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‘Constitutional Justice and Social Integration’

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Key-note presentation

(Theme 1)

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Challenges of social integration in a globalised world

- Presidents,
- Judges,
- Professors,
- Dear Friends,

I should like to begin by thanking you very warmly for taking the time to reply to the questionnaire.

The points covered by the questionnaire were social integration in a globalised world and the role of constitutional courts and equivalent bodies in this connection.

Reading the replies to the questionnaire was most interesting; the analyses and information provided were very detailed. This makes my task of summarising them all the trickier, so I ask you to bear with me.

This report concerns the first part of the questionnaire, to which around 40 constitutional courts replied. It can be seen straightaway that different approaches have been taken for dealing with the concept of 'social integration'. In addition to the questions posed (asylum law, taxation law and social security), several courts extended the range of the questionnaire submitted.

Some preliminary remarks need to be made to give the proper perspective for obtaining a clear overview of the points made in the national reports:

Political systems are making substantial advances by enshrining in constitutions, as they are reformed and amended, principles and standards which ensure greater social protection and safeguards for human rights and fundamental freedoms, thereby establishing a legal environment conducive to social integration. At the same time, some constitutional councils have been transformed into constitutional courts, giving individuals direct or indirect access for protecting their rights.

The various constitutional courts, whose competence regarding constitutionality is generally geared towards abstract law, are now opening up more towards appeals by individuals, especially insofar as some are adopting the procedure of priority preliminary rulings on constitutionality.

These advances are dictated by the new standards of constitutional states, in which constitutional courts are no longer arbiters between authorities. They now receive complaints from individuals, either directly or indirectly. This gives them a pioneering role in the area of social integration.

In a globalised world economy where there is a trend towards standardisation of all facets of modern life, there is a clear desire on the part of political organisations for uniform approaches to certain areas. This trend means that modern states are actively addressing social issues and national solidarity, which are regarded as essential levers for giving practical meaning to the equality of citizens guaranteed by abstract law. Social integration aims at stable and fair societies which provide security and well-being for all.

The natural flows of migrants leaving the poorest regions or fleeing other countries affected by armed conflicts in search of a better life have become a worrying trend. These migrants often end up living illegally in countries which are gradually closing their borders and tightening up their legislation on international migration for security and other reasons.

These two categories of people (the poorest and migrants) are both entitled to protection; the former are covered by their own countries' constitutional provisions and the safeguards they provide and, additionally, by the principles of international human rights law.

In contrast, it is usually only the fundamental principles of human rights which are available as legal mechanisms for protecting the dignity of migrants whose immigration status is illegal. Social integration operates differently for the two categories of people.

1-1 The difficulties most often quoted in terms of social integration are linked to the economic and financial crisis, the recession and inadequate government revenues, which have an immediate impact on the public policies and welfare programmes aimed at social integration and cohesion. The impact of this crisis is more severe regarding the measures for the reception of foreigners, with asylum law being cited most frequently as an example.

1-1-1 Social integration undermined by the economic crisis

Most of the cases presented as examples involve social security, medical assistance and care, retirement pensions, unemployment benefit and the various forms of assistance provided for the poorest members of society.

In these circumstances, the constitutional courts acknowledge the fact that governments cannot spend money which they do not have and can therefore restrict the implementation of their own commitments towards society and individuals. For instance, they can reduce pensions and other welfare benefits on the one hand while increasing taxes on the other.

The vital precondition is for the various measures to be aimed at ensuring a fair and equitable social security system in line with the principles of the rule of law. It is frequently stated that constitutional states must guarantee a minimum level of income as a fundamental human right that ensures human dignity.

Some reports note that budget cuts have affected the social rights of foreigners lawfully resident in countries more severely than those of nationals and acknowledge that rights traditionally available have been denied. The right to family reunification is given as one example.

1-1-2 Reception of foreigners and asylum law

There are many difficulties as regards asylum seekers and illegal immigrants; they involve appeal procedures and legal aid. These difficulties are further complicated by the fact that international standards are not applied directly. Illegal immigrants

sometimes make themselves “undocumented” to prevent their countries of origin being identified so that they cannot be sent back. This additional complication raises the problem of the relevant jurisdiction for these cases, as well as the difficulty in determining the law applicable to cases involving illegal migrants.

Situations of this kind of pose that many legal problems and complicate both administrative and judicial procedures. Some constitutional courts indicate that the principles of the rule of law have not always been complied with in respect of foreigners.

The reception of foreigners in hardship in general and of asylum seekers in particular is based on humanitarian considerations and concerns of solidarity. On the basis of these fundamental principles, some other constitutional courts stand out as good examples, in particular the Swiss Constitutional Court, with formalised case-law which provides that **persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living.**

1-2 It should be noted that the **second question concerning the transformation into legal issues** of this first theme did not trigger many reactions. Part of the reason may lie in the fact that not all legal systems make a distinction between sociopolitical conflicts and purely legal matters.

The reports which did answer this question state that the range of social rights enshrined in their countries’ constitutions is more than broad enough to deal with social conflicts. As far as they are concerned, insofar as states are responsible for meeting the needs of society, the fundamental principles of social justice, equality and solidarity inter alia provide a legal basis for resolving social conflicts and it is **not therefore necessary for sociopolitical issues to be transformed into legal issues.**

The constitutional courts in countries which describe themselves as “welfare states” maintain that all disputes regarding social justice and respect for human rights have a legal aspect. **All social conflicts relating to fundamental rights, in particular social justice, equality and non-discrimination, are therefore subject to the jurisdiction of the courts.**

It should also be noted that any problems of social integration which are directly related to fundamental freedoms and the principles of equality are ipso facto legal matters.

However, while some of the relevant cases fall within the jurisdiction of constitutional courts, others are dealt with by other courts, depending on how the legal systems in the countries concerned are organised.

1-3- An increase in cases directly or indirectly related to social integration is mentioned in several reports, including, for instance, by Germany, France and South Korea, the host country of this important meeting. This is largely put down to the impact of the global economic and financial crisis. It is also sometimes the result of constitutional reforms, in particular the introduction of appeals by individuals. The combined effect of the two causes is evident in certain national reports.

The constitutional courts which have recorded an upward trend indicate that it is the result of the economic and financial crisis and the ensuing budget cuts, which have had an **impact on social integration policies**. The other collateral impact of the multifaceted global crisis involves an increase in the number of cases concerning **asylum applications in particular and migration in general**. Some courts also add another factor in this upward trend, which relates to changes in society. This is because appeals for constitutional reviews of recent legislation aimed at satisfying new forms of human emancipation are now being made to these courts. This applies in particular to **cases involving partnerships between people of the same sex and, more broadly, gender equality**. Several courts, in particular those of Italy and Russia, referred to this trend.

1-3-1 The examples which come up most frequently in terms of social integration involve social assistance, social security, medical assistance, retirement pensions and child benefits. As noted above, the relevant cases are usually related to the global economic crisis, but sometimes transition economies are involved. The appeals usually concern failure to respect the principles of equality in the distribution or redistribution of national wealth, either in the form of various types of social assistance or in the form of contributions to national budgetary efforts through taxation and other levies.

1-3-2 Cases brought before constitutional courts by foreigners or in connection with their situation generate the most difficulties. They concern the social rights of foreign workers, the rights of asylum seekers and illegal immigration in general.

It should also be underlined that the rights to work, education, health, security and social assistance are usually areas of overlap between cases brought by nationals and those brought by foreigners.

The number of cases brought by foreign nationals has increased significantly in the areas of asylum law, nationality law, family reunification, individual liberty and equality, non-discrimination and the right to human dignity.

It is quite clear that social integration encounters the greatest difficulties in this category of cases, in particular in terms of asylum and cases involving illegal

immigration. **These are very complex cases which cause difficulties not only for the authorities of the host countries but also for transit countries and countries of origin**; at the same time, it should be underlined that they concern a real human tragedy and very painful situations for thousands of families, if not entire communities.

Although illegal immigration is not a new trend, it has expanded significantly in recent years, in particular because of economic globalisation and the development of means of communication, and new challenges and threats which have followed.

As well as direct consequences in security and economic terms, illegal immigration also has psychological and social effects. There has been a significant rise in xenophobia in many parts of the world, especially in developed countries which are facing a growing influx of migrants.

The problem of illegal immigration is a worrying concern today; thousands of illegal immigrants live and work in inhuman and degrading conditions of great vulnerability and without any protection in transit and destination countries.

It is worthwhile noting certain international commitments in this area, in particular the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Part III of which covers the rights of migrant workers and members of their families (applicable to all migrant workers, **including illegal migrants**), and the UN Convention against Transnational Organised Crime of 15 November 2000, known as the Palermo Convention, which is the first criminal law instrument for combating transnational organised crime. It has two protocols concerning transnational crimes relating to international migration.

The first protocol concerns trafficking in persons, especially women and children. It lays down strict measures for combating trafficking in human beings and protecting them against slavery, sexual exploitation and illegal employment.

The second protocol concerns the smuggling of migrants by land, sea and air, and its purpose is to prevent and combat the smuggling of migrants and to promote co-operation between the States Parties, while protecting the rights of migrants who are victims of smuggling.

Certain other texts provide procedural safeguards of essentially three kinds: the right to a fair hearing, the right to an effective remedy and safeguards concerning expulsion (Protocols Nos. 4 and 7 to the European Convention on Human Rights).

The main basic safeguards include the right to lead a normal family life, the prohibition of inhuman or degrading treatment and the right to freedom and security.

The 1981 African Charter on Human and Peoples' Rights is also an international instrument which was regional in origin but reasserts some universal standards, **providing for freedom of movement and the right to seek and receive asylum abroad in the event of persecution, in keeping with national and international rules.**

1-3-3 The other upward trend, which concerns a new category of cases brought before constitutional courts in direct relation to social integration, is the result of new legislation that has been passed and where there are difficulties concerning its scope of application. This new trend involves **appeals connected with homosexuality, which is widely rejected if not banned in certain societies, whereas other societies adopt very open approaches to the concept of individual freedoms and have accepted various types of union between persons of the same sex, up to and including marriage.** In countries where this is the case, the applicants are seeking full alignment with traditional marriage as regards the rights relating to marriage, in particular medically assisted procreation, the right to adopt, tax benefits and child benefits. The applications are always based on a broad interpretation of fundamental freedoms and the principles of equality. Pensioners' right to work, quoted by the Armenian Court, is a further example.

[Ladies and gentlemen,]

As we begin our discussions and take them forward, we must bear in mind one vital parameter, namely the fact that our institutions are an integral part of national systems and operate within the area provided for in the relevant constitutions.

The main difficulty in summarising the reports was to find areas of convergence between institutions grouped together under the generic heading of constitutional courts. In practice, they are either constitutional councils, the main task of which is to review constitutionality, which gives them the role of arbiters between authorities, sometimes with some possibility of referrals or appeals by the opposition and, more infrequently, individuals, or constitutional courts, which are sometimes confused with the judicial authorities. However, the difference between the two categories is not entirely clear; there are cases of constitutional councils which are like courts and of constitutional courts which are like constitutional councils on account of their membership, method of operation and referral procedures.

This lack of uniformity is merely a consequence of the sovereign political choices made by individual countries. Although it does not appear anywhere in the national reports, it is nevertheless on the basis of the principle of sovereignty that the national systems base their resistance to the universal application of certain standards. This

resistance is often justified on the ground of certain national characteristics and historic and sociocultural reasons specific to each country.

The area with most specific national characteristics concerns the place occupied by individuals in society; the social status of individuals is consolidated through various domestic legal texts and international standards are applied only if they do not run counter to specific national characteristics. This explains why certain international conventions that are clearly related to social integration are quite often not ratified by major powers – a particular example here being the International Covenant on Economic, Social and Cultural Rights, which is mentioned only very rarely in the national reports.

Sovereignty and the protection of specific national characteristics are reflected indirectly in the replies given in relation to the integration of international standards, their application and their effect in the event of conflict with national standards.

The universal application of the standards relating to social integration needs a greater degree of consensus to address the new challenges posed by globalisation and economic standardisation, in particular in terms of specific national characteristics, solidarity, **the protection of the poorest groups in the context of global solidarity and the rights of displaced persons**. These conditions are likely to open up new opportunities for constitutional institutions in their search for new possibilities for protecting and strengthening social integration.

[Ladies and gentlemen,]

These introductory comments to our discussions clearly confirm that the organisers' choice of topic was very wise.

The challenges of social integration demand responses from public institutions in general and constitutional courts in particular; the latter are becoming increasingly involved in consolidation processes aimed at moving forward the legal and organisational environment and making it more exacting so that society is ultimately offered greater safeguards.

Globalisation, in turn, presents us with an encouraging dual reality and that many challenges and goals to be addressed, stemming from the mobility of individuals on the one hand and access to ever broader and more open jurisprudence on the other.

Efforts still nevertheless have to be made to assimilate the progress achieved and overcome the difficulties which emerge clearly from the national contributions that will form the basis of our discussions.