

The Sixth Conference of Asian Constitutional Court Judges

Ulaan Bataar, Mongolia 24 – 26 September 2009

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The Sixth Conference of Asian Constitutional Court Judges was organised by the Constitutional Court of Mongolia in cooperation with the Konrad Adenauer Stiftung in Ulaan Bataar, Mongolia during 24 – 26 September 2009.

The Conference gathered together judges of Constitutional Courts or equivalent organs from Cambodia, Indonesia, Republic of Korea, Kyrgyzstan, Malaysia, Mongolia, the Philippines, Thailand and Uzbekistan. Participants from the Federal Constitutional Court of Germany, the Venice Commission of the Council of Europe and the Konrad Adenauer Stiftung also attended the Conference.

The Delegation of the Constitutional Court of Thailand was led by the Right Honourable Chut Chonlavorn, President of the Constitutional Court.

The theme of the Conference was “Constitutional Review and Separation of Powers” and the Conference was divided into four sessions.

In the first session dealing with the relations between constitutional review organs, governments and the ordinary judiciary, there were presentations from delegates of the Federal Court of Malaysia, the Constitutional Council of Cambodia, the Constitutional Court of Kyrgyzstan and the Constitutional Court of Thailand. The session focused on the systems of constitutional review and the relations between Constitutional Courts or equivalent organs and other state organs in the presenters’ countries, thus safeguarding the principle of separation of powers.

Justice Chalermpon Ake-uru made presentation on behalf the Constitutional Court of Thailand. He explained to the Conference that the principle of separation of powers is enshrined in the Constitution of Thailand; namely: the legislative power is vested in

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the National Assembly, the executive power is vested in the Council of Ministers and the judicial power is vested in the Courts.

However, since Thailand adopted the parliamentary system of democratic government the principle is not strictly applied as in the case of the United States of America, especially with regard to the relations between the legislative power and the executive power. The system in Thailand is rather the fusion of powers as in the United Kingdom because the executive branch of government is usually from the legislative branch. He stated further that constitutional review of laws or legislation is the area where the Constitutional Court interacts with the government or the ordinary courts. Constitutional review of laws or legislation is the main jurisdiction of the Constitutional Court and the Thai system of constitutional review covers both a priori review and a posteriori review.

As regards the role of the Government in a priori constitutional review, if the Prime Minister is of the opinion that a bill approved by the National Assembly but before submitting for royal assent contains provisions contrary to or inconsistent with the Constitution or the enactment process under the Constitution, he may refer the matter to the Constitutional Court for ruling. In its a priori review, the Constitutional Court will look into the substance of the legislation as well as the enactment process. If the provisions of such a bill are decided to be contrary to or inconsistent with the Constitution or its enactment is contrary to the provisions of the Constitution and such provisions of the bill form its essential element, the bill will lapse.

A posteriori review, on the other hand, is a review of promulgated legislation in a concrete case. This is where the Constitutional Court interacts with the ordinary judiciary, i.e. the Courts of Justice and the Administrative Courts. In the application of the provisions of any law to any case, if the court by itself is of the opinion, or a party to case raises an objection with a reason, that the provisions of such a law are contrary to or inconsistent with the Constitution and there are no decisions of the Constitutional Court on such provisions, the Court will submit that opinion to the Constitutional Court for consideration and decision. During such period, the Court may continue the trial but must suspend the adjudication of the case until the Constitutional Court has made its decision.

Justice Chalermpon Ake-uru stated further that another important jurisdiction of the Constitutional Court is to decide on disputes pertaining to the respective powers and duties between two or more constitutional organs other than the Courts. These constitutional organs are the National Assembly, the Council of Ministers and other Constitutional Organs, such as the Election Commission, the Ombudsmen, the National Counter Corruption Commission

and the State Audit Commission. However, questions on the powers and duties of a single organ with respect to its ability to take a certain action will not be accepted for consideration. With this jurisdiction the Constitutional Court can perform the balancing function safeguarding the principle of separation of powers.

The decision of the Constitutional Court is final and binding on the National Assembly, the Council of Ministers, Courts and other State organs. It is final in the sense that the parties may not file an appeal to any court or body. It is binding in the sense that the decision of the Constitutional Court will be binding not only to the parties but also to third parties. Thus, once the Constitutional Court passes a ruling, that ruling will be directly binding on the National Assembly, the Council of Ministers, Courts as well as constitutional organs and state agencies in the enactment, application and interpretation of laws.

Under the second session that discussed the topic of constitutional adjudication vis-à-vis the legislature, the participants from the constitutional courts of Germany, the Republic of Korea, Indonesia, Uzbekistan and the Philippines, presented interesting examples on how the interpretation of the Constitution often affects legislative acts passed by a parliamentary majority. Laws are declared unconstitutional - in full or in part - and lawmakers are asked to pass new legislation to be in line with the respective rulings of the court.

In the third session dealing with reports on important decisions in recent years, participants from Cambodia, Republic of Korea, Kyrgyzstan, Malaysia, Mongolia, the Philippines, Thailand and Uzbekistan made presentations. Justice Suphot Khaimuk presented Constitutional Court Ruling No. 12/2552 dated August 19, 2009. This is a case concerning a Military Government Order issued in 1972 which prohibited owners or possessors of shops from operating food and beverage businesses between 1 a.m. to 5 a.m. without authorization. In this case, the defendant, a rice soup restaurant owner in upcountry Thailand, was accused of breaking the law when he opened his business after 1 a.m. The defendant pleaded not guilty and the provincial Court of Justice submitted the objection of the defendant to the Constitutional Court to determine whether a Military Government Order issued in 1972 was contrary to or inconsistent with the Constitution or not. The Constitutional Court ruled that the Military Government Order was contrary to or inconsistent with the Constitution. The reasons for the decision may be summed up as follows:

First, the restriction of liberties in occupation may be imposed only in accordance with the protection of rights and liberties principle provided by the Constitution. In considering whether the law that is claimed to restrict rights and liberties is contrary to or

inconsistent with the Constitution, the country's atmosphere and the people's way of life at the time of the enactment of the law and thereafter must be taken into consideration.

In this case, it was clear when Military Government Order was enacted in 1972, the Military Council controlled both the legislative power and executive power of the country for the purpose of maintaining public order and a peaceful society until the Constitution had been promulgated. During that period, the Military Council acting as the government, intended to have people stay in peace and order, not conducting activities that may cause chaos and wreck havoc to the security of the State. Therefore, the Military Council deemed it necessary to enact a specific law for the purpose of restricting some rights and liberties, such as law limiting liberties in operating food and beverage businesses and restricting the rights and liberties of consumers.

However, in peaceful circumstances such as the present time, an individual's way of life is different from the past. Economic growth of the country has contributed to easier traveling and a change in working hours. Daily behavior can no more be restricted to certain hours. These kinds of thing pose no threat to national security.

Second, the Constitution stipulates that restriction on such liberties cannot be imposed except by virtue of law specifically enacted for the following purposes: maintaining security and safety of the State or the national economy, protecting the public in regard to public utilities, maintain public order and good morals, regulating the engagement in an occupation; consumer protection, town and country planning, preserving natural resources of the environment, public welfare, preventing monopoly, or eliminating unfair competition. In this case, the Constitutional Court decided that the time limitation for operating and selling food and beverages during 1 a.m. to 5 a.m. not only restricted the opportunity for people to run businesses and obstructed them from undertaking businesses freely and fairly by imposing unnecessary measures but also put the burden on other people who need to consume those food and beverages at night or any time.

The Constitutional Court therefore ruled that the Military Government order issued in 1972 limited the liberties to run a business and to undertake a fair and free competition and held that that the Military Government order issued in 1972 was against the provision on restriction of the rights and liberties of people as provided by the Constitution as well as the right of engagement in a business or an occupation of the Constitution of the Kingdom of Thailand.

The essence of this decision is to set a standard on the protection of rights and liberties of individuals. It does not matter if the party who submitted the petition is an ordinary merchant without any power or the State authority. Thus, the people's rights and liberties recognized by the decisions of the Constitutional Court achieve the actual manifestation in practice.

In the fourth session, the Conference heard the report from Justice Dong-Heub Lee of the Constitutional Court of the Republic of Korea, Chairman of the Preparatory Committee on the current status and further procedures regarding the establishment of an Asian Association of Constitutional Courts and Equivalent Organs. He stated that much has been achieved since the first and second meetings of the Preparatory Committee in April 2008 and May 2009. The second meeting, held in cooperation with the Konrad Adenauer Stiftung in Seoul, resulted in the agreement on the current tentative name "Asian Association of Constitutional Courts and Equivalent Organs" and the understanding that it was more important to launch the Association with the current participating countries than to expand the membership. In the meantime, the opinions and suggestions of members have been collected and reflected on the draft Statute of the Association. The Constitutional Courts of the Republic of Korea will host the Third Meeting of the Preparatory Committee some time in spring of 2010.

The representative of the Venice Commission of the Council of Europe made a short intervention regarding the progress of organizing a second World Conference on Constitutional Justice and the preparation for the establishment of the World Conference on Constitutional Justice as a permanent body. Towards the end of the Conference, Indonesia expressed its willingness to host the next Conference of Asian Constitutional Court Judges in 2010 in Indonesia.

Thailand has been involved in the movement to establish a permanent regional body for Asian constitutional courts since its participation at the 3rd Seminar of Asian Constitutional Court Judges in Ulaan Bataar, on September 8, 2005. More recently, Thailand attended the first World Conference on Constitutional Justice held in Cape Town, South Africa during 22-24 January, 2009 to discuss constitutional justice and its influence on society and on developing a global human rights jurisprudence. The Constitutional Court of Thailand is always pleased to participate in a fruitful cooperation among Constitutional Courts and Equivalent Organs on a regional or worldwide basis in the future.