ordinary court may be in a stronger position, which is the legal situation in Austria since 2015: A party in a legal matter that has been decided by a court of first instance may allege infringement of his rights because of the application of an unconstitutional law.

A “full constitutional complaint” means that an individual may challenge any act by the public authorities which directly and currently violates their fundamental rights. The most prominent variation in this regard is the “constitutional complaint”, where an individual is given a remedy against final decisions by ordinary courts.

- The last possibility for individual access to constitutional courts I would like to mention is the challenge made against a general norm where the applicant needs to prove that the legal provision interferes directly with his rights, legal interests or legal position.

### **III. Access to ordinary and lower courts as fundamental right**

The right to a fair trial is one of the most important fundamental rights and the access to an independent and impartial court is a main procedural aspect. With a view to Article 6 of the ECHR (which correspond to Article 14 of the International Covenant on Civil and Political Rights), the ECtHR stresses that the right of access to a court must be “practical and effective” and not “theoretical or illusory”. Constitutional courts around the world are – together with ordinary courts – the main guardians of this right. The replies to the questionnaire show that many constitutional courts deal with similar questions. Many examples from the case law show that individual access to courts is a sensitive topic around the world and that problems are not limited to a specific geographical region or legal culture. Limitations of access to a court can occur in various forms and one has to keep in mind that not all of them violate fundamental rights with regard to access to a court. Let me highlight

just one specific feature, which seems to be of constitutional relevance in many countries, which is the imposition of court fees on the parties to the proceedings.

The main issue of access of the individual to a court is reflected in a judgment of the Estonian Supreme Court – and I quote: “[t]he right to judicial protection and the right to appeal are important fundamental rights and [...] these rights must be guaranteed for everyone and not only to persons who are able to participate in covering expenses”. The Hungarian Constitutional Court refers to a “discrimination on [...] ground of [a person’s] financial situation”.

As already indicated, the imposition of court fees is not illegitimate in itself. As the Constitutional Court of Latvia puts it: “Payment of various fees as a restriction upon a person’s right to free access to court is admissible only if this is not an obstacle preventing from exercising the right to free access to court”. It is obvious that a constitutional court has to assess every specific regulation in its context, which often is a difficult task. Sometimes cases resemble each other: In 1961, the Italian Constitutional Court declared the so called “*solve et repete*-method” in tax law unconstitutional. This method implies that you first pay your taxes as a necessary precondition for bringing a judicial claim for the purpose of ascertaining the illegality of that tax. The Constitutional Court held that this contradicted the principle of equality, because it discriminates taxpayers on the basis of their economic status, allowing only wealthy people to seek justice, and also contradicted the constitutional principles that grant access to a court to all citizens on an equal basis. Likewise, in a recent judgment, the Constitutional Court of Bosnia and Herzegovina declared a provision unconstitutional which stipulated that a court must not take any action whatsoever if a taxpayer failed to pay the fee prescribed by the law.

#### **IV. Other individual rights related to the rule of law**

As the replies to the questionnaire indicate, the Rule of Law is a predominant factor in the case law of constitutional courts around the world. As it is observed 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”. In this context, the importance of human and fundamental rights mentioned before is sometimes set against the principle of the Rule of Law. In fact, there may be discrepancies in individual cases, but in general there is – as the Constitutional Chamber of the Supreme Court of Kyrgyzstan framed it in its reply – “a great deal of overlap between the two concepts”. The genuine link becomes apparent in a short sentence taken from the case law of the South Korean Constitutional Court – and I quote: “The Constitution is based on the underlying ideology of realizing a government under the Rule of Law that protects the people’s fundamental rights from the abuse of governmental power”. I am going to address this issue in the final part of my speech with

regard to the Rule of Law as a general concept in the absence of specific fundamental rights in the text of a constitution.

At this stage, two specific observations may be made when reading the respective replies by the constitutional courts:

- The Rule of Law is of particular importance in the context of criminal law. Just to mention a few examples from the case law of some constitutional courts: The German Federal Constitutional Court has developed four principles under the principle of “Rechtsstaat”: protection of legitimate expectations, proportionality, effective protection of legal interests, and the independence of courts. Other courts e.g. the Constitutional Courts of Azerbaijan and Chile also made use of the principle of the Rule of Law to establish the principle of proportionality as inherent to the constitution. The Constitutional Court of Belarus dealt with the right of witnesses in criminal proceedings to legal assistance in 2015. In various judgments, the Constitutional Courts of Belgium and Lithuania established case law on 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*. In 2016, the Constitutional Court of the Russian Federation declared some provisions of the Criminal Procedure Code as unconstitutional and this example illustrates the close link between the Rule of Law and fundamental rights: The Court had to deal with the legal situation that female defendants were treated differently from male defendants with regard to the right to have their criminal cases considered by a jury. The main argument of the Court was that the principle of legal equality of men and woman with regard to access to a court, derived from three provisions of the Russian Constitution reflecting the Rule of Law.
- My second observation is that constitutional courts often have to deal with the lack of legal certainty of laws. I just give you one example from the case law of the Hungarian Constitutional Court: In a judgment delivered in 2013, the Court found a penal provision unconstitutional, which prohibited the public use of totalitarian symbols, because it was too vague as it defined the range of criminal conducts too widely. Here again, the connection to fundamental rights is apparent to the Court, which held that the provision in question violated the principle of the Rule of Law and legal certainty and, through this restricted disproportionately, the freedom of expression. And just to show you the variety of what can possibly be extracted from the principle of legal certainty: According to the Constitutional Court of Latvia, it requires that final judgments of the courts are not contested, which means that the conclusion of legal proceedings must be legally enduring.

This brief overview demonstrates that the concept or principle of the Rule of Law is almost a *constitutional passe-partout* for constitutional courts. While it seems to be impossible to trace every particular element in the tradition of a legal system – the close interrelation to the idea and realisation of fundamental rights in many cases is made clear. In this context, reference should be made to the Rule of Law Checklist of the Venice Commission, which identifies common features of the Rule of Law around the world.

#### **V. The Rule of Law as a general concept in the absence of specific fundamental rights**

The Rule of Law might have a specific function in constitutional systems, where fundamental rights are not fully codified. One has to bear in mind that nowadays, most constitutions contain a comprehensive list of fundamental rights. In these cases, a recourse to the principle of the Rule of Law to fill the gap is rarely needed. For example, the French *Conseil Constitutionnel* insists in its reply that the fundamental rights are enshrined in the Constitution itself and therefore there is no need to fall back to the more general principle of the Rule of Law. The same approach seems to be pursued in several other countries, such as Finland or Madagascar. In this context, the advantages of a written catalogue of fundamental rights outweighs the difficulties with regard to the application of the principle of the Rule of Law, which is a general concept. It is, therefore, understandable that constitutional courts tend to refer to written rights laid down in the constitution. If the European fundamental rights catalogues are integrated into constitutional law, as is the case in Austria, the Constitutional Court directly refers to the European Convention on Human Rights and increasingly to the Charter of Fundamental Rights of the European Union. Sometimes the national concept of the Rule of Law (*“Rechtsstaat”*) and references to European fundamental rights are combined.

However, hardly any catalogue of fundamental rights is exhaustive and self-explanatory. This is where the Rule of Law comes into play: Constitutional courts use this principle to interpret and refine existing fundamental rights. Even in constitutions in which there is a specific right, constitutional courts go beyond this. For access to courts in disputes against public authority, the case law of the Federal Constitutional Court is based upon the guarantee of effective protection of legal interests under Article 19 § 4 GG. In other legal disputes, a comparable guarantee of effective protection through the courts has been derived from Article 20 § 3 in conjunction with Article 2 § 1 of the Basic Law. The guarantee not only includes access to a court, but also the right to a comprehensive review of the facts and law. We can find a similar line in the case law of the European Court of Human Rights under Article 6 of the Convention.

Another example can be found in the case law of the Turkish Constitutional Court: The second part of the Turkish Constitution entitled “Rights and Duties of the Individual” contains

a comprehensive list of fundamental rights. Article 36 reads as follows: “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction”. The execution of court judgments without delay is mentioned in the third part of the Turkish Constitution as an obligation of the public authorities. The Turkish Constitutional Court stated that in a system in which the Rule of Law prevails, the non-execution of court judgments cannot be accepted. Therefore, the fundamental right enshrined in Article 36 of the Turkish Constitution includes the right of the individual to having court judgments executed without delay. In other words, the Turkish Constitutional Court converts an objective rule into an individual right. This is not a standalone judgment: The Turkish Constitutional Court interprets the objective duty of the judiciary to conclude the cases as quickly as possible (Article 141 of the Turkish Constitution) as an individual right covered by the right to a fair trial enshrined in Article 36 of the Turkish Constitution.

These are just two examples in which the principle of the Rule of Law is used as a tool for interpretation and further development of fundamental rights. A similar approach with regard to procedural guarantees can be observed in the case law of the Georgian Constitutional Court.

## **V. Concluding remarks**

The foregoing observations lead me directly to my concluding remarks. The perspective of the individual shows the particular quality of the Rule of Law-principle. It is not a standalone concept, but rather a basic concept related not only to democracy, but also to individual fundamental and human rights. It is the foundation of fundamental individual guarantees, but it also fills gaps where the rights do not offer sufficient protection. The extent to which objective principles fill a gap in individual rights varies according to the particular constitutional framework. However, the idea that the Rule of Law and fundamental rights are inseparable constitutional elements and principles is confirmed not only by national constitutions, but by international, regional and European texts as well, above all with regard to human rights such as e.g. the European Convention on Human Rights.

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