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‘Constitutional Justice and Social Integration’

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Key-note speech

(DRAFT)

CONSTITUTIONAL INSTRUMENTS FOR SOCIAL INTEGRATION*

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Dear distinguished participants, ladies and gentlemen,

I was asked to deliver a keynote speech on the subject of constitutional instruments enhancing/dealing with/for social integration. In what follows I will explore these instruments by relying upon the replies of constitutional courts to the questionnaire.

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I wish to thank Dr. Serdar Gülener, a rapporteur of the Turkish Constitutional Court, for summarising the country replies to the questionnaire.

My presentation is divided into four parts. In the first part, by way of introduction I would like to say a few words about the integrative function of constitutional justice. The second part of the presentation will deal with the constitutional law instruments to be applied in cases of social integration focusing on rights provisions and such constitutional principles as equality and social state.

The third part takes up the powers of the constitutional courts to prevent or settle social conflicts. The common competences of the constitutional courts will be underlined with a special reference to the nature of decisions in the cases of individual applications. The fourth and final part examines the main difficulties/limitations in applying the constitutional instruments in cases of social integration. It will be argued that these difficulties and limitations do not constitute a serious obstacle that would paralyse the integrative function of constitutional courts.

The presentation concludes that even though the constitutional courts have relevant and effective instruments for enhancing/dealing with/for social integration, their integrative roles are limited.

1. Integrative function of constitutional justice

In today's increasingly globalised and fragmented world, social integration became an important political problem that must be resolved by the governments. As the European Court of Human Rights has suggested, the state authorities must act as a kind of "mediator" between conflicting groups with a view of ensuring these groups recognize and tolerate each other.[1]

The expansion of the judiciary to cover almost all social and political issues has given rise to expectations that it must also play a crucial role in fostering social integration. Judges are expected not only to settle disputes, but also to solve social and political problems that other branches of the state are "unable or unwilling to deal with effectively".[2] Indeed, as Ran Hirschl put it, "national high courts worldwide have been frequently asked to resolve a

[1] *Serif v. Greece*, Application no: 38178/97, 14/12/1999, par. 53; *Supreme Holy Council of the Muslim Community v. Bulgaria*, Application no: 39023/97, 16/12/2004, par. 96: "The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."

[2] Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, (Oxford: Oxford University Press, 2002), p.1.

range of issues, varying from the scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor and environmental protection".[3]

The Germany's reply to the questionnaire reveals that "all major political conflicts eventually reach the (Constitutional) Court." Today constitutional courts deal with disputes arising from income gaps among different classes of society, taxation, social security, ethnic, religious and national differences, gender equality and migratory flows, all of which constitute the main sources of social conflict. Therefore, the issue of social integration inevitably falls within the scope of constitutional justice.

The constitutional courts have contributed to the solution of social problems and to enhancement of social integration by eliminating the laws that could trigger social conflict and disintegration. Besides, some historic judgments provided a moral support alongside legal one to the struggle against discrimination. Perhaps typical example of such judicial contribution was the *Brown* decision of the US Supreme Court, which was a turning point in ending school segregation.[4] The *Brown* judgment not only radically altered the policy of segregation but also provided a moral support for the civil rights movements. In 1955, a year after *Brown*, Martin Luther King urged the African American people to support the boycott of Montgomery's segregated bus system by referring to the Supreme Court alongside God Almighty. In his famous speech he declared, "We are not wrong. If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong."[5]

The integrative function of constitutional justice should not be exaggerated. It is true that constitutional courts can and in fact do influence social integration, but they are not the prevailing actors who determine the process of social integration. As Dieter Grimm states, constitutions "produce normative effects", and "the process of social integration does not unfold on a normative ground".[6] Grimm has emphasised that "Integration takes place in

[3] Ran Hirschl, "The Judicialization of Politics", *The Oxford Handbook of Law and Politics*, K.E.Whittington, R. D. Kelemen & G.A.Caldeira (eds.), (Oxford: Oxford University Press, 2008), p.119.

[4] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[5] Quoted in Mark Tushnet (ed.), *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases*, (Boston: Beacon Press, 2008), p.xvii-xix.

[6] Dieter Grimm, "Integration by constitution", *International Journal of Constitutional Law*, Volume 3, Numbers 2 & 3, Special Issue, (May 2005): 193-208, p.195.

the real world. It is a social process that can be promoted by the constitution but is not controlled by it."[7]

Keeping in mind this limited function of constitutions and constitutional justice, we can now turn to the question of what kinds of constitutional instruments are available for the constitutional courts to invoke in preventing and/or settling social conflicts and fostering social integration.

2. Constitutional law applied in cases of social integration

The reports of the countries, based on the replies to the questionnaire, reveal that there exist a variety of constitutional law to be applied in the cases concerning social integration. The main instrument is the text of constitution. Generally speaking, there are two kinds of constitutional provisions that may be invoked to deal with social integration. First, constitutions have provisions expressing such principles as rule of law, social state and equality with a view to maintaining social integrity. Second, constitutions contain rights provisions either as a separate bill of rights or entrenched articles of constitution. The constitutional courts directly apply provisions on social and economic rights to dry out the sources of social conflict and to enhance social integration.

Some courts also invoke directly or indirectly supranational and international conventions in the cases of social integration (Austria, Estonia, Georgia, Italy, Moldova, The Netherlands, Russia, Turkey). In Austria, for instance, even though there are no social fundamental rights of constitutional rank, the social rights granted by the Charter of Fundamental Rights of the European Union can be applied to settle social disputes. Likewise the Netherlands indicates that since the European Union Law and other self-executing treaties function as a *"de facto* constitution", the social and cultural rights (especially relevant for minority) protected by these texts alongside the Constitution such as the freedom of religion and belief, the freedom of education, cultural and linguistic rights, and equal treatment norms are invoked in enhancing social integration. Besides, some countries (Mongolia, Norway) apply organic laws. To sum up, in cases concerning social integration constitutional courts apply almost all kinds of constitutional law, most notably fundamental social rights, constitutional principles of equality and social state, and international human rights law.

[7] *Ibid*., p.95.

The constitutional principle of equality and non-discrimination is certainly one of the most effective means of enhancing social integrity. The abstract equality before law requires the ignorance of particular differences and privileges of individuals. In applying principle of equality "it is necessary to ignore all factual differences that distinguish one individual from the next in order to promote the counterfactual identity that goes hand in hand with equal moral worth".[8] However, this is not always the case. In certain circumstances, the principle of equality requires the recognition of differences such as in the case of protecting the right to freely exercise religion.[9]

The headscarf or full-face veil of Muslim women has been a kind of social problem affecting social integration in some countries, especially France, Belgium, Germany, the Netherlands and Turkey. The reply of the Netherlands to the questionnaire clearly states that the dominant questions concerning social integration before the Council of State concern, among others, “clothing (and other) habits including face-covering veils”. Germany’s reply has also clearly referred to the headscarf judgment of the Federal Constitutional Court which dealt with the claims of Muslim women wearing headscarf to have equal rights compared to other religious groups.[10] Turkey’s response also mentions the Constitutional Court’s recent judgment on the issue of wearing headscarf by lawyers in courtrooms.

In Europe where Islam is a minority religion the headscarf or *burka* has generally been perceived as an obstacle to social integration. The European Court of Human Rights, from the very beginning, shared the view that headscarf and most recently full-face veil (burka) is not compatible with principle of secularism and gender equality.[11]

Unlike the courts in France, Belgium, and some other European countries, the Spanish Supreme Court quashed the ban on wearing burka in public places on the ground, among others, that “*a ban on the wearing of the full-face veil would have the result of isolating the women concerned and would give rise to discrimination against them, and would thus be incompatible with the objective of ensuring the social integration of groups of immigrant*

[8] Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity", M.Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, (Durham: Duke University Press, 1994), p.9.

[9] *Ibid*., p.10.

[10] FCC, decision of 24 September 2003, BVerfGE 108, 282.

[11] *S.A.S v. France* (GC), Application no: 43835/11, 1 July 2014.

origin."[12] Similarly, the Turkish Constitutional Court (TCC) has recently found a violation of religious freedom and principle of equality in a case where the applicant as a female lawyer was removed from the court hearing because she was wearing a headscarf. The TCC is of the opinion that different treatment of the applicant who wears headscarf as a requirement of her religious belief constitutes a violation of principle of equality, which requires the state organs and officials, including judges, to treat everybody equally.[13]

The headscarf judgment of the Turkish Constitutional Court also reveals that in countries where the access of individuals to the constitutional courts is possible, the applicants are given the opportunity to invoke rights provisions as well as constitutional principles such as equality and prohibition of discrimination. Indeed on another occasion, an individual application was lodged before the TCC on the basis that the applicant was unable to use her maiden name alone after marriage, and therefore she was subject to gender discrimination. Surname question was a legal and eventually constitutional problem having a certain impact on social integration. Article 187 of the Turkish Civil Code stipulates that "woman takes the surname of her husband; however, she may also bear her maiden name before her husband's surname...". In 2011 the TCC as plenary reviewed the constitutionality of this provision and found it constitutional.[14]

Two years later, the same issue was brought before the TCC through individual application. This time the TCC found a violation of the right to preserve and develop one's spiritual being by invoking Article 90 of the Constitution which gives certain primacy and priority to the international human rights agreements over national laws. Accordingly, in case of conflict between international human rights treaties and national laws the former prevails.

Referring to the relevant judgments of the European Court of Human Rights[15] and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the TCC argued that the court of first instance should have taken into account

[12] Cited in *S.A.S v. France*, par. 47.

[13] TCC (Plenary) Application No: 2014/256, 25/6/2014, par. 152. With this judgment, the Turkish Constitutional Court radically changed its previous judgments that the laws lifting the ban on headscarf were unconstitutional.

[14] E. 2009/85, K. 2011/49, 10/3/2011.

[15] See *Ünal Tekeli v. Turkey*, Application no: 29865/96, 16/11/2004; *Leventoğlu Abdulkadiroğlu v. Turkey*, Application no: 7971/07, 28/5/2013; *Tuncer Güneş v. Turkey*, Application no: 26268/08, 3/10/2013; *Tanbay Tülen v. Turkey*, Application no: 38249/09, 10/12/2013.

these provisions of international conventions, rather than contravening provision of Civil Code, to settle the concrete conflict.[16] The Court therefore reached the conclusion that the intervention in the spiritual integrity of the applicant as protected under article 17 of the Constitution was not prescribed by law. The TCC's surname judgment is a typical example of invoking international human rights law in settling some disputes that may lead to social disintegration.

Apart from the principle of equality, the constitutional principle of social or welfare state is also applied by constitutional courts to settle social conflicts. German Federal Constitutional Court, for instance, responded that the state must respect the constitutional principle of welfare state which entails, read in conjunction with the right to human dignity, a right to minimum welfare. Likewise, Federal Constitutional Court invoked the fundamental right to human dignity, "a cornerstone of German constitutional law" in its jurisprudence on social integration.[17]

Latvia stated that the principle of socially responsible state is an effective instrument which involves not only protection of fundamental social rights but also a general objective that must be pursued by the legislator. The Constitutional Court of Latvia has emphasised "in its case-law that the duty of the state to form a sustainable and balanced policy to ensure welfare of the society follows from the principle of a socially responsible state." Similarly, the Constitutional Court of Lithuania indicated that "the social character of the state and the social orientation of the state are construed not only in the context of the concrete rights and freedoms of human social rights, but also with the reference to a larger concept of state functions."[18]

In a quite number of countries individuals have direct access to the constitutional courts in various forms called individual application, constitutional complaint and concrete appeal. In

[16] Application No: 2013/2187, 19/12/2013.

[17] The relevant part of the Germany's reply is as follows: "*In several cases, the FCC has emphasized that there is a right to an existential minimum the legislature must protect. More specifically, many decisions in tax law did focus on the particular needs of families, where an amount needed to sustain a minimum meaningful life must, according to the constitution, be free from taxation (i.e. FCC, decision of 29 May 1990, BVerfGE 82, 60 <80>)*".

[18] The relevant part of the Lithunia's reply is as follows: "*The Constitutional Court has formulated several obligations for the legislature that the latter must fulfill before it discharges its other functions. For instance, while adopting the law on the state budget, the Seimas must pay heed to the striving for a just and harmonious society that is consolidated in the Constitution, whereas the state budget must be formed in consideration of, inter alia, the existing social and economic situation, and of the needs and possibilities of society and the state.*"

such countries individuals may invoke with some limitations a great range of constitutional law including constitutional rights (e.g. right to equality, freedom of education and certain political rights), constitutional principles and relevant instruments of international law.

However, some countries like Germany, Spain and Turkey exclude certain social and economic rights from the scope of constitutional complaint. Article 148 of the Turkish Constitution clearly indicates that the constitutional rights which are at the same time protected by the European Convention on Human Rights are the subject of constitutional complaint. In Slovenia constitutional complaint does not cover the allegations as to violations of general constitutional principles. Therefore the Constitutional Court would reject an individual complaint "alleging only infringements of the principle of a social state determined in Article 2 of the Constitution". Likewise, Czech Republic indicated that some social rights such as right to adequate level of material security and right to free medical care are not extended to aliens. It also stated that corporations may lodge a constitutional complaint "but they may only rely on rights and freedoms whose nature allows for protection of corporations (notably the right to protection of property, right to a fair trial etc.)".

3. Powers of constitutional courts to prevent/settle social conflicts

The replies to the questionnaire reveal that most constitutional courts have competence to deal with social groups in conflict through the individual complaints or concrete norm review. In countries where the individual application or constitutional complaint is adopted, social groups as private legal entities in various forms such as foundations or associations have the opportunity to appeal to the constitutional courts with a view to solve their problems.

Apart from the system of constitutional complaint, almost all constitutional courts have the competence to review constitutionality of laws either in the form of *a priori* or *a posteriori* review. The *a priori* review of laws adopted by some countries like France provides a clear preventive role for the constitutional courts in avoiding social conflict. The case of Moldova is worth mentioning, because the competence of *a priori* review of constitutionality was in a way self-granted by the Constitutional Court of this country.[19] Moldova's reply indicated

[19] Moldova stated that "*Until now, subject to constitutional review were only the laws published in the Official Journal (a posteriori review), but by the interpretation of the constitutional norms on 14 February 2014, the Constitutional Court ruled that, in the meaning of the Article 135 para. (1), lett. a) of the Constitution, the review of constitutionality*

that "The *a priori* constitutional review of laws is integrated, inseparably, in the legal mechanism aimed to contribute to the effective preventive protection of the rights and fundamental freedoms of the person."

The *a posteriori* constitutional review in its abstract and concrete forms grants the courts the competence to invalidate the unconstitutional laws enacted by the parliaments, including the laws that creates social conflict and causes disintegration in society. Unlike concrete review, the abstract constitutional review of laws also provides a preventive instrument to a certain extent because the constitutional courts may rapidly annul the unconstitutional laws which are incompatible for instance with the principle of equality, before they were fully implemented.

As a matter of principle, in cases of constitutional complaint, where the constitutional courts found a violation of a right, the source of violation whether it is a legal provision or its practice by the state authorities must be removed in order to avoid the repetitive violations. Some courts, like the Federal Constitutional Court of Germany, have the competence to annul the laws in cases of constitutional complaint, where it found the relevant law in breach of constitutional rights. On the other hand, some other courts including the Turkish Constitutional Court have no power of annulling the unconstitutional laws in cases of constitutional complaint.

With regard to review of constitutionality, the constitutional courts as negative legislators, to use the words of Hans Kelsen, act to remove the obstacles to social integration by invalidating unconstitutional laws which either created or likely to create social conflict. The forms of decisions given by the constitutional courts to settle social conflicts are various ranging from annulling or repealing (Germany, Spain, Macedonia, Turkey etc.) to declaring the unconstitutional law void and null (Mongolia, Thailand, Ukraine). Some courts have also the competence not to apply the unconstitutional law in a specific case dealing with social integration (Norway).

Finally, most of the courts declared that the prevention of social conflicts falls outside of their jurisdictions; thus they have no preventive role in the field of social integration. Having said that, as explained above, *a priori* and to a certain degree *a posteriori* abstract review

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of laws includes the laws passed by Parliament, both after and prior publication in the Official Journal of the Republic of Moldova (a priori review)."

of constitutionality provide necessary means in order to foster harmony and toleration that may serve preventing social conflicts.

4. Difficulties in applying constitutional instruments and limitations in the access to courts

The analysis of replies reveals that most of the constitutional courts have faced some structural and systemic difficulties in applying the constitutional instruments at their disposal. In some countries primary difficulties derive from the structure of constitutional system. The reluctance of the other state organs to execute decisions of the constitutional court constitutes an important difficulty (Croatia, Slovenia and Macedonia). Some responses emphasise that the pressures of social groups on the courts during some particular proceedings constitute a difficulty in terms of settling conflicts (Croatia, Ecuador).

Estonia mentions that the Court does not always have sufficient knowledge to take decisions in dealing with social issues. This is so because “the Court often finds it difficult to decide on which solution would be the best for the society – it is largely a political decision that mostly concerns the distribution of resources within the society.” It must be noted that a few countries indicate that they do not encounter any problems in settling social disputes (Thailand and Mongolia).

With respect to limitations in the access to the courts which prevent them from settling social conflicts, some responses indicate that there is no direct individual or group access to the constitutional courts aiming to prevent social conflicts and to enhance social integration. However, the courts deal with certain social problems concerning group conflict and social integration within the framework of their general jurisdictions.

In some countries, constitutional justice is accessible only to limited number of organs or persons who are state related (Bulgaria, Chad. Moldova). However, most constitutions provide the individuals and groups with the chance to bring their complaints before the constitutional courts in a direct and indirect ways. There are also certain limitations in terms of individual access to the courts which might have negative impacts on the function of settling some conflicts. The exclusion of social and economic rights from the constitutional complaint may be mentioned as a typical example of limitations on the competences of the courts to effectively prevent social conflicts arising from, for instance, unemployment or working conditions (Turkey).

Another limitation in the access to the constitutional courts is the court fee to be paid in order to lodge individual applications. However, this cannot be considered as a serious obstacle that may prevent the courts from settling disputes, because (a) the amount of fee is usually affordable, and (b) the legal aid is provided for the applicants who have no sufficient financial means (Czech Republic, Turkey).

Conclusion

A number of conclusions may be drawn from above explanations based on replies to the questionnaire. Firstly, enhancing or dealing with issues concerning social integration is perceived as one of the responsibilities of the constitutional courts. In realising this delicate function, the courts are bound to respect social and cultural diversity deeply embedded in our societies. The struggle against discrimination on especially ethnic and religious ground is precondition for ensuring diversity. Therefore all the state organs, as the Strasbourg Court has emphasised, "must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment."[20]

Secondly, there are relevant and sufficient constitutional law provisions at the disposal of constitutional courts in settling social conflicts and fostering social integration. The rights provisions, constitutional principles and international human rights law provide the required instruments for dealing with such social issues as social security and migration.

Thirdly, constitutional courts have necessary competences of invalidating the laws which they deem incompatible with the constitutional rights and principles. By using their competences, the supreme or constitutional courts historically contributed to social integration by helping for instance to eliminate ethnic and religious discrimination. However, the constitutional courts have not magical powers of preventing all social conflicts or settling every kind of social disputes. The constitutional judges are not Hercules, to borrow Ronald Dworkin's metaphor, to create an integrated society by resolving all kinds of group conflicts.

[20] *Nachova and others v. Bulgaria* (GC), Application no: 43577/98, 43579/982006, 6/7/2005, par. 145.

Finally, the enduring success in social integration depends on effective work of all state organs and the willingness of individuals to live together. This ultimately requires a political culture that recognises the ontological status and rights of “other(s)”.