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ИЗДАЕТСЯ ЦЕНТРОМ КОНСТИТУЦИОННОГО ПРАВА РЕСПУБЛИКИ АРМЕНИЯ
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Конституционная экономика или антиконституционность (коррупционность) экономики?

В конце прошлого столетия в научную литературу было введено понятие "конституционная экономика"[1]. Оно было предложено американским экономистом Ричардом МакКин-

[1] См., в частности, McKenzie, Richard B., ed., Constitutional Economics: Containing the Econoic Powers of Government. Lexington Books, 1984; The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1986 James M. Buchanan Jr.; Ludwig Van den Hauwe, "Constitutional Economics II", *The Elgar Companion to Law and Economics*, 2005; Jeremy Cooper, *Poverty and Constitutional Justice*, in "Philosophy of Law: Classic and Contemporary Readings", edited by Larry May and Jeff Brown, Wiley-Blackwell, UK, 2010; *Гаджиев Г.А.* Этические основы философско-правовой категории "общее благо" в контексте конституционной экономики, а также - *Мазаев В.Д.* Метод конституционного права и конституционная экономика. См. в сборнике - Философия права в начале XXI столетия через призму конституционализма и конституционной экономики /Сост. П. Д. Баренбойм и А. В. Захаров/. - М.: Летний сад, 2010. ISBN 978-5-98856-4; *Баренбойм П.Д., Гаджиев Г.А., Лафитский В. И.* Конституционная экономика: проблемы теории и практики// Журнал зарубежного законодательства и сравнительного правоведения. 2005. № 2.; *Мау В. А.* Конституционная экономика и история// Законодательство и экономика. 2003. № 12; *Баренбойм П.Д.* Философия права и конституционная экономика. Очерки конституционной экономики. 23 октября 2009 г./ Отв.ред. Г.А. Гаджиев. - М., 2009. - С. 254.; *Г.А. Гаджиев, П.Д. Баренбойм, В.И. Лафитский, В.А. Мау, А.В. Захаров, В.Д. Мазаев, Д.В. Кравченко, Т.М. Сырунина,* Конституционная экономика /Ответственный редактор Г.А. Гаджиев. - М.: К65 Юстицинформ, 2010. - 256 с. - ISBN 978-5-7205-1067-1.

зи в 1982 году в качестве названия конференции в Вашингтоне, посвященной вопросу влияния экономических проблем на развитие и состояние конституционной структуры государства и общества. Многие ученые признают также, что идею конституционной экономики существенно развил другой американский экономист - Джеймс Макгилл Бьюкенен (James McGill Buchanan Jr.), получивший в 1986 году Нобелевскую премию по экономике "За исследование договорных и конституционных основ теории принятия экономических и политических решений". Его концепция основывалась на необходимости исследования конституционных правил и ограничений, которые должны учитываться политиками при принятии решений[2].

Определение "конституционной экономики" прежде всего представляется как отрасль экономики или как межотраслевая дисциплина, которая изучает закономерности и правила конституционного урегулирования экономических отношений с учетом особенностей политической системы и характера принятия политических и нормативно-правовых решений по экономическому развитию[3].

Профессор Гаджиев Г.А. считает, что "конституционная экономика представляет собой межотраслевые знания о

[2] Считается самым важным вкладом Бьюкенена в экономику различение им двух уровней общественного выбора: начального уровня, на котором конституция выбрана, и постконституционного уровня. Первое относится к урегулированию правил игры, а второе - к игре в пределах правил. Бьюкенен больше всего обратил внимание на первый уровень и инициировал выпуск нового журнал под названием *"Конституционная экономика"* / http://**www.econlib.org/library/Enc/bios/Buchanan.html**/. James M. Buchanan, 1990. "The Domain of Constitutional Economics," *Constitutional Political Economy*, 1(1), pp. 1-18, adapted as "Constitutional Political Economy" in C. K. Rowley and F. Schneider, ed., 2004, The *Encyclopedia of Public Choice*, v. 2, pp. 60-67.

[3] Francisco Cabrillo, Miguel A. Puchades-Navarro, Constitutional Economics And Public Institutions, /Edited by Francisco Cabrillo, Department of Applied Economics, Complutense University, Madrid, Spain and Miguel A. Puchades-Navarro, Department of Applied Economics, University of Valencia, Spain/, 2013; Richard A. Epstein, Economics of Constitutional Law /Edited by Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law, University of Chicago, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution and Visiting Professor of Law, New York University Law School, US, 2009.

том, в какой мере конституционные нормы и принципы влияют на принятие политическими органами государства важнейших экономических решений, облекаемых в форму нормативных актов"[4].

Объектом исследования конституционной экономики является также изучение влияния экономических отношений на устойчивость конституционного равновесия в стране. При этом предметом целенаправленного исследования становятся состояние реализации социально-экономических прав человека и гражданина и позитивная обязанность государства в их обеспечении. Такой подход становится более востребованным в связи с возрастающей ролью государства в экономике, что отчетливо проявляется в условиях кризисного управления.

Представляет определенный интерес формулировка В.Д. Мазаева, согласно которой "конституционная экономика - научное направление, изучающее принципы оптимального сочетания экономической целесообразности с достигнутым уровнем конституционного развития. Оно выражает методологию оценки эффективности взаимосвязи и взаимообусловленности экономических отношений и конституционных положений"[5].

Подобная формулировка содержится и в других публикациях: "Конституционная экономика - это научное направление, изучающее принципы оптимального сочетания экономической целесообразности с достигнутым уровнем конституционного развития, отраженным в нормах конституционного права, регламентирующих экономическую и политическую деятельность в государстве"[6].

[4] *Гаджиев Г.А.* Этические основы философско-правовой категории "общее благо" в контексте конституционной экономики// Философия права в начале XXI столетия через призму конституционализма и конституционной экономики /Сост. П. Д. Баренбойм и А. В. Захаров/. - М.: Летний сад, 2010. - С. 77.

[5] *Мазаев В.Д.* Метод конституционного права и конституционная экономика. Философия права в начале XXI столетия через призму конституционализма и конституционной экономики /Сост. П. Д. Баренбойм и А. В. Захаров/. - М.: Летний сад, 2010. - С. 190.

[6] *Г.А. Гаджиев, П.Д. Баренбойм, В.И. Лафитский, В.А. Мау, А.В. Захаров, В.Д. Мазаев, Д.В. Кравченко, Т.М. Сырунина,* конституционная экономика /Ответственный редактор Г.А. Гаджиев/. - М.: ЮСТИЦИНФОРМ, 2010. - С. 10.

В.И. Авдийский и С.Г. Павликов приходят к заключению, что "...одной из главных задач конституционной экономики является анализ взаимодействия экономики и государства, права и экономики, выработка управленческих решений, направленных на обеспечение эффективного функционирования экономики в интересах граждан и государства"[7].

С научной точки зрения все представленные подходы по раскрытию сущности и предмета исследования конституционной экономики являются очень важными и необходимыми для проведения научно обоснованной и правомерной экономической политики.

Вместе с этим нам кажется, что для выявления глубинного аксиологического характера конституционной экономики необходимо исходить также из целостно-системного характера проявления конституционализма в обществе, **выявить закономерности взаимодействия социально-экономических факторов и конституционной действительности в стране**. Мы считаем немаловажным выявление именно взаимообусловленности экономических отношений и конституционных положений не на уровне конституционных решений, а в реальной жизни, **выявление характера конституционности самой экономики** - "... чтобы показать естественные условия естественных событий"[8]. **Конституционность экономических отношений выявляет характер ценностно-системной ориентации экономики, суть правовой направленности экономической политики, уровень политико-экономической обоснованности деятельности институтов власти**. А это, в свою очередь, означает, что необходимость научного анализа закономерностей **взаимообусловленности экономических отношений и конституционализма в обществе** выдвигается на первый план.

Понятие конституционализма также является предметом активной научной дискуссии, и пока нет единого понимания

[7] *Авдийский В.И., Павликов С.Г.* О соотношении экономики и права и тенденциях конституционно-правового регулирования экономических отношений // Государство и право, 2014, N11. - С. 42.

[8] *Иммануил Кант*. Критика чистого разума. - М.: 2012. - С. 419.

данного феномена[9]. Нам представляется, что **"конституирование" общественных отношений, установление при всеобщем согласии общеобязательных правил поведения исходят, прежде всего, от системы социокультурных ценностей данного общества, духовно-нравственных начал поведения социума и формируют соответствующий уровень конституционной культуры.** Независимо от временного измерения **культура каждого народа - это его осознанное бытие, осмысленное присутствие во времени.** Именно это осмысленное присутствие **на определенном уровне развития** приводит к конституированию социального поведения человека и власти. С учетом именно ценностно-системной природы конституционного праворегулирования профессора Мишель Розенфельд и Андраш Шайо подняли актуальность проблематики **о влиянии трансплантации либеральных конституционных норм** на распространение и укрепление либерального конституционализма[10].

Конституционная культура - не абстрактное понятие, она имеет объективную основу и проявляется во всех сферах бытия социального общества, проявляется на прочной основе выработанных, выстраданных, выверенных за века духовных и материальных ценностей и идеалов независимо от наличия письменной конституции и воли правителей[11]. В современном мире диалектическая связь между реальной общественной жизнью и самой Конституцией проявляется через призму соответствующих признаков конституционализма в данном обществе. Нам кажется очевидным, что наличие Конституции не определяет уровень и суть конституциона-

[9] См., в частности, *Арутюнян Г.* Конституционализм как фундаментальный принцип права в правовом государстве // Конституционное правосудие, 2012, N 1, - С. 5-16; NEW MILLENIUM CONSTITUTIONALISM: PARADIGMS OF REALITY AND CHALLENGES (Published on the Initiative and with a Foreword of Dr. G.G. HARUTYUNYAN), YEREVAN, - 2013.

[10] См. *Мишель Розенфельд, Андраш Шайо*. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях // Сравнительное конституционное обозрение. 2007. N1. - С. 102.

[11] Более подробно см. *Harutyunyan G*. Constitutional Culture: The Lessons of History and the Challenges of Time. Yerevan, 2009.

лизма в обществе. Нельзя не согласиться с мнением П.А. Баренбойма, о том, что "причинная связь и взаимозависимость между осуществленными и книжными утопическими идеями является одним из важнейших вопросов в понимании утопизма как важнейшего движения конституционной и общественно-политической мысли в течение последних трех тысячелетий"[12].

Однако "конституционализм" - это не утопическое восприятие идей о необходимости конституционной регуляции общественных отношений. **"Конституционализм" - это проявление определенной конституционной культуры**, адекватной осмысленному бытию данного социума, **это системное и осознанное наличие конституционных ценностей в реальной общественной жизни**, на чем базируется вся правовая система, **это фундаментальный принцип современного права**.

Нормативные характеристики данного принципа предполагают наличие необходимых и достаточных правовых гарантий для осознанной реализации прав и свобод во всей системе права и общественных отношений. В правовом государстве любая норма права должна иметь объективную основу и проявляться как элемент конституционно взаимосогласованной системы правового и нравственного поведения человека и государства.

Сама система базовых категорий права, параллельно с социокультурной эволюцией, приобретает новый облик и характер. В данной системе **принципиальное значение приобретает понятие "конституционализм" как общеправовой принцип реального социального поведения общества**. Это понятие неразрывно связано с конституционализацией общественных отношений, в том числе экономических, **и качественно новыми проявлениями конституционной культуры.**

Подытоживая сказанное, можем констатировать, что **конституционализм определяет суть взаимосогласованного поведения социума в реальной действительности, характер его осмысленного существования во**

[12] См. *Баренбойм П.А.* 3000 лет доктрины разделения властей. Суд Сьютера. - М., 2003. - С. 75.

времени, уровень зрелости общественных отношений и их правового регулирования. Это, в первую очередь, идеал цивилизованной саморегуляции, к которому должно стремиться общество.

В рамках приведенной нами формулировки **современный конституционализм является наличием установленных общественным согласием фундаментальных правил демократического и правового поведения, их существованием как объективной и живущей реальности в общественной жизни, в гражданском поведении каждого индивидуума, в процессе осуществления государственно-властных полномочий**.

Проблема сводится не только к применению Конституции, но и к формированию той социальной системы, в которой конституционная аксиология реализуется каждой клеткой этой системы **как условие ее существования**. Это единственная и прошедшая испытание веками гарантия реализации конституционных установок и обеспечения стабильного развития базовых экономических отношений в стране. В рамках предмета нашего исследования равноценное состояние конституционализма, с одной стороны, обусловлено уровнем конституционализации экономических отношений, с другой стороны, воздействием экономического фактора на реализацию основополагающих конституционных ценностей и принципов.

С точки зрения конституционализации экономических отношений считаем необходимым обозначить следующие исходные подходы, требующие конституционных гарантий:

1) основой любой Конституции является человек, его достоинство и непосредственно действующие права и основные свободы. Следовательно, в основе экономических отношений также должен быть человек со своими неотчуждаемыми правами и правомерными потребностями;

2) государство в силу права должно нести позитивную обязанность по гарантированию, обеспечению и защите достоинства человека, его прав и свобод, взять на себя соразмерную публично-правовую ответственность;

3) любое вмешательство в основные права и любое действие власти должны исходить из принципа соразмер-

ности. Должен полноценно гарантироваться принцип равенства всех перед правовым законом;

4) в правовом государстве право собственности должно быть конституционно защищено и должны быть гарантированы свобода экономической деятельности и свободная экономическая конкуренция;

5) государственная власть должна осуществляться на основе разделения и баланса законодательной, исполнительной и судебной властей, гарантируя динамичный конституционный функциональный баланс, осуществление власти должно базироваться на четкой гармонизации функций и полномочий, а в основе публичной власти должен лежать исключительно принцип верховенства права;

6) обязанность государства - обеспечивать стабильность цен, осуществлять единую государственную финансово-экономическую, кредитную и налоговую политику, а также государственную политику регионального развития, осуществлять эффективный контроль за использованием бюджетных средств и государственной и муниципальной собственности;

7) правосудие должно быть независимым и беспристрастным;

8) законы и иные правовые акты должны соответствовать принципу правовой определенности, быть прогнозируемыми, четкими, не иметь пробелов и не быть двусмысленными;

9) в соответствии с критериями правового государства должен гарантироваться принцип запрета произвола и должны быть более четкими границы усмотрения органов публичной власти.

Конституция РА, как и конституции многих других стран, предусматривает, в частности, также следующие положения, имеющие для экономических отношений существенное и непосредственное значение:

1) каждый имеет право на эффективные средства правовой защиты своих прав и свобод в судебных, а также иных государственных органах /ст. 18/;

2) каждый для восстановления своих нарушенных прав, а также выяснения обоснованности предъявленного ему обвинения имеет право на публичное рассмотрение своего дела в разумные сроки независимым и беспристрастным судом

в условиях равенства, с соблюдением всех требований справедливости /ст. 19/;

3) каждый имеет право на владение, пользование, распоряжение своей собственностью и ее наследование по своему усмотрению. Осуществление права собственности не должно наносить вред окружающей среде, нарушать права и законные интересы иных лиц, общества и государства. Никого нельзя лишать собственности, за исключением предусмотренных законом случаев в судебном порядке. Отчуждение собственности для нужд общества и государства может быть произведено только в исключительных случаях при наличии высших общественных интересов в установленном законом порядке с предварительной равноценной компенсацией /ст. 31/;

4) государство защищает интересы потребителей, осуществляет предусмотренные законом меры по контролю за качеством товаров, услуг и работ /ст. 31.1/;

5) каждый имеет право на свободный выбор труда. Каждый работник имеет право на справедливую и не ниже установленного законом минимального размера оплату труда, а также на условия труда, отвечающие требованиям безопасности и гигиены. Работники в целях защиты своих экономических, социальных и трудовых интересов имеют право на забастовку, порядок проведения и ограничения которой устанавливается законом. Запрещается прием на постоянную работу детей в возрасте до 16 лет. Порядок и условия их приема на временную работу устанавливаются законом. Принудительный труд запрещается /ст. 32/;

6) каждый имеет право на отдых. Максимальное время труда, выходные дни и минимальная продолжительность ежегодно оплачиваемого отпуска устанавливаются законом /ст. 33/;

7) каждый имеет право заниматься предпринимательской деятельностью, не запрещенной законом. Запрещаются злоупотребление монопольным или доминирующим положением на рынке и недобросовестная конкуренция. Законом могут устанавливаться ограничения конкуренции, возможные виды монополии и их допустимые размеры, если это необходимо для защиты интересов общества /ст. 33.1/;

8) каждый для себя и своей семьи имеет право на удовлетворительный уровень жизни, в том числе на жилье, а также на улучшение условий жизни. Государство предпринимает необходимые меры для осуществления этого права граждан /ст. 34/;

9) каждый имеет право на социальное обеспечение по старости, инвалидности, болезни, по случаю потери кормильца, безработице и в иных предусмотренных законом случаях. Объем и формы социального обеспечения устанавливаются законом /ст. 37/;

10) государство обязано содействовать занятости и улучшению условий труда населения /ст. 48/.

Закрепление таких положений на конституционном уровне и их гармонизация с общей конституционной аксиологией являются необходимой предпосылкой для конституционной экономики. Однако **для выявления реального состояния конституционности самой экономики требуется диагностика реального состояния конституционализма по всем указанным параметрам**. Она позволит раскрыть не только влияние реализации конституционных положений на характер экономических отношений, но и взаимовлияние экономических отношений на конституционную действительность.

В данной статье мы попытаемся обратиться к ряду обобщающих показателей, которых достаточно, чтобы представить реальную картину и прийти к некоторым заключениям качественного характера.

Учитывая, что особенно в странах новой демократии сложилась особая и в аспекте конституционализма - кризисная ситуация, попытаемся в первую очередь для выводов принять за основу ряд показателей, положенных в основу расчета индекса верховенства права в рамках Международной программы правосудия[13]. Нами выделены те страны, в которых обобщающие параметры, оцененные на основании 535 показателей, имеют неудовлетворительный уровень.

Исходя из задач настоящего исследования выделим следующие основные параметры:

- действие сдержек и противовесов в реализации полномочий государственно-властных структур /учитывается 61 фактор/;
- уровень коррупции (68 факторов);
- основные права (в том числе социально-экономические, 115 факторов);
- прозрачность управления (36 факторов);
- правоприменение и эффективность администрирования (84 фактора);
- состояние гражданского правосудия (57 факторов);
- состояние уголовного правосудия (97 факторов).

[13] worldjusticeproject.org/rule-of-law-index

Более чем по половине указанных признаков состояние является неудовлетворительным в 47 из 99 исследуемых стран. Причем уровень коррупции очень высок в 54 странах (55,7%), уровень доступности властей неудовлетворителен в 56 странах (57,7%), уровень уголовного правосудия неудовлетворителен в 53 странах (54,6%). В большинстве стран за последние годы также углубляются отрицательные тенденции основных параметров индекса верховенства права. Данные результаты свидетельствуют о том, что:

1) эти параметры взаимосвязаны и взаимообусловлены;

2) имеет место существенный дефицит конституционализма, искажены основополагающие конституционные ценности и принципы;

3) экономика де-факто не может считаться конституционной во всех тех странах, где, например, более 50 процентов отношений коррумпированы, а правосудие недееспособно.

Подобная ситуация свидетельствует о наличии антиконституционной или коррупционной экономики.

Выявление причинно-следственных связей в создавшейся ситуации требует нового подхода к многофакторному анализу.

Для комплексной оценки устойчивости и выявления фактического уровня конституционной сбалансированности общественной системы, по нашему мнению, необходима система индикаторов на следующих уровнях:

- индикаторы правовой охраны Конституции, прав и свобод человека;
- индикаторы реализации демократических ценностей в обществе;

- социально-экономические характеристики общества.

Для эффективного контроля за состоянием конституционализма в стране, по нашему мнению, необходимо по окончании каждого года посредством нижепредставленных индикаторов раскрыть реальную картину реализации фундаментальных конституционных ценностей и принципов в обществе, сделать это прозрачным для общественности, предметом многофакторного анализа и основой программно-целевой политики развития.

Используя, к примеру, применяемую Американской организацией Дом свободы методику[14], для каждого индикатора может быть выбрана 7-балльная оценочная система, где 0 - лучшее состояние, 7- худшее.

Не имея задачи представить в рамках настоящего материала подробные результаты анализа, хотим лишь отметить, что для реальной оценки состояния конституционализма в стране и выявления взаимообусловленности социально-экономических и иных факторов можно взять за основу, например, следующую систему индикаторов.

Характеристики правового государства:

- наличие необходимых и достаточных предпосылок гарантирования верховенства права и достоинства личности;
- гарантии обеспечения верховенства Конституции;
- характеристика реального разделения и сбалансированности властей;
- степень реальной независимости судебной власти;
- степень сращения политических, экономических и административных сил;
- степень обеспечения реального равенства всех перед законом;
- уровень коррупции;
- уровень теневой экономики;
- уровень правосознания населения;
- криминогенная обстановка.

Характеристики демократических развитий:

- уровень развития парламентаризма;

[14] См. http: //www.freedomhouse.org/

- степень доверия к избирательной системе;
- уровень становления политических партий;
- свобода прессы;
- свобода Интернета;
- свобода собраний;
- свобода объединений;
- уровень гражданской активности и становления институтов гражданского общества;
- прозрачность деятельности институтов власти;
- уровень дееспособности государственных демократических институтов;
- религиозные свободы;
- степень защищенности прав национальных меньшинств;
- уровень плюрализма;
- уровень толерантности;
- уровень недискриминации.

Социально-экономические характеристики:

- свобода экономической деятельности и свободная экономическая конкуренция;
- уровень защиты собственности и предпринимательской деятельности,
- уровень безработицы;
- уровень миграции;
- уровень стабильности цен (уровень инфляции);
- среднегодовой рост валового внутреннего продукта в расчете на душу населения;
- соотношение прожиточного минимума к минимальной заработной плате;
- соотношение пенсий к средней заработной плате;
- уровень социальной защищенности умственного творческого труда;
- доля населения с доходами ниже стоимости минимальной потребительской корзины в расчете на 100 тыс. населения;
- соотношение годовых доходов 10 процентов самых богатых к годовым доходам остальных 90 процентов населения;
- соотношение и динамика годовых доходов 10 процен-

тов самых богатых лиц к бюджетным средствам, выделенным на социальную сферу страны за год;
- соотношение и динамика годовой зарплаты должностных лиц законодательной, исполнительной и судебной власти к декларированным общим доходам за данный год;
- соотношение и динамика декларированных годовых доходов лидеров политических партий к средней заработной плате в стране;
- динамика имущества высших должностных лиц и политической элиты страны в годы занятия ими государственных должностей.

Проведенные нами исследования свидетельствуют, что средний коэффициент конституционализма в странах новой демократии не только очень низок и картина похожа на вышеприведенный пример, но также в последние годы имеет тенденцию ухудшения. Это свидетельствует также об углублении правовых, политических и социально-экономических кризисных явлений и большом потенциале накопления взрывоопасной критической массы отрицательной социальной энергии.

Приведенные выше некоторые показатели характеризуют также уровень олигархизации власти и коррумпированности экономики. Наши исследования, в частности, свидетельствуют, что, например, когда в годовых доходах высших должностных лиц законодательной, исполнительной и судебной власти страны доля заработной платы выше 80-90 процентов, то угроза сращения политического, экономического и административного потенциала снижается до минимума, имеются реальные предпосылки для действительного разделения властей и реализации основополагающих конституционных принципов. Важно то, что в подобных условиях реальная мотивация носителя власти - эффективная реализация его функции. Это свидетельствует также о здоровом социальном климате и прогрессирующих экономических отношениях в обществе. Однако когда плата, полученная за осуществление функции носителя власти, ниже 50 процентов его годовых доходов, очевидно, что функция становится дымовой завесой для осу-

ществления деятельности, обеспечивающей его основной доход. В некоторых странах встречается такая картина, когда в системе судебной власти этот показатель составляет около 55 процентов, в исполнительной - 30-35, а в законодательной - вплоть до 2-3 процентов. Подобная картина - это лакмусовая бумага, свидетельствующая о системных метастазах и опасных искажениях основополагающих конституционных ценностей и принципов. Фактически имеем дело не с конституционной экономикой, а подобная картина свидетельствует о наличии антиконституционных, коррупционных экономических отношений. В такой системе достоинство человека, его права и свободы не являются определяющим фактором в обществе. Воля власти и властвующих становятся нормой жизни. Взаимоотношения рабочей силы и работодателя приобретают характер, свойственный феодальной системе. Уместно по этому поводу вспомнить статью 16 Французской декларации прав человека и гражданина от 26 августа 1789 года: **"Любое общество, где не обеспечено гарантирование прав человека и не утверждено разделение властей, вовсе не имеет Конституцию"**.

Не секрет также, что во многих новых независимых государствах повсеместные процессы приватизации сопровождались многочисленными проявлениями коррупции, что в дальнейшем имело также другие негативные воспроизводящиеся последствия. Следовательно, для характеристики реальной картины конституционных искажений в этих странах важно рассчитать соотношение доходов политических лидеров, должностных лиц законодательной, исполнительной и судебной властей (вместе с доходами членов их семей) за последние 20 лет к среднегодовому росту доходной части государственного бюджета. Это может служить также своеобразным показателем оценки уровня теневого сектора. По нашим оценкам, даже в тех странах, где уровень теневой экономики оценивается в 40-50 процентов, указанное соотношение больше в 2,5-3 раза. В реальности это свидетельствует и о более высоком уровне теневого сектора в реализации государственно-властных полномочий, и о коррумпированности системы.

Для комплексного научного анализа и многофакторной оценки реального состояния конституционализма важно сопоставление всех вышеотмеченных характеристик, а также определение на их основе обобщенного интегрального показателя. Количественная определенность подобного показателя позволит выявить узкие места искажений конституционализма и осуществить программно-целевую политику для их преодоления[15].

Об опасностях олигархизации государственной власти и проявлений антиконституционных экономических отношений еще в свое время убедительно и красноречиво говорил Аристотель, представляя виды олигархии[16]:

"Первый вид олигархии *- когда собственность, не слишком большая, а умеренная, находится в руках большинства; собственники в силу этого имеют возможность принимать участие в государственном управлении; а поскольку число таких людей велико, то верховная власть неизбежно находится в руках не людей, а закона.*

Второй вид *- число людей, обладающих собственностью, меньше числа людей при первом виде олигархии, но самый размер собственности больше; имея большую силу, эти собственники предъявляют и больше требований; поэтому они сами избирают из числа остальных граждан тех, кто допускается к управлению; но вследствие того, что они не настолько еще сильны, чтобы управлять без закона, они устанавливают подходящий для них закон.*

Третий вид *- если положение становится более напряженным в том отношении, что число собственников становится меньше, а самая собственность - больше, то получается третий вид олигархии - все должности сосредотачиваются в руках собственников, причем закон повелевает, чтобы после их смерти сыновья наследовали им в должностях.*

Четвертый вид *- когда же собственность их разрастается до огромных размеров и они приобретают себе массу сторонников, то получается династия, близкая к монархии, и тогда властителями становятся люди, а не закон".*

[15] Об этом см. *Арутюнян Г.Г.* Конституционализм: уроки, вызовы, гарантии. - Киев: "Логос", 2011. - С. 99-100.

[16] См. *Аристотель*. Этика. Политика. Риторика. Поэтика. Категории. - Мн.: Литература, 1998. - С. 561 (в разделе "Политика", книга четвертая).

Через тысячелетия во многих странах новой демократии эти процессы повторяются под прикрытием лозунгов установления конституционализма и конституционной экономики. Однако в некоторых странах верховная власть уже находится "не в руках закона", а людей. Власти добиваются или властителями становятся личности, в руках которых сосредотачивается основная экономическая, политическая и административная сила, а Конституция им нужна лишь для властвования. Общественная опасность подобной ситуации заключается в том, что, во-первых, для такого сращивания используется потенциал демократических перемен в обществе. А во-вторых, подобный процесс происходит при наличии Конституции, в которой провозглашены приверженность к демократии, верховенству права, народовластию и другим фундаментальным ценностям, которые при искажении принципа разделения властей и установлении так называемой "корпоративной демократии"[17] в полной мере деградируются в реальной жизни.

Недопущение подобного сращения легче, чем его преодоление. Последнее требует огромных усилий, времени и системной реставрации деградированных реалий. Для недопущения подобной ситуации главная задача успешного осуществления общественной трансформации - это последовательность в конституционализации общественных отношений с преодолением конфликта между Конституцией, правовой системой и правоприменительной практикой в целом. Только этим путем можно обеспечить необходимую дееспособность системы разделения и сбалансированности властей, гарантировать желаемые устойчивость и динамизм общественного развития, достичь конституционности экономики.

[17] См. *Арутюнян Г.Г.* Угрозы корпоративной демократии// Международный вестник "Конституционное правосудие". 2006. N3, с. 38-46.

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Constitutional economics or anti-constitutionalism (corruption) of economy?

Summary

Analyzing the notion “constitutional economics”, the author emphasizes the presented approaches for revealing the essence and subject of study of the constitutional economics which are of great importance and are necessary for carrying out scientifically grounded and lawful economical politics.

For revealing the axiological character of the constitutional economics it is necessary to derive from the holistic system nature of the manifestation of the constitutionalism in the society; reveal regularity of interaction of the social-economic factors and constitutional reality in the country. The author considers significant revealing of conditionality of the economic relations and constitutional positions not on the level of the constitutional decisions but in the real life, revealing the character of the constitutionality of the economics itself. It is emphasized that the constitutionalism of the objective economical relations reveals the nature of the axiological orientation of the economy, essence of the legal trend of economical policy level of political-economical validity of the activity of the institutes of power. This, in its turn, means that the necessity of scientific analysis of regularity inter-related economic relations and constitutionalism in the society is highlighted.

The system of the main categories of the right, parallel with the social cultural evolution, obtains with the new image and nature. In the given system the notion “constitutionalism” as common legal principle of the real social behavior of the society becomes of significant importance. This notion is inseparably connected with constitutionality of the public relations as well as economical and new manifestation of the constitutional culture.

From the perspective of the constitutionality of economic relations, the author points out the initial approaches which demand constitutional guarantees.

On certain examples it is shown that for the assessment of the constitutionalism of the economics the diagnosis of the real condition of the constitutionalism by the parameters offered by the author is needed.

The provided analysis states about the presence of the anti-constitutional or corruptive economics in a number of countries of the new democracy.

3rd Congress of the World Conference on Constitutional Justice

Congratulatory Message

Ban Ki-moon

Secretary-General of the United Nations

Your Excellency President Park Geun-hye of the Republic of Korea,

Honorable Park Han-chul, President of the Constitutional Court of Korea,

Honorable Gianni Buquicchio, President of the Venice Commission of the Council of Europe,

Honorable Gagik Harutyunyan, President of the Bureau of the World Conference on Constitutional Justice,

Excellencies,

Ladies and gentlemen,

I congratulate the Constitutional Court of Korea for organizing this Congress.

Constitutions are a compact between the people and the state. They create the basis for inclusive societies guided by the rule of law. They provide the means of securing property rights, and improving the equitable use of a country's resources. A strong constitutional framework sets constraints on the use of force, and serves as a check against the abuse of power.

Constitutional courts play a vitally important role in safeguarding this foundation. They protect rights and deliver justice. They ensure that public institutions are accountable to the people. They are central in implementing and reviewing laws that enhance peace and democracy.

Constitutional reform in the aftermath of violent conflict can have a profound impact in addressing root causes and providing peaceful channels for the resolution of disputes.

As the international community shapes a post 2015 development agenda, and the new sets of sustainable development goals, great attention to the rule of law, institutions, and justice will be crucial if we are to succeed in building lives of dignity for all.

Thank you for your commitment to strengthening the role of constitutional courts and helping the United Nations advance its global mission of peace, development, and human rights.

Please accept my best wishes for a successful conference.

Reports

Session I
Challenges of Social Integration in a Globalised World

Mourad Medelci

President of the Constitutional Council of Algeria

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 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.

Valery Zorkin

President of the Constitutional Court of the Russian Federation

Dear colleagues! Ladies and gentlemen!

The difficulty of all-human integration, which we are discussing today, is connected inseparably with the growth of global challenges and threats. Split of the world community to winning countries, which gain all the profit from the process of globalisation and, using words of Jurgen Habermas, "defeated countries", becomes one of the main factors of disintegration of the all-world human society.

Nowadays the main advantages of global interaction belong to the most economically powerful states, transnational monopolies, and even some family clans. Common global social space turns more and more to the arena of struggle of egoistic interests, which sometimes have a criminal nature. I mean the situations when transnational criminal groups, interfering in legal business, begin to influence the global economy.

It leads to marginalisation and deprivation of people in many (primarily developing) countries of decent life, to the growth of a number of "unwanted people" who become a target for extremists' ideas and practices. This tendency leads to the reaction which is expressed in revival of various local identities (in the first place - confessional and ethnical ones), which quite often oppose to the rest of the world.

From a legal perspective distribution of the world economy income in accordance with the principle of accumulated advantages leads to the substantial *limitation of the majority's right* to development. And that is why it is a step aside from fairness.

In this regard the following questions arise:

- Why does law, which because of its universal significance is the most effective instrument of social integration, obviously cannot cope with this function in the frameworks of the global social space?

- What needs to be done for improvement of effectiveness of the integrative function of law?

The necessity of solving of two general problems arises from the above mentioned questions. **The first problem** is improvement of the legal doctrine following the goal of better understanding of the place of law in the modern world. **The second problem** is development of democratic routes of supranational law-making.

Concerning the first problem I would like to clarify and at the same time to stress my point in the following way: **Does the liberal-individualistic point of view on human rights, which is predominant today, really correspond to the tasks of social integration of all the mankind?**

Giving the response to this concern from a perspective of human rights, being understood as a quintessence of reasonable foundations of people's community, I believe, one shall address the ideas of distinguished philosopher Immanuel Kant. And one shall agree that the nature, which created a human as a rational being, was intending to develop these rational prerequisites not in a human being per se, but in the all humankind, leading it to reaching a "perfect civilian community of all the mankind" based on law.

Kant wrote that if to try to discover the aim of the nature in meaningless human routine, where a lot of things are made of "childish anger and passion to destroy", one will recognise that potential of a person as a reasonable being is *"realised in full not in an individual but in a genus"*. It is not a sole human being regardless of his or her abilities, could be called a crown of nature, but all the mankind with regard to its unrealised yet potential.

From this perspective the law, being the most complete reflection of rational foundations of social rules, has to promote preservation and development of all the mankind and, at the minimum, not to undermine foundations of its preservation and development. Meanwhile, the real life shows that liberal-individualistic interpretation of human rights often contradicts to this imperative. One can see it in different spheres of human life - from egocentric behaviour of economic monopolies grabbing the main Planet's life-supporting resources, to aggressive struggle of sex-

ual minorities to equality of opportunities of their self-realisation, including such controversial issues as upbringing of adopted children.

These facts which seem to be very different one from another have a common route - individualistic ideology, which currently defines the dominant approach towards understanding of the core meaning and content of human rights. From a perspective of this approach a person regards the world not as an environment which has inner connections and ties with this person, which is a precondition for continuation and rise of the mankind, but rather as a sum of external means which he or she can use for a personal well-being and success.

I believe that rejection from this strain influence of this interpretation of liberalism would contribute a lot to strengthening of the role of law in securing social integration.

I have to stress: I am challenging neither the ideology of liberalism nor the principle of liberal understanding of law according to which a human being is free in his or her actions unless this freedom violates freedom of others. My point is that the concept of "freedom of others" should be interpreted in the context of the mankind as a whole, since freedom of each and every person is possible only when free development of all the mankind is preserved.

The second problem which I have addressed is **development of democratic routes of supranational law-making**.

We see that while proneness of conflict of the modern world is complicating, the need for legal regulation of international relations is increasing. I am sure that a conceptual foundation for securing of this social request can be found in an emerging concept of the global constitutionalism.

I have to mention in advance that I understand the concern of those who regard formation of global constitutionalism as a threat of losing national ability to determine foundations of their national and social regimes within their domestic constitutional frameworks independently. Difficulties and dangers connected with the democratic deficit of law-making within the supranational and, moreover, global level - are understandable.

But from the other hand, for me it is not less obvious that without a transfer of some state functions to the level of interna-

tional structures in accordance with the idea of united nations - that is the idea of *united sovereignties* (provided that they are united on the *ground of equality*) - it is impossible to deal with numerous challenges of globalisation. Including such dangerous trends as privatisation of global public space by several states which adhere to the concept of global leadership as well as by transnational financial economic groups which create international networks of global influence which function in accordance with their own rules.

By this moment theoretical formation of the doctrine of global constitutionalism is only being developed. That is why I would address just some conceptual frameworks of this idea originated from the Kant's project of "eternal peace".

According to Kant this peace is possible only within the frameworks of a universal federation of sovereign equal republics. I believe that all the characteristics of this cosmopolitan union of states, which were listed by Kant (these are: **sovereignty, equality, and republican form of government**) have the principal importance and nowadays, taking into account some additional content, they still are of an actual significance.

I strongly disagree with those who claim that departure from the principle of **national-state sovereignty** is the only way to secure safety and human rights in globalising world.

All of us understand that the modern meaning of sovereignty is not just a maxim of Jean Bodin who said that: *"Sovereignty is an absolute and permanent state power over its nationals and citizens"* - the maxim which lies in the basis of the Westphalian international system. However, taking into account that this power is not an absolute anymore, it means that the world moves from the ancient lawless sovereignty which was understood as *the right of the strong to abuse* - to modern legal construction of sovereignty as *lawful organisation of power*.

Herewith it does not mean that I am talking about dying away or destruction of sovereignty of states, but I rather mean voluntary association of sovereignties of different states, seeking to provide more effective guarantees of human rights.

The world system which corresponds to all the requirement of safety, which is able to oppose all challenges and threats of globalisation, can be built only by sovereign states which united their

powers and sovereignties on the grounds of voluntary participation and equality. And this is the only possible way for global integration of all the mankind.

Special difficulties within the context of the problem of correlation between principles of global constitutionalism and national-state sovereignty are concerns about human rights protection. I assume that for many of us substantial weaknesses of the "responsibility to protect" doctrine which replaced the failed doctrine of "humanitarian intervention", are obvious.

The approach towards the state sovereignty not as a privilege but as a responsibility is undoubted. This approach includes the obligation of states to provide guarantees of rights of its citizens as well as the right of the international community to control implementation of this obligation. However, the devil is in details. And details of this concept are not well-elaborated. It opens a room for abuses of "global leaders". The consequences we may see on the examples of Iraq, Libya, and Syria.

I believe that some clarifications of the main United Nations documents would be an important step on the way of improvement of the international law system. These clarifications could define legal borders and hierarchy of such fundamental categories as the state sovereignty, human rights, obligation of states to protect human rights, responsibility of all the world community for maintenance of human rights all over the world etc. Only on the ground of legally confirmed consensus of the world community it is possible to restore trust to international and supranational legal and political institutions. The other way round, extension of current legal uncertainty could lead to collapse of international law and return to the archaic right of the strong.

In my opinion on this stage we shall agree that a theoretical model of global constitutionalism can be constructed as a multi-level system, where an inner republican constitution is complemented with international public law which regulate relationships between states, and with the global layer of human rights. Within the mainstream of this theoretical construction we can search for solutions of problems arising on the way of global constitutionalism as an institutional foundation of the all mankind integration.

An important step on this way would be consequent formation and development of regional systems of human rights pro-

tection, based on corresponding conventions, and secured with mechanisms of court law-enforcement. When the Asian Convention on Human Rights will be enforced (and it will hardly be just a copycat of the European Convention) we will be able not just in theory but also in practice estimate intersection points between the European understanding of law and the Asian one, which in future would lead to creation (or natural formation) of the universal understanding of law. And there are all grounds to believe that as a result we would be able to harmonise the liberal-individualistic understanding of law from the position of strengthening of its solidarity foundations.

Session II
International Standards for Social Integration

Park Han-Chul

President of the Constitutional Court of Korea

It is my great pleasure to deliver this keynote address at the second session of the 3rd Congress in Seoul.

In the first session, we addressed the sub-topic of "Challenges of social integration in a globalised world" and looked into the specific cases of each country.

Globalization brings more openness, diversity and wealth to the world, thus promoting human rights. However, free flow of people, products, information triggered by globalization also generates new social conflicts; it may also bring about a fragmented society by aggravating already existing conflicts, such as the gap between the rich and the poor. We have learned in the earlier session that diverse social conflicts present us with equally diverse tasks in our efforts to overcome such conflicts and achieve integration.

Building on our discussion from the first session, we will now delve into the second sub-topic of "International standards for social integration." We will explore the possibilities of implementing common international standards aimed at achieving social integration. We previously collected information about the current practice of individual countries, based on the 55 countries' responses to our questionnaires. The questions were about i) international influences on the Constitution regarding social integration issues, ii) specific provisions with an international source of social integration, iii) direct application of international instruments in social integration issues, iv) implicit or express reference to international instruments, and v) conflict between national and international standards

1. The need for international standards for social integration and our current status

We need some sort of international standard to resolve social conflicts in areas that influence international relations, including foreigners' human rights issues, social treatment of political and economic refugees, and acts of environmental destruction.

International standard can also be important in common issues faced by the whole world, such as economic polarization, as it can serve as a major reference, regardless of binding force, in comparative studies that incorporate political, economic circumstances of each country and function as the backbone of minimum protection of human rights.

Social conflicts in an individual country arise, in many cases, from discriminatory elements among members of society regarding race, religion, region, and social and economic status. We have seen extreme outbursts when such conflicts are politically abused. Human rights issue in an individual country is not just a domestic problem but can be a huge threat to peace in the region.

In order to solve these social conflicts and to achieve social integration, it is vital that every member of society is not left isolated but respected as an equally valuable human being. This in essence is the protection of human rights. It is the important role all of you here carry on your shoulders.

There are many international standards regarding human rights protection for social integration.

What is important is the relationship between many international standards and domestic law. I will go over the specific cases of the countries based on written answers.

2. Incorporation of international standards into domestic law

The constitutions of modern countries provide how international law should be dealt with, and many countries join conventions or agreements known as international human rights law. However, the standards of such international human rights law hold different status under different constitutions, and the possibility of the standards being cited in domestic judicial norms differ from one country to another. Therefore, it is important to see

which international human rights norms are adopted by national constitutional courts.

In most countries, constitutional courts refer to international standards on protecting human rights in reviewing whether their domestic laws conform to the Constitution. Many countries, such as the Constitutional Court of Uzbekistan, the Constitutional Council of Burkina Faso, and the Constitutional Council of Algeria, implicitly take account of or expressly refer to international standards in their constitutional adjudication. The Constitutional Court of Belarus takes into account universally recognized principles and rules of international law and ratified international treaties.

More specifically, the courts of the Netherlands do not have the jurisdiction to review the constitutionality of laws, but they do have the authority to review whether provisions of domestic law violate the self-executing clauses of international treaties (including EU laws) that act as a de facto constitution. This can be seen as a system that reviews whether provisions of domestic law are consistent with international law. The Constitutional Court of Italy calls the European Convention on Human Rights and the case laws of the European Court of Human Rights as norme interposte (intermediate law), and applies them in constitutional cases.

Meanwhile, there are also countries like Armenia where they implement constitutional control prior to the ratification of international treaties or agreements. This is to ensure that the duties under international agreements are consistent with the Constitution.

In Finland, when interpretation of its constitution is clear enough, it is not necessary to seek international standards for support. But when it is not the case, international standards such as the practices of the European Court of Human Rights serve as an important factor in the interpretation. According to the Constitutional Court of Portugal, international standards can contribute to expanding the scope of the rights enshrined in the Constitution, and the Universal Declaration of Human Rights can be applied to interpret the constitutional concepts. The Constitutional Council of Cote d'Ivoire is obliged to apply the ratified international standards related to social integration at the national level.

The Korean Constitutional Court often explicitly mentions international law in a decision where a complainant makes an argument based upon it. In the case of the Ministry of Labor's established rule limiting labor rights of foreign workers, the Court referred to Article 5 of the Labor Standards Act and Article 4 of the UN ICESCR (International Covenant on Economic, Social and Cultural Rights). However, international law is not the only determining factor in constitutional review; rather, it is referred to as a norm to be respected in the course of judgment.

3. Conflicts between the national constitutional law and international standards

We have seen that most countries, by employing both their unique standards and rational interpretations, have embraced international standards in accordance with domestic circumstances. In some instances international standards have constitutional effects or are directly applied as a criterion; in others they are employed to confirm and construe the substance of a national constitution or basic right. International standards have influence in the review of constitutional cases in various ways.

Individual courts, naturally, may encounter conflicts between the standards applicable on the national and on the international level, as seen below.

In Armenia, the national law on social security cards was declared not in conformity with the UN Convention on the Rights of the Child. In Estonia, in case of conflict between legislation and international treaties, the domestic law was not applied.

In Germany, cases involving freedom of speech, right to private life, and incarceration policies have dealt with the standards of the European Convention on Human Rights. The Constitutional Court of Portugal decided on the constitutional conformity of international standards regarding same-sex civil marriage. The Russian Constitutional Court referred to the ILO Convention when ruling on the right to nursing leave for female military servicemen.

Tajikistan encountered contradictions, which were resolved in favor of international standards recognized by the Republic of Tajikistan. The Constitutional Court of Uganda made explicit reference to international human rights law in upholding the death penalty. In Ukraine, trade union law was declared unconstitutional as the requirements of UN ICESCR (International Covenant on Economic, Social and Cultural Rights) and ILO were not given proper reflection in its provisions.

The Council of State of the Netherlands tries to avoid conflicts between international standards and national law by interpreting national law in the light of international law. In Poland, the Constitutional Tribunal analyzed several EU laws in the case on men and women's pensionable age.

As constitutions and laws are based on the history, culture, and time period of one country, it follows that each country has its unique systems and standards. But it is not to say that drawing out a constitutional value and principle that may become a universal standard is entirely impossible. The duty of the constitutional courts and equivalent institutions, when universal constitutional values are in conflict with specific construction of the constitution of one country, it shell be rendered in the decision.

4. International standards for social integration and the role of regional human rights protection organizations

In order to deduct a harmonious solution, we need a forum of discussion. This is where close international cooperation among constitutional courts comes into play.

International cooperation among constitutional courts and equivalent institutions provide a precious opportunity to share each country's experiences and wisdoms on social integration and the protection of human rights. It also reduces the risk of losing universality and objectivity, being buried in one country's circumstance and culture.

Already there are nine such associations for cooperation among constitutional courts, including the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, and the Union of Arab Constitutional Courts and Councils. In Asia, the Association of Asian Constitutional Courts and Equivalent Institutions were established in 2010.

Such cooperation among regional groups that share the same cultural background or linguistic groups that speak the same language, seek to share essential information for the devel-

opment of democracy and the rule of law as well as the protection of fundamental rights. It also establishes minimal international standards or practices that can be commonly applied despite political and cultural differences.

Aside from regional cooperation among constitutional courts, a system of regional human rights protection based on regional Convention on Human Rights can also play an important role in identifying international standards for human rights protection and harmonizing it with domestic law. International cooperation among constitutional courts explained above is limited by not having any legal force by itself. As such cooperation is not based on international multilateral Convention on Human Rights, the effect of international cooperation, which is intended for universal protection of human rights, must have its limits.

In contrast, a system of regional human rights protection based on multilateral Convention on Human Rights makes a concrete agreement among countries within the region on the contents of human rights protection. Thus it has the merit of operating the process of investigation, decision and execution on human rights violations, according to binding international agreements. Moreover, as implementation of the decisions of regional human rights protection mechanism is secured through mutual observation and peer pressure of the regional countries, social integration and human rights protection may be more effective.

Typical regional system of human rights are: the European Court of Human Rights based on the European Convention on human Rights, the Inter-American Court of Human Rights based on the American Convention on Human Rights, and the African Court on Human and People's Rights based on the African Charter for Human and People's rights.

Among African nations, Niger takes account of or expressly refers to the international standards included in "bloc de constitutionalité," and, in Benin, the African Charter on Human and People's Rights, which is a part of its Constitution, often influences on decisions of the Constitutional Court.

In Europe, the European Convention on Human Rights as well as the European Social Charter and the case-law of the European Court of Human Rights are directly applied and referred to in the constitutional courts of European countries. We can say that,

generally speaking, the role of the constitutional courts in Europe today is not limited to an isolated interpretation of national constitutional law.

5. Proposing a concept of an Asian Court of Human Rights

To date, constitutional courts in Asia have been sharing their experience and wisdom, exchanging information on constitutional law and constitutional justice within the framework of the Association of Asian Constitutional Courts and Equivalent Institutions, established in July 2010. Now, it is time that we build on our exchange and further the advancement towards a way to establish a regional human rights protection mechanism, such as an Asian Court of Human Rights.

There already exists a universal consensus among Asian countries that people's inviolable rights should be protected. Most of all, establishment of an Asian Court of Human Rights will be a turning point. We Asians have experienced the brutality of war and egregious wartime human rights violations of women, which still remain unresolved. We have also witnessed ruthless ethnic annihilation and human rights violations arising from racial conflict. The activities of an Asian Court of Human Rights, founded upon a consensus on respect for human rights, will function as a lever to prevent such tragedy and ensure peace in the Asian region.

Meanwhile, economic interdependence within the region is growing. Social, cultural exchanges between countries in the region are dramatically increasing both in size and quality. Domestically, conflicts of interest between social echelons in various socio-economic areas, such as employment instability, wealth distribution problems, disadvantage in educational opportunity, racial or cultural conflicts, and environment destruction, are constantly on the rise. Furthermore, as population composition becomes diverse due to an increase in immigrants and refugees, respecting diversity while maintaining social integration and public order is becoming a heavy task.

In order to actively handle these problems, we need to examine, through a system of regional human rights protection such as an Asian Court of Human Rights, the ever increasing tasks of social integration in the Asian countries together with our neigh-

bors. We share similar social backgrounds and legal cultures. This will enable us to substantially realize the international standards of social integration in concrete, real-life situations, and strengthen continuous cooperation and partnership for effective protection of liberties and human rights.

We can first look into what areas each Asian country can agree on in terms of human rights protection, and then gradually broaden our discussion on the scope of human rights as well as on many different systems designed to protect human rights. In this way, we may come up with a way to provide human rights protection consistent with universal values. We may achieve social integration without having to sacrifice the Asian values of harmony between individuals and society.

By founding an institution for international cooperation to ensure respect for life and guarantee of human rights, by making sure that violations against humanity are restrained and victims are given access to legal remedies at the regional level, we may bring about the enhancement of human rights in Asia as well as a groundbreaking progress of peace in the region.

Thank you for your attention.

Christian Baptiste Quentin Rogombe

Judge in the Constitutional Court of Gabon

Ladies and gentlemen,

I have been asked to report on the discussions in Session II on the theme of International Standards for Social Integration. I shall attempt to do so to the best of my ability.

While the concepts of social integration and fundamental social rights are clearly linked, they nevertheless differ in many respects.

The concept of social integration is primarily addressed from a sociological approach, whereas social rights can only be asserted and understood from a legal perspective.

With regard to the point which we are dealing with particularly today, namely international standards for social integration, two questions may arise.

Firstly, what part does international law play in asserting fundamental social rights?

Secondly, to what extent does international law contribute to the social integration process?

These are the two main questions which were considered during the discussions.

In terms of the relationship between social rights and international law, the main concern involves their universality.

Even though there is still debate among some legal writers, it can now be legitimately agreed that a universalist approach is taken to fundamental social rights.

To confirm this, one only has to note that many of them are set out in the 1948 Universal Declaration of Human Rights, as well as in the covenants on economic, social, cultural, civil and political rights, the conventions on the elimination of all forms of racial discrimination, and international instruments dealing with labour issues, etc.

To come back to the Universal Declaration of Human Rights, Article 22, in particular, provides that everyone, as a member of society, has the right to social security.

Article 23 of the same text sets out everyone's right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, to equal pay for equal work, to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection, as well as the right to form and join trade unions for the protection of his interests.

These two provisions confirm the universality of these social rights. However, this universality is immediately called into question when we come to the area of their implementation.

It is then necessary to measure the influence of the international standards at domestic level. Let us take the example of the 1948 Universal Declaration of Human Rights, the instrument with the greatest symbolic impact without forgetting that many international protocols derived from it can also play a part.

In principle, three main groups of countries can be identified.

The first includes countries like Gabon, Benin, Senegal, Burkina Faso and many other African countries which have incorporated the international declarations in the preambles to their constitutions, whose membership of the constitutional bloc is no longer questioned. Here we are dealing, in particular, with all the social rights set out in the 1948 Universal Declaration of Human Rights and also those enshrined in the 1981 African Charter on Human and Peoples' Rights.

In the specific case of Gabon, these rights are supplemented by those set out in the National Charter of Freedoms, such as the right to decent housing, the right to protection, in particular of mothers and children and a minimum income for the destitute, the right to equal access to employment, the right of people with disabilities to employment, the right to social security and medical care, the right to a healthy and well-preserved natural environment and, also, the right to education and teaching.

By decision of 28 February 1992, the Constitutional Court immediately confirmed the constitutional force of the preamble to the Constitution.

The same pattern also applies in other countries which, in addition to the rights enshrined in their constitutions, have built up a range of social rights, in particular through international conventions. This, of course, does not prevent there being close ties between these two categories of social rights.

Lastly, in some other countries, fundamental rights are set out in special instruments outside the Constitution. This raises the classic problem of their recognition.

Even on this level, however, it has to be said that, in spite of this variety in terms of presentation, there is a degree of consistency: the sacredness of fundamental rights and freedoms, which form the basis for a minimum standard shared by almost all countries. That is what makes them universal.

Nevertheless, a degree of diversity does show through this admirable unity.

This is because, although there is consensus in overall terms and a kind of universality surrounding certain social rights, such as the right to education, to social protection, to health, to work and to housing, to name but a few, there is divergence or at least extreme disparity regarding implementation of these principles by lawmakers.

In some ways, it is more straightforward if not easy to formalise individual freedoms such as freedom of movement, freedom of opinion, respect for private life and freedom of expression. The domestic legislation of democratic states is quite homogenous in this respect. The freedoms are implemented in more or less the same way by the various national lawmakers because, in the final analysis, wherever you go, there is a shared understanding of the freedom to come and go, the right to vote and freedom of expression.

The situation concerning what are known as "social" rights is quite different. How can the right to health, the right to work or the right to social protection be formalised?

There are many parameters which lead to substantial differences in implementation between countries.

If we take the case of only one of them, namely a nation's wealth, it can be seen that some rights, for instance the right to health, the right to education and the right to social protection,

are not implemented in the same way depending on whether the country concerned is rich or poor.

What might be seen as a step backwards in some countries could be regarded as an advance in others. What is more, the situation may vary within a single state depending on its current economic situation.

Given these disparities, how can constitutional courts determine the point at which lawmakers violate or, on the contrary, reinforce particular fundamental social rights? Therein lies the main difficulty of the task facing them.

While maintaining diversity, constitutional courts should seek to ensure the unity of harmonious integration.

Moreover, perceptions of social rights vary greatly depending on a nation's founding philosophy or shared principles.

In these circumstances, it is easier to understand the difficulties involved in identifying a body of shared rules for all states concerning social rights, which accordingly explains why there can only be very heterogeneous constitutional case-law regarding these rights.

Nevertheless, international law does provide a common foundation on which to build realities, which, although different, do involve a degree of convergence. It has the merit of helping to establish a body of shared fundamental social and civil and political rights, which courts have a duty to strengthen through their decisions, while adapting to the situations in their own states.

International sources are therefore a tool for social integration in the broadest sense of a democratic world where fundamental rights and freedoms are respected.

Of course, individual states have all built their own models of social integration, but social integration can also be addressed at local and also at regional level.

It is from this perspective that we should see, on the one hand, the decision by the Arab countries to set up a Court on Fundamental Rights and, on the other, the corresponding proposal which has just been made by the President of the Constitutional Court of the Republic of Korea concerning Asia.

Reference should also be made to judicial mechanisms already in operation, such as the European Court of Human

Rights, the African Court of Justice and the Inter-American Court of Human Rights.

Where they already exist, regional human rights courts have unified member states' case-law around a common approach to fundamental rights.

However, the establishment of regional human rights courts is not enough in its own to ensure effective protection.

The establishment of discussion forums in which individual countries could share with others their experience of social integration and the protection of human rights also contributes to this process of universality. This is especially true because such forums have the advantage of promoting objectivity, while also establishing standards or practices which may be applied routinely regardless of political or cultural differences.

In this connection, is it not the case that Article 1 of the 1948 Universal Declaration of Human Rights reminds us of a duty which is the very essence of social rights, namely that human beings "should act towards one another in a spirit of brotherhood"?

The discussions about the theme were wide-ranging and constructive and confirmed the universal nature of fundamental rights in their diversity.

In this respect, the main aspects of the discussions can be summed up as follows:

1) The diversity of situations leads to a degree of relativity between countries and between continents.

2) Constitutional law may draw on international law. In practice, this is more a matter of a kind of reciprocal influence, which helps explain what has been called the internationalisation of constitutional law and the constitutionalisation of international law, even though, in some countries, international law does not fall within the jurisdiction of constitutional courts.

3) There is a need for international co-operation of the kind that already exists in some regions, but which should be reinforced with more binding machinery, in particular with a system of peer monitoring and observation.

4) The legitimacy of constitutional courts. It has to be said that they do not have the power to define the authorities' policies or lay down rules on fundamental freedoms and rights. Instead, their role is to check the compliance of legislation with constitutions and protect the rights enshrined in them.

This involves the age-old debate about governments' legitimate fears of courts, which does not, however, preclude the accepted idea of constitutional courts, which, in addition to their censuring function, are increasingly playing a positive role in terms of issuing guidance and in some cases instructions.

Constitutional courts may therefore be dynamic while remaining restrained within the bounds of their traditional powers.

5) Lastly, there is a need to step up dialogue between courts to further facilitate the resolution of disputes concerning fundamental rights and social integration.

Ladies and gentlemen,

I cannot be sure that I have been totally accurate in reproducing our thoughts and discussions. I hope you will make allowances for that.

Thank you for your kind attention.

Session III
Constitutional Instruments for Social Integration

Zuhtu Arslan
Justice at the Turkish Constitutional Court

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.

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 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 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.

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.

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.

7 *Ibid*., p.95

2. Constitutional law applied in cases of social integration

The reports of the countries, based on the replies to the questionnaire, reveal that there exists 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, and 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.

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 immi-

[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.

grant 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.

[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.

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 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

[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.

[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>)".*

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 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.)".

[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."*

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 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.

[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 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)."*

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 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.

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)".

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

Juiz Raul Araujo

Judge of the Constitucional Court of Angola

I - Os tribunais constitucionais, intervêm na resolução de litígios de vária natureza na defesa dos direitos fundamentais dos cidadãos, assim como em outras matérias de natureza jurídica e política, contribuindo, desta forma, para prevenir e evitar conflitos sociais e contribuir para a integração social.

A justiça constitucional tem um papel importante na integração social mas a sua função é limitada, já que ela não é o actor principal nesse processo.

II - O principal instrumento a ser utilizado pelos tribunais constitucionais nos casos relativos à integração social é a Constituição. Outro instrumento são as normas de direito internacional relativas aos direitos humanos que podem ser aplicadas directamente pela justiça constitucional. Estas normas sobrepõem-se às normas ordinárias de direito interno.

A Constituição dispõe de princípios que podem ser invocados na justiça constitucional em casos de integração social. São os casos dos princípios, por exemplo, da igualdade e da não discriminação, o princípio do Estado de Direito, o princípio do Estado social.

Outros princípios essenciais a serem tomados em consideração são os do acesso à justiça e à celeridade processual.

III - Os tribunais constitucionais podem contribuir para a prevenção de conflitos sociais através dos mecanismos do recurso de inconstitucionalidade ou por intermédio da fiscalização preventiva ou sucessiva das leis, nas suas formas concreta ou abstrata.

A maioria dos tribunais constitucionais têm competência para receber recursos de inconstitucionalidade, ordinários ou extraordinários, de grupos sociais, enquanto entidades jurídicas de direito privado, tais como fundações ou associações. Nestes casos quando os tribunais constitucionais se deparam com a violação de um direito, a fonte de violação, se é uma disposição legal ou a sua prática pelas

autoridades estatais, devem anular ou revogar essas leis, quando haja violação de direitos constitucionais.

Os tribunais constitucionais têm também competência para fazer a fiscalização da constitucionalidade, de forma preventiva e sucessiva, concreta ou abstrata.

A fiscalização preventiva da constitucionalidade das leis permite aos tribunais constitucionais evitar conflitos sociais e integra-se no mecanismo jurídico destinado a contribuir para a protecção preventiva eficaz dos direitos e liberdades fundamentais dos cidadãos. A fiscalização sucessiva, nas suas formas abstrata ou concreta, dá competência aos tribunais constitucionais para invalidar as leis inconstitucionais, aprovadas pelos parlamentos, destacando-se as que criam conflitos sociais e provocam a desintegração social.

IV - Existem várias limitações que impedem que os tribunais constitucionais possam exercer a sua função de integração social ou na aplicação dos instrumentos constitucionais. Algumas dessas dificuldades são estruturais e sistémicas uma vez que, por vezes, os outros órgãos do Estado têm relutância em executar as decisões dos tribunais constitucionais e, outras vezes, há uma grande pressão sobre os tribunais quando eles estão a apreciar alguns processos.

Outra limitação resulta do facto de em alguns países o acesso ao tribunal constitucional estar reservado apenas a entidades públicas não se dando aos particulares a possibilidade de recorrerem directamente a este tribunal. A exclusão dos direitos sociais e económicos do recurso de inconstitucionalidade em alguns países é, igualmente, uma limitação à possibilidade dos tribunais constitucionais impedirem a existência de conflitos sociais, como por exemplo, o desemprego ou as condições de trabalho.

Conclusão:

A intervenção do orador principal e as várias intervenções feitas podem ser resumidas nas seguintes conclusões:

1 – Os tribunais constitucionais são instrumentos relevantes e eficazes para tratar da integração social mas as suas funções integrativas são limitadas.

Melhorar ou lidar com questões relacionadas com a integração social é uma das responsabilidades dos tribunais constitucionais. Para

a realização desta função delicada, os tribunais devem respeitar o pluralismo jurídico, social e cultural das sociedades onde estão inseridos.

2 - Existem disposições de direito constitucional pertinentes e suficientes colocados à disposição dos tribunais constitucionais na resolução dos conflitos sociais e para promover a integração social. As disposições relativas aos direitos, princípios constitucionais e do direito internacional dos direitos humanos fornecem os instrumentos necessários para lidar com tais questões sociais como a segurança social e as migrações.

Particular destaque devem ser dados aos princípios da igualdade, da não discriminação, do Estado de Direito, do Estado social.

Destaque particular foi dado ao princípio do acesso ao direito e à justiça, assim como ao princípio da celeridade processual. Neste sentido os tribunais constitucionais, na sua organização e funcionamento devem dotar-se dos meios e mecanismos que lhes permitam a efectivação do direito a um processo equitativo e a exames rápidos aos recursos que lhes sejam submetidos.

Os tribunais constitucionais devem, igualmente, recorrer-se da experiência oriundas de decisões de outras instâncias, em sede de direito comparado, para enriquecimento dos seus acórdãos.

3 - Os tribunais constitucionais têm competência para invalidar as leis que considerem incompatíveis com os direitos e princípios constitucionais. Ao usar os seus poderes, os tribunais supremos ou constitucionais historicamente contribuíram para a integração social, ajudando, por exemplo, a eliminar a discriminação étnica e religiosa. No entanto, os tribunais constitucionais não têm poderes para prevenir todos os conflitos sociais ou a liquidação de todo o tipo de conflitos sociais.

4 - O sucesso duradouro de integração social depende de um trabalho efetivo de todos os órgãos do Estado e da vontade dos indivíduos a viver juntos. Esta última análise, requer uma cultura política que reconhece o estatuto e os direitos de todos os cidadãos.

Session IV
The Role of Constitutional Justice in Social Integration

Ricardo Lewandowski

President of the Federal Supreme Court of Brazil

Mr Park Han-Chui, President of the Constitutional Court of South Korea

Mr Gianni Buquicchio, President of the Venice Commission

Presidents of the Constitutional Courts and Conferences of Constitutional Jurisdictions here present,

Mr Il-won Kong, Judge of the Constitutional Court of South Korea

Sheikha Munira bint Abdullah bin Mohammed Al Khalifa,

Assistant Secretary General of the Constitutional Court of Bahrain

Ladies and Gentlemen,

Members of the international legal community,

I am delighted to be here as keynote speaker at the 4th Session of this major World Conference, whose most recent Congress, organised jointly by the Federal Supreme Court of Brazil and the Venice Commission, took place in Rio de Janeiro from 16 to 18 January 2011, to the great benefit of the international legal community.

Besides the fruitful relationships that have been cultivated since that valuable opportunity to share experiences, these forums for excellence show that contacts between judges from different national jurisdictions, ensured by what is now known as "legal diplomacy", are essential to dialogue between peoples. They also show that there are more common aspects which bring them together than areas of disagreement that keep them apart.

Periodic meetings and exchanges of ideas between members of the Constitutional Courts of various countries heighten our understanding of the multidimensional nature of our tasks as interpreters of the Constitution in an increasingly more interconnected world, as we seek solutions for common problems in areas such as the environment, health, culture, science, human development, etc. These issues raise many challenges in applying the law more fairly, maintaining legal security, ensuring peaceful social relationships and consolidating fundamental rights.

I believe my topic today, "The role of constitutional justice in social integration", is central to the work of the Constitutional Courts. In this area the Brazilian Supreme Court - the *Supremo Tribunal Federal*, which I have the honour to chair - has a substantial body of well-established case-law, the main precedents of which I will now briefly outline.

I will begin this short presentation by referring to the thinking of John Rawls, for whom *"the concept of justice is defined (…) by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages"*.[1] I firmly believe that the judiciary in democratic nations is increasingly involved in pursuing such objectives, aware as it is of its responsibility in promoting justice, which is now understood as the promotion of equality of opportunity for people, irrespective of natural or acquired inequalities.

This meeting, organised under the auspices of the distinguished Constitutional Court of South Korea and the Venice Commission, provides a forum for mutual reflection on issues that currently drive constitutional justice in areas that allow it to contribute towards ensuring the integration of all groups that make up society, without discrimination.

It seems clear to me that the deepening of international cooperation at the most varied levels, besides simply boosting economic activity, has shown just how far the challenges we face in the day-to-day exercise of our function of judging are surprisingly similar.

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[1] Rawls, John. A *Theory of Justice, revised edition*, Belknap Press, Cambridge, 1999.

To give just a few examples, I would like to mention the defence of minorities and vulnerable groups, the consolidation of women's rights, the achievement of republican equality, guaranteed public liberties, the enforceability of social rights, transparent judicial action, the opening of decision-making procedures to public debate, the dissemination of fundamental guarantees on private relations, the appropriate protection of workers, etc., among so many other major issues.

I believe that the important role of constitutional justice in social integration now more than ever involves applying the generally recognised principle of equality before the law with due consideration. If it is interpreted on a linear basis, bearing only its formal aspect in mind, i.e. merely guaranteeing equality for all before the law, it may give rise to enormous injustices, particularly when legal decisions disregard the appreciable differences that exist between the various groups and individuals that make up society.

One of the key objectives of democratic states based on the rule of law in this 21st century is the eradication of social inequalities by ensuring that citizens are completely equal before the law. In that context, the relevance of the judiciaries of the various nations is growing exponentially, particularly their Constitutional Courts as agents for realising the commitments to and desire for material equality set out in the respective political charters, and moreover provided for in countless international covenants and treaties.

According to more progressive schools of legal thought, a desirable level of social integration cannot be achieved without incorporating the idea of material or substantive equality and going beyond the formal orthodox perspective of the principle of equality before the law bequeathed by 19th-century constitutions.

This is because the very concept of democracy generates the need to ensure that all people have the right to equality, but an equality which tolerates, accepts and includes any differences between the varied groups and individuals that make up society, assuring them that their respective particular features will be preserved. It is therefore essential to go beyond the concept of merely formal equality, particularly when it might represent a factor of

discrimination or a means to assert superiority over people who stand out from other members of the community because of certain personal characteristics.

According to this approach, the notion of social integration relevant to us today involves a sense of cohesion, harmony and equilibrium in interpersonal relationships, overcoming the differences intrinsic to human beings which have often crystallised over the centuries. In the light of the understandable slowness of different societies in adapting to the democratic changes introduced in modern times, the judiciary - by means of its Constitutional Courts in particular - must be a vanguard institution in speeding this process up.

Against that background, in the short time available to me I will outline a number of Brazilian Federal Supreme Court decisions which seek to fulfil the constitutional rule of the promotion of social integration, regarded as one of the pillars of republican life.

I must stress that the development of Brazilian Supreme Court case-law in this area has been accompanied, particularly over the last decade, by great advances in cutting-edge public policies that have allowed millions of Brazilians to escape the abject poverty in which they lived and join the labour and consumer market.

I will divide my presentation on the development of Brazilian Supreme Court decisions on the topic at issue into three parts. Firstly, I will outline the body of case-law which has set out the parameters required to recognise the **enforceability of social rights** on the basis of specific cases heard by the Court.

I will go on to address a number of important decisions on the **protection and inclusion of minorities or vulnerable groups** which have had great social consequences and the effects of which are now felt in citizens' daily lives.

Finally, I will comment on the opening of the Court to civil society through **the latter's participation in decision-making processe**s, via *amici curiae* and the holding of **public hearings** which allow its judges to benefit from the great plurality of ideas and values characteristic of a multicultural society such as Brazil's.

I believe that the decisions I will outline represent the key milestones in the Brazilian Supreme Court's action to promote social integration.

1) The enforceability of social rights

The idea underlying the concept of the enforceability of social rights provided for in the constitution is that government failure to ensure such rights legitimises judicial intervention to consolidate them. Brazil's Federal Supreme Court has stated in this respect that *"when the public authorities fail to comply totally or in part with their duty to implement public policies defined in the text of the constitution itself, that inadequate performance violates the very identity of the Constitution".*[2]

With such words in this specific case, the Court guaranteed access to crиches or nurseries for children of up to 5 years of age, a duty assigned explicitly to the State by the Brazilian Constitution. In another case the Federal Supreme Court guaranteed the right of people in need to free medication.[3] In yet another it imposed the establishment of a pool of 'public defenders' to serve the underprivileged who could not afford to take on a lawyer,[4] thus ensuring that they had full access to justice.

Before the consolidation of that opinion, which has been systematically underscored in subsequent judgments, the public authorities, in order to avoid complying with certain constitutionally-established obligations concerning social rights, repeatedly cited the theory, of German origin, of the "limits of the possible", according to which the possibility of demanding positive assistance from the State is conditional not only upon the availability of budgetary resources but also upon the reasonableness of the claim, in view of the needs of society as a whole.

This gradual restriction by the Federal Supreme Court of the possible circumstances in which the State could make use of this theory to avoid complying with constitutional rules on social rights, based on examining specific cases, marked great progress in legal theory. The Court's current understanding on this issue is summarised as follows:

> *"The 'limits of the possible' precept - which the public authorities cannot cite in order to defraud, frustrate and render inviable the implementation of public policies defined in the Constitution itself - is insurmountably limited by the constitutional guarantee of the social minimum, which in the context of our positive legal system represents a phenomenon emanating directly out of the presumption of essential human dignity".*[5]

The Supreme Court's recognition that people must be allowed to benefit from the **social minimum**, together with the understanding that the principle of **human dignity** is a fundamental pillar of the Constitution, imposed ever greater restrictions on the possibility open to the public authorities to cite the theory of the "limits of the possible", making it feasible for citizens to demand the realisation of social rights via legal means.

Similarly, Brazil's Federal Supreme Court began to identify situations involving inertia or indeed government negligence in complying with its constitutionally-established responsibilities, consolidating the **"unenforceability of the State's discretion in rendering social rights effective".**[6]

Having made these initial remarks, I will now examine some more significant judgments that have contributed to the better integration of minorities or vulnerable groups in their respective communities.

2) Integration of minorities or vulnerable groups

2.1) Constitutionality of ethnic/racial quotas

In presenting the leading case[7] on recognition of the constitutional legitimacy of affirmative-action programmes establishing a system of reserved places, based on ethnic/racial criteria, for access to Brazilian university education, I would first like to say that the decision in question - taken unanimously by the Supreme Court - brought about a real revolution in the country in terms of the integration of populations that had previously been excluded from higher education.

As judge-rapporteur in that important case, my opinion laid stress on the difference between the formal and material aspects

2 ARE 639.337-AgR
3 STA 175-AgR
4 AI 598.212-ED
5 RE 581.352-AgR
6 ADPF 45
7 ADPF 186

of equality before the law, stating that in order to achieve material equality between people, the State can make use both of policies of a universalistic nature, encompassing an indeterminate number of individuals through structural measures, and affirmative actions, which affect particular social groups in specific cases, awarding them certain advantages for a limited time to allow them to overcome inequalities deriving from particular historical situations.

Under the principle of equality before the law, which according to the ancient Greek philosophers means treating the unequal unequally according to their inequality, I recognised, as did my Court colleagues, that the different selection method for public universities can indeed take ethnic/racial or socio-economic criteria into consideration to ensure that the academic community and society itself may benefit from a plurality of ideas, a cornerstone of the Brazilian State, as provided for in Article 1(V) of the current Constitution.

The Supreme Court's validation of the different rules that established racial and socio-economic quotas in higher education led to an exponential increase in the inclusion of students of African descent in Brazilian university life, simultaneously promoting an extraordinary increase in the self-esteem of people belonging to that ethno-cultural group, which moreover forms the broad majority in Brazil in demographic terms.

2.2) Same-sex unions

The Federal Supreme Court has also confirmed that stable unions between same-sex couples are lawful under the Constitution.[8] The recognition that such relationships have the status of a family entity enabled the rights conferred by law to unions of people of different sexes to be extended to them. The Court's decision was based essentially on constitutional grounds of the prohibition of discrimination on the basis of gender or sexual orientation, fundamental human dignity, the right to seek happiness and the State's duty to ensure special protection for families.

It is not difficult to understand the impact and scope of this decision on the social integration of certain socially marginalised

[8] ADI 4.277 and ADPF 132.

people and groups whose fundamental rights had previously been restricted in certain respects, and who had been prevented from fully exercising their freedom and realising their potential. Brazil was a pioneer in this area, together with a small group of countries.

2.3) Protection of women

With respect to the protection of women against domestic violence, the Brazilian Supreme Court reaffirmed the constitutionality of the "Maria da Penha Law",[9] a legal instrument that increased the severity of punishment for aggression against women. This law was named after a woman who became paraplegic after repeated ill-treatment and two attempted murders by her then domestic partner.

By amending the criminal code in this area, the Maria da Penha law allowed perpetrators of violence against women in a domestic or family setting to be arrested and remanded in custody, avoiding the possibility of the usual punishment of mild or alternative penalties. It also became possible to bring criminal proceedings against offenders, usually without the need for the victims - who are normally inhibited by fear of reprisals - to be formally represented.

In debating the constitutionality of affirmative action in favour of women, the Supreme Court ruled that it is the State's duty to prevent domestic and family violence, whether physical or psychological. The Court confirmed that, by creating specific mechanisms to restrict and prevent physical or psychological abuse in the private domain and by introducing special measures of protection, assistance and punishment to prevent gender-based violence of that kind, the legislature used the appropriate and necessary means to achieve the ends enshrined in the Constitution.

This judgment had enormous symbolic value, in particular because it drew attention to an important social issue that had previously had a very low profile. What is more, it opened up the possibility of giving a voice to helpless, weakened and vulnerable people, increasing their belief in justice and impacting on society as a whole.

[9] ADC 19 and ADI 4.424

2.4) Demarcation of indigenous land

To continue this appraisal of decisions that have had a marked impact on the social integration of marginalised people, I would like to cite the Federal Supreme Court judgment which recognised the right of indigenous communities to continuous demarcation of their land,[10] without its division into separate territories. The Court took the view that it had to take that stance to ensure, amongst other things, that Brazil's various indigenous populations have sufficient land to guarantee decent livelihoods, not only in economic terms but also from a linguistic and even physical perspective, so as to preserve their rich heritage of ancestral wisdom, which contributes to the diversity and originality of the Brazilian cultural mosaic.

In the "Raposa Serra do Sol Indigenous Reservation" judgment, the Supreme Court confirmed the demarcation of a two million hectare protection area for the native population, with a perimeter of some 1 000 km, and also ordered the expulsion of thousands of farmers, miners or simple squatters who were unlawfully occupying it for speculative reasons.

In so doing the Federal Supreme Court merely enforced the constitutional rules incumbent upon the State to protect social groups which contributed and continue to contribute to the formation of our society's ethnic, cultural and historic identity.

By asserting the need to fully integrate minority segments of the social body into society, the Court helped to preserve our acknowledged multiculturalism, which, together with the country's extremely rich environmental diversity, constitutes an inalienable heritage that present generations have the duty to bequeath to future generations.

2.5) Right of parliamentary minorities to object

To bring this summary of relevant precedents of Federal Supreme Court case-law on the protection of minorities to a close, I would like to mention the decision guaranteeing the right of parliamentary minorities to object, as an expression of the right to demonstrate in a democratic society, allowing them to establish committees of inquiry.

[10] PET 3.388

In the case in which the issue was considered, the Supreme Court declared that *"the legislative majority cannot frustrate the exercise, by minority groups which participate in the National Congress, of the subjective public right that (…) gives them the power to see the effective establishment of the parliamentary inquiry, for a certain period, into a particular event".*[11]

Thus by preserving the right of parliamentary minorities to establish committees of inquiry without undue interference from majority political groups, the Court enhanced democratic debate, allowing diverging (albeit minority) opinions to be given free expression.

I would like to conclude my short presentation with a brief outline of the Brazilian experience of *amici curiae* in cases of abstract monitoring of constitutionality and the opening of the Court to society in debating controversial issues prior to opening the decision-making procedure.

3) Participation of amicus curiae and public hearings

By accepting the participation and extending the procedural powers of *amici curiae* in proceedings on the constitutionality of laws, the Brazilian Supreme Court not only provides assurance that its decisions are more effective and legitimate but also enhances the pluralism ensured by the Constitution. This procedural device enables the Court to guarantee the formal participation of bodies and institutions that represent the general interests of the community rather than the disputing parties, thus allowing the particular values of certain social groups, classes or categories to come to the fore and assisting the Court in the difficult task of handing down decisions as impartially as possible.

In our court practice the *amicus curiae* is more than a merely potential or optional collaborator in proceedings on constitutionality: it is now a special part of the the procedural relationship in its own right. In this capacity the "friend of the court" can present written submissions and orally argue the standpoint of the social segment represented in the proceedings.

The other side of the same coin - society's participation in trials - is represented by **public hearings**. These are convened by

[11] MS 26.441

the Court prior to hearing so-called hard cases, when it hears the testimony of people with experience and authority in a particular area in order to ensure public discussion of questions of fact or law with a general impact and of significant public interest as a way of supporting the judges.

These meetings generally make it possible to clarify the issues in dispute in cases being heard by the Court, which can now rely on different views of the factual, technical-scientific, political, economic and legal elements of the cases it is required to hear. Over the last five years a number of public hearings have been held in which specialists and interested parties have provided information on matters of the utmost importance, such as: (i) the possibility of the use of embryo stem cells in scientific research for therapeutic purposes; (ii) the system of funding election campaigns; (iii) affirmative action policies in access to higher education; (iv) the possibility of producing biographies not authorised by the person concerned; (v) controversial aspects of the Brazilian prison system; (vi) implementation of the right to health, based on public authority provision of free medication and treatment; (vii) prohibition of the sale of alcoholic drinks close to highways; and (vii) the interruption of pregnancy in the event of anencephalic foetuses.

With this increasingly common practice, the Federal Supreme Court has clearly shown that in exercising its constitutional jurisdiction in a democratic State based on the rule of law, it must constantly strive to promote respect for the diversity of lifestyles and world views existing in the plural society in which we live in this 21st-century world.

Ladies and Gentlemen,

I have no doubt that the experience we will share during this Congress will strengthen our commitment, as judges and legal practitioners, to an increased focus on the integration of marginalised or more vulnerable persons and groups into society through constitutional justice.

I do hope we can maintain that momentum, since as a renowned Brazilian legal scholar, Professor Dalmo de Abreu Dallari, has rightly observed, *"the extension of the powers of the Judiciary, with acknowledgement of its political role, has been recognised since the end of the 20th century. (…) It is essential now more than ever for judges to participate actively in discussions on their social role and to seek, with composure and fortitude, to show how they can be more useful in achieving justice".*[12]

This overview of the case-law of the Brazilian Supreme Court in consolidating social rights - which until very recently were seen as merely procedural rules - and the possibility of society's participation in interpreting a nation's constitution shows how much progress can be made in this field which lies between the Law and Politics.

Thank you very much for your attention.

12 DALLARI, Dalmo de Abreu. **O Poder dos Juнzes**. 3a. ed. São Paulo: Saraiva, 2007. p. 166.

Kang Ilwon

Justice of the Constitutional Court of Republic of Korea

In session 4, the honorable President of the Federal Supreme Court of Brazil, Mr. Ricardo Lewandowski made a keynote speech on the role of constitutional justice in social integration under the presidency of Deputy Secretary General Ms. Alkhalifa of Bahrain Constitutional Court. President Lewandowski emphasized that the important role of constitutional justice in social integration involves applying the generally recognized principle of equality before the law with due consideration. Also, he stressed that a sense of cohesion, harmony and equilibrium in interpersonal relationships are needed to overcome the differences intrinsic to human beings.

Every country has different type of courts which are in charge of constitutional justice. Many Courts answered to the questionnaire that their constitutions do not directly enable the Court to resolve social conflicts and they do not act as social mediator. However all constitutional courts and equivalent institutions play a key role in protecting human rights and enhancing rule of law. Through this function, Courts are at least indirectly acting in settling or avoiding social conflicts and contributing to social integration.

The Federal Supreme Court of Brazil is very active in fulfilling the constitutional role of the promotion of social integration. President Lewandowski introduced a body of case law. He showed us that the enhancement of Brazil's democracy and social integration was possible through the Brazilian court's effort to consolidate social rights, to protect minorities and vulnerable groups, and to promote society's participation as a whole in interpreting constitution.

Through its decisions, the Court recognized enforceability of social rights to guarantee the minimum level of social protection so that citizens can demand the realization of social rights via

legal means. The Court also ruled a number of important decisions upholding legitimacy of affirmative action for ethical/racial minorities, the right of same-sex couples to form a union, the duty of the State to protect women against domestic violence, as well as the right of indigenous

people to land. In addition, the amicus curiae and public hearings are important mechanisms that promote the society's meaningful participation and respect for diversity in trials.

According to the replies to the questionnaires, the active role of some constitutional courts is remarkable. The Constitutional Court of Armenia has acted as a social mediator in many cases. In Austria, until the early 1980s, the Constitutional Court has exercised judicial self-restraint. However, since then, the Court has gradually loosened this self-restraint under the influence of the case law of the European Court of Human Rights. Now the lawmaker's discretionary scope of policy making is significantly narrowed.

The Croatian Constitutional Court makes clear distinction between the politics and the constitutional law. In doing so, it balances between activism and judicial self-restraint. In Czech Republic, it is not unusual that a minorities resort to the Constitutional Court after it has been outvoted in the Parliament on a specific issue. This practice makes the Court de facto the third Chamber of Parliament.

In Germany, it is also a regular occurrence that the minority or opposition group challenges the decision of the political majority in court. Decisions of the Constitutional Court are usually understood as very forceful interventions into political and legal debates, and mostly enjoy full respect. The Court is seen hybrid institution between the courts and political organs.

The Italian Constitutional Court is in the position of supplementing the operation of the political organs. The Court sometimes expresses warnings and hopes so as to orient the Parliament's action in a constitutionally compatible direction. Due to the Court's special position, these expressions are particularly authoritative and contribute to guide not only institutions, but also society in general.

The Latvian Constitutional Court plays an important role in defining the content of the social rights. The judicial power is

committed to assess whether the legislator has observed the limits of its margin of appreciation. The Lithuanian Constitutional Court solves the disagreement that occurs amongst political parties, public figures and other actors in the social space. The Constitutional Court of Moldova has solved many cases of unconstitutionality on violation of the right of property, the principle of equality, and the right of social assistance and protection.

The Constitutional Court of Russian Federation plays the role of social mediator by establishing balance between public and private interests in its decision. When considering cases connected with protection of social rights, the Russian Constitutional Court finds balance of competing social values having obvious political significance and thereby fixes the boundaries of admissible increase of the burden of social transformation.

The Constitutional Court of Korea, the host court, has made its best efforts to duly perform the duty of social integration. In 2013, the Court received about 1,500 cases, and more than 95% of cases were constitutional complaints. Anyone whose basic right has been infringed by governmental power can file a constitutional complaint. We have taken pride in faithfully implementing the duty of social integration since the Court was established in 1988. As a result, the Court has been voted as the most trusted and influential government agency since 2005 in the public opinion.

In floor discussion, France emphasized the importance of the court's role in protecting equality. France mentioned about its two recent cases on same-sex marriage and full headscarf, how it interpreted the issues within the framework of matrimonial and gender equality.

Romania emphasized the role of the constitutional court in striking balance between the means provided by the state and the needs of the vulnerable people. Particularly, the Court upheld a law imposing a duty on the employer to hire people with disabilities at a certain rate.

Peru raised several points to consider in exercising constitutional judges' authorities to promote social integration, especially the issue of limitation and independence of the judges.

Dominican Republic, although it has only two years of history, shared its experience in protecting the rights of disadvantaged

people, promoting participatory democracy and realizing a social state with the rule of law.

Germany pointed out that the role of the constitutional court is to provide normative interpretation based on the applicable sources of law.

Bolivia emphasized the importance of international instruments in providing common ground to respect and protect ethnic diversity.

Albania focused on the function of the constitutional court to implement the constitution in a way to find a balance between positive and negative sides of democracy.

There were additional comments by Andorra and the Netherlands on the French headscarf case. Finally, Algeria made a comment about the rights of children of same-sex couples.

To sum up, all participants agreed on the basic idea that constitutional justice should play a more active role to promote social integration by guaranteeing fundamental rights of socially and economically vulnerable and disadvantaged minorities. At the same time, we also acknowledged that there could be some variations in implementing and realizing the idea among the States.

Closing Session

Seoul Communique

From 28 September to 1 October, the World Conference on Constitutional Justice held its 3rd Congress in Seoul, upon the invitation of the Constitutional Court of the Republic of Korea.

The World Conference on Constitutional Justice unites 93 Constitutional Courts and Councils and Supreme Courts as well as Constitutional Chambers (hereinafter all referred to as "Constitutional Courts") in Africa, the Americas, Asia and Europe. It promotes constitutional justice - understood as constitutional review including human rights case-law - as a key element for democracy, the protection of human rights and the rule of law (Article 1.2 of the Statute of the World Conference).

In addition to delegations from 73 Constitutional Court members, 21 Constitutional Courts eligible for membership as well as 3 international and regional Courts, participated in the 3rd Congress, which had a total of 306 participants.

The topic of the 3rd Congress, proposed by the host Court and approved by the Bureau of the World Conference, was the "Constitutional Justice and Social Integration". The 3rd Congress dealt with this theme in four sub-topics:

1. Challenges of social integration in a globalised world
2. International standards for social integration
3. Constitutional instruments enhancing/dealing with/for social integration
4. The role of constitutional justice in social integration.

On the basis of the replies to a questionnaire, each sub-topic was introduced by a key-note speaker and then discussed by the participants. At the final concluding session, the key-note presentations and the discussions of each session were summarised by rapporteurs.

There is a wide range of constitutional systems and the implication of the Constitutional Courts depends on the powers they exercise on the basis of their Constitution.

While some courts have a very wide jurisdiction that specifically includes adjudication of social rights, the powers of other courts relate more to civil and political rights, at least as concerns claims individuals. Some courts have developed a rich case-law on social issues on the basis of the rights to dignity, liberty and equality and in the light of the principle of proportionality. Another group of courts receives appeals only from State bodies rather than from individuals. Finally, some Courts are most active in the control of elections or the constitutional review of organic or institutional laws.

Notwithstanding this diversity of jurisdictions, there was consensus among the participants of the 3rd Congress that their work, whether directly related to social rights, or to civil and political rights or to institutional issues, contributes to social integration.

At some point, all Constitutional Courts have to deal with social issues, be it because they have to solve a legal conflict, which developed between actors in society, be it because they act preventively and have to examine the constitutionality of legislation before it enters into force. In this case, the court pre-empts possible conflict by abstract control by invalidating unconstitutional legislation, which could give rise to social conflicts, before the legislation enters into force.

The economic crisis, which has gripped many countries, forces Constitutional Courts to take up this challenge even more urgently. Within countries, budgetary cuts result in the reduction of services, which can lead to social problems. Inequalities between countries, but also internal strife, often lead to illegal migration. Within the framework of their competences, it is the task of the Constitutional Courts to ensure that - in such a difficult context - constitutional rights continue to be guaranteed.

Each judgment by a Constitutional Court upholding the Constitution, democracy, the protection of human rights and the rule of law, if properly implemented, contributes to social integration because it settles - with final authority - disputes, which could otherwise result in social conflict. The Constitutional Courts thus

have a pacifying role in society, which is essential to the functioning of democratic states that respect the protection of human rights and the rule of law.

On the basis of the debates at the 2nd Congress of the World Conference (Rio de Janeiro, 16-18 January 2011), which had dealt with the independence of Constitutional Courts as the main topic, the Bureau of the World Conference on Constitutional Justice had decided that each Congress should, in addition to the main topic, also include stocktaking on the independence of the Constitutional Courts, members of the World Conference.

The 3rd Congress included such a stocktaking exercise. The replies to the questionnaire on this point and the discussions at the 3rd Congress showed that some courts and some judges have indeed come under serious pressure from the executive and the legislative powers, from vested interests, but also from the media, which sometimes misunderstand judgments or distort the image of courts. This generally occurs when courts render decisions that displease other state powers. Several courts have been subjected to fierce and disrespectful criticism, even seeing their judgments not executed and in some cases, their budgets cut and their powers reduced and some courts had even been dissolved.

The participants call upon the member Courts of the World Conference to resist undue pressure from other State powers and from vested interests and to take their decisions only on the basis of the Constitutions and the principles enshrined in them. The World Conference, through its Bureau, stands ready to offer its good offices to Courts, which come under pressure. While the World Conference can only provide moral support, solidarity from peer courts, expressed via the World Conference, can be helpful for a Court in order to be able to resist such pressure.

Furthermore, the participants were informed about the initiative of the Constitutional Court of the Republic of Korea to promote discussions on human rights co-operation, including the possibility of establishing an Asian human rights court based on international human rights norms, in order to enhance human rights protection in the region. Recognising the great contribution by existing international human rights Courts in Europe, the Americas and Africa to the protection of human rights in the

respective regions through the effective implementation of international human rights norms, the participants encourage participating Asian Courts to promote such discussions.

In addition to the representatives of the 10 regional and linguistic groups represented in the Bureau of the World Conference on Constitutional Justice (Association of Asian Constitutional Courts and Equivalent Institutions, the Association of Constitutional Courts using the French Language, Commonwealth Courts, Conference of Constitutional Control Organs of Countries of New Democracy, Conference of Constitutional Courts of Countries of Portuguese Language, Conference of Constitutional Jurisdictions of Africa, Conference of European Constitutional Courts, Ibero-American Conference on Constitutional Justice, Southern African Chief Justices Forum, Union of Arab Constitutional Courts and Councils), the Bureau is composed of three other members that the first General Assembly of the World Conference elected until the next regular General Assembly which will take place in 2017 - the Constitutional Courts of Austria, Lithuania and Turkey - (Article 4.b.1 of the Statute).

The 8th meeting of the Bureau of the World Conference (Seoul, 28 September 2014) approved the financial report presented by the Venice Commission of the Council of Europe, which acts as the Secretariat of the World Conference and approved guidelines for accepting financial contributions (Article 4.b.7 of the Statute).

The members of the World Conference and all other delegations present express their sincere gratitude to the Constitutional Court of the Republic of Korea for generously hosting the 3rd Congress, which was organised in an outstanding manner, and to the Venice Commission for its excellent secretarial support.

Заключительная сессия

Сеульское коммюнике

С 28 сентября по 1 октября Всемирная конференция по конституционному правосудию провела свой 3-й Конгресс в Сеуле по приглашению Конституционного Суда Республики Корея.

Всемирная конференция по конституционному правосудию объединяет 93 Конституционных суда и совета и Верховных суда, а также Конституционные палаты (нижеименуемые "Конституционные суды") в Африке, Америке, Азии и Европе. Конференция содействует конституционному правосудию, понимаемому как конституционный контроль, в том числе и прецедентного права в области прав человека – в качестве основополагающего аспекта демократии, защиты прав человека и верховенства права (статья 1.2 Устава Всемирной конференции).

В 3-ем Конгрессе, помимо членов делегаций из 73 Конституционных судов, участвовали представители 21 Конституционного суда, имеющего право быть членом Конференции, а также трех международных и региональных судов – в целом 306 участников.

Тема 3-го Конгресса, предложенная принимающим судом и утвержденная Бюро Всемирной конференции, - "Конституционное правосудие и социальная интеграция". 3-й Конгресс рассмотрел данную тему по четырем подтемам:

1. Социальная интеграция в глобализированном мире.
2. Международные стандарты социальной интеграции.
3. Конституционные инструменты укрепления/регулирования/оказания поддержки социальной интеграции.
4. Роль конституционного правосудия в социальной интеграции.

На основе ответов на вопросник каждая подтема была представлена основным докладчиком, а затем обсуждалась

участниками. На итоговой сессии докладчики представили резюме основных докладов и обсуждений, состоявшихся на каждой сессии.

Существует широкий спектр конституционных систем, и роль конституционных судов зависит от тех полномочий, которые они осуществляют на основе Конституции своей страны.

Притом что некоторые суды имеют весьма широкую юрисдикцию, в которую конкретно включены судебные полномочия по социальным вопросам, полномочия других судов связаны больше с гражданскими и политическими правами, по крайней мере в том, что касается индивидуальных жалоб. Некоторые суды разработали богатую прецедентную практику по социальным вопросам на основе прав на достоинство, свободу и равенство, а также с учетом принципа соразмерности. Другая группа судов получает заявления лишь от государственных органов, а не отдельных лиц. Наконец, некоторые суды наиболее активны в сфере контроля за выборами или при конституционном рассмотрении органических или институциональных законов.

Несмотря на многообразие юрисдикций, между участниками 3-го Конгресса был достигнут консенсус в отношении того, что их работа, независимо от того, связана ли она напрямую с социальными правами или же с гражданскими и политическими правами или институциональными вопросами, вносит свой вклад в социальную интеграцию.

На определенном этапе все конституционные суды должны рассматривать социальные вопросы, будь то в силу того, что они призваны урегулировать какой-либо юридический конфликт, который возник между сторонами в обществе, или же потому, что они действуют превентивно и должны рассматривать конституционность законодательства еще до того, как оно вступит в силу. В этом случае суд предупреждает возможный конфликт благодаря абстрактному контролю, признавая неконституционным то законодательство, которое могло бы породить социальные конфликты, еще до того, как законодательство вступит в силу.

Экономический кризис, который охватил многие страны, заставляет конституционные суды отвечать на этот вызов в

еще более срочном порядке. Во многих странах сокращения бюджетов привели к урезанию услуг, а это может вызвать социальные проблемы. Неравенство между странами, а также внутренние раздоры часто приводят к незаконной миграции. В рамках своих полномочий задача конституционных судов состоит в том, чтобы обеспечивать и в будущем – в таком сложном контексте – гарантии конституционных прав.

Любое постановление Конституционного Суда, касающееся вопросов защиты Конституции, демократии, защиты прав человека и верховенства права, если оно должным образом исполняется, содействует социальной интеграции, ибо оно регулирует – в окончательном порядке – споры, которые в ином случае привели бы к социальному конфликту. Таким образом, конституционные суды играют умиротворяющую роль в обществе, что чрезвычайно важно для функционирования демократических государств, обеспечивающих защиту прав человека и верховенство права.

На основе обсуждений на 2-ом Конгрессе Всемирной конференции (Рио-де-Жанейро, 16-18 января 2011 года), на котором рассматривалась в качестве основной темы независимость конституционных судов, Бюро Всемирной конференции по конституционному правосудию решило, что на каждом конгрессе, помимо основной темы, будет включаться вопрос о независимости конституционных судов – членов Всемирной конференции.

Подведение итогов обсуждений по этой теме состоялось и на 3-ем Конгрессе. Ответы на вопросник по этому пункту и обсуждения на 3-ем Конгрессе продемонстрировали, что некоторые суды и некоторые судьи действительно испытывали серьезное давление со стороны исполнительной и законодательной властей, со стороны заинтересованных лиц, а также со стороны СМИ, которые иногда неправильно понимали постановления или же искажали имидж судов. Такое часто происходит, когда суды выносят решения, не нравящиеся другим государственным властям. Некоторые суды подверглись жесткой и неуважительной критике, при этом их постановления даже не исполнялись, а в некоторых случаях были сокращены их бюджеты и ограничены полномочия, а некоторые суды были даже распущены.

Участники призывают суды – члены Всемирной конференции оказывать противодействие необоснованному давлению со стороны других государственных властей и заинтересованных лиц, а также принимать свои решения лишь на основе Конституций и воплощенных в них принципов. Всемирная конференция посредством своего Бюро выражает готовность предоставить свои добрые услуги тем судам, которые попадают под давление. Притом что Всемирная конференция может оказать лишь моральную поддержку, такая солидарность судов такого же уровня, выраженная посредством Всемирной конференции, может быть полезной для судов для того, чтобы сопротивляться такому давлению.

Помимо этого, участники были проинформированы об инициативе Конституционного Суда Республики Корея содействовать обсуждениям сотрудничества в сфере прав человека, в том числе возможности создания Азиатского суда по правам человека, основываясь на международных нормах в области прав человека, для того чтобы укрепить защиту прав человека в этом регионе. Признавая огромный вклад существующих международных судов по правам человека в Европе, Америке и в Африке в защиту прав человека в соответствующих регионах на основе эффективной реализации международных норм в области прав человека, участники призвали азиатские суды, принявшие участие в Конгрессе, содействовать таким обсуждениям.

Помимо представителей 10 региональных и лингвистических групп, представленных в Бюро Всемирной конференции по конституционному правосудию (Ассоциация азиатских конституционных судов и эквивалентных учреждений, Ассоциация конституционных судов, использующих французский язык, суды Содружества наций, Конференция органов конституционного контроля стран новой демократии, Конференция конституционных судов стран, использующих португальский язык, Конференция конституционных юрисдикций Африки, Конференция европейских конституционных судов, Иберо-американская конференция по конституционному правосудию, Южноафриканский форум глав высших судебных инстанций, Союз арабских конституционных судов и советов), Бюро состоит из трех других членов, которые были

избраны Генеральной ассамблеей Всемирной конференции до следующей Генеральной ассамблеи, которая состоится в 2017 году. Это конституционные суды Австрии, Литвы и Турции (статья 4.b.1 Устава).

На 8-ом заседании Бюро Всемирной конференции (Сеул, 28 сентября 2014 года) был утвержден финансовый отчет, представленный Венецианской комиссией Совета Европы, которая действует в качестве Секретариата Всемирной конференции, а также руководящие принципы по принятию финансовых вкладов (статья 4.b.7 Устава).

Члены Всемирной конференции и все другие делегации выражают свою искреннюю благодарность Конституционному Суду Республики Корея за великодушный прием, оказанный 3-му Конгрессу, который был организован чрезвычайно эффективно, и Венецианской комиссии за отличную поддержку со стороны Секретариата.

Closing address

Philippe Boillat
Director General of Human Rights and Rule of Law of the Council of Europe

Monsieur le Président, Excellences, Mesdames et Messieurs,

C'est un privilège et un réel plaisir pour moi, au nom du Secrétaire Général du Conseil de l'Europe, M. Thorbjørn Jagland, que j'ai l'honneur de représenter aujourd'hui, de prendre la parole sur un sujet de la plus haute importance pour les 47 Etats membres du Conseil de l'Europe : la justice constitutionnelle.

Nous sommes particulièrement heureux de la tenue de ce 3ème Congrès de la Conférence mondiale sur la justice constitutionnelle ici, en Corée, un pays qui s'est résolument engagé sur la voie de la démocratie, du respect des droits de l'homme et de l'Etat de droit.

Je tiens à mon tour à remercier vivement la Cour constitutionnelle de la Corée et vous-même, Monsieur le Président, de l'excellente organisation de cette manifestation, de votre accueil chaleureux et de votre généreuse hospitalité.

Mr President,

The Council of Europe is the parent organisation of the Venice Commission, which acts as the Secretariat for the World Conference on Constitutional Justice. The Council of Europe can be proud of what the World Conference has accomplished with the assistance of the Venice Commission.

As the Secretariat, the Venice Commission not only provides logistic assistance to the World Conference, it also brings values. I am pleased to read in the Statute of the World Conference the same principles as those of the Council of Europe: democracy, the protection of human rights and the rule of law. I can assure you that the

Council of Europe will continue to fully support your Secretariat in the pursuit of these goals.

Mr President,

You made the proposal to establish an Asian Court of Human Rights. On behalf of the Council of Europe, I warmly welcome this initiative. We are ready to share our experience in establishing the European Court of Human Rights with likeminded Asian States which are willing to take part in this important endeavour. Establishing a genuine regional human rights court is a challenging task, but I am confident that you will take on this task with conviction and I wish you every success.

It is also with great interest that we take note that there is a similar initiative within the Arab countries. We are of course ready to co-operate with these countries as well.

Mr President,

During these two days, we have had ample occasion to discuss various aspects of the important role of constitutional courts in promoting social integration. The topic of this 3rd Congress is also very close to the goals of the Council of Europe. Social integration has a firm link to human rights. Social rights are human rights, even if the enforcement of social rights may differ in some respects.

This was referred to during this Congress, in the Council of Europe, we have established a special mechanism for the protection of social rights, the European Committee of Social Rights which supervises the implementation of the European Social Charter. This legally binding instrument not only sets out such rights as housing, health, education, employment but it also provides a collective complaint mechanism open to employers' organisations and trade unions in order to guarantee these rights. Many other activities of the Council of Europe, for example the protection of minorities, contribute to social integration.

In Europe but also in other parts of the World, countries struggle with the effects of a profound economic crisis which seriously endangers social cohesion. This crisis leads to unemployment, a lack of public funds and a reduction of welfare services, which in

turn had a very negative effect on the economy and on social integration.

The Governments and Parliaments have to react to such crises and they are sometimes obliged to take drastic measures. However, our discussions have shown that the Courts and notably Constitutional Courts are able to ensure that such measures remain within the framework of the Constitution. Constitutional rights have to be respected not only in times of affluence, when this may be easy, but also in times of crisis.

Finally, Mr President, this Congress has rightly focused on the independence of the Constitutional Courts. We have heard about pressure exerted on several of the participating Courts, but this should not discourage you. I am delighted that this issue is, from now on, a permanent topic on the agenda of your World Conference congresses. In Europe and abroad, the Council of Europe strongly supports judicial independence and in particular the independence of Constitutional Courts. An independent and efficient judiciary is the cornerstone of a genuine democracy. We have seen that courageous constitutional judges can make a difference. It is up to each one of you to defend your Constitution, even in difficult circumstances.

I wish you every success in this noble task and I thank you very much for your attention.

Gianni Buquicchio

President of the Venice Commission

Mr President of the Constitutional Court of Korea,
Court Presidents and Judges,
Ladies and Gentlemen,

I am sure that I will receive your approval when I say that the past three days of the 3rd Congress have been an important success for the World Conference on Constitutional Justice and for all of its members. Let me thank the Constitutional Court of Korea, once again, for its outstanding performance in the organisation of this major event.

Thank you also for your kindness and your very warm hospitality.

Ladies and Gentlemen,

We had some passionate discussions on the main topic of the Congress: Constitutional Justice and Social Integration. We have looked at this topic from various angles and we have seen that whatever the type of constitutional justice, concentrated and specialised or diffuse, each Constitutional Court or Council or Chamber, each Supreme Court has an essential role for the furthering of social integration.

Social integration is much more than social rights; the very idea of a Constitution, which unites the people of a country, is the best example of social integration. Your Courts are called upon to safeguard this web of institutional and personal relations.

You are also called upon to defend the Constitution and the values that bind the strata of society together. We have intensely discussed the dangers the Courts have to avert, which international standards they can apply and how these international standards tie into the framework of the Constitution.

Depending on your Constitution, you have different tools at your disposal to fulfil your tasks. We have seen that values such as equality, social justice and human dignity directly relate to social integration, but we have also seen that more abstract principles such as proportionality or reasonableness have the same importance in this respect.

Like democracy, social integration can never be achieved but should be seen as a process; a process that you, as constitutional judges, steer towards its constitutional goal.

Judges,

We have also spoken about your independence. We have seen that it is under threat in some countries.

You have a constitutional mandate – more accurately - you have a mission to act independently; you have the duty of ingratitude towards those who have appointed or elected you. And you fulfil this role.

This can be difficult, you may face obstacles, you may be threatened and we have even seen such threats implemented.

Judges sometimes stand alone against other State powers and this can be very difficult, but you are called upon to fulfil your constitutional task.

This is your noble duty, to defend the Constitution not only when this is easy – but also when it is difficult to do so.

You should know that you are not alone; there are other judges elsewhere, who may have a similar experience. If they cannot come to the rescue, you should know that they support you morally. This is not little. This may be just what is required to be able to fulfil your role as independent constitutional judges.

Ladies and Gentlemen,

We have come here for two purposes: we had useful and rich discussions on an important topic, which relates to your daily work. And we have come here to show that constitutional justice is too important to be seen from only the angle of a single country.

The World Conference gives us the opportunity to share

information, to discuss situations that are important to constitutional justice and the courts that seek to uphold it.

Ladies and Gentlemen,

The World Conference on Constitutional Justice is here to assist you. It is a forum that is there for you, to share ideas with other judges and to provide support where it is needed.

Thank you very much for your attention.

Park Han-Chul

President of the Constitutional Court of Korea

Honorable Mr. Gianni Buquicchio, President of the Venice Commission,

Mr. Schnutz Dürr, Secretary of the World Conference,

Honorable Presidents,

Chief Justices,

Chairpersons,

Distinguished delegates,

I regret to say that the time has come to bring the 3rd Congress of the World Conference to a close.

Over the past three days, we had a very special time together, putting our heads together to share our ideas, experience, and wisdom about the constitution and constitutional justice.

Thanks to your active participation, passionate exchange of ideas, deep understanding, and close cooperation, we were able to engage in candid, productive discussions of key issues related to constitutional justice and social integration.

During the Congress, we have reaffirmed that the protection of universal human rights through constitutional justice results in increased happiness of the members of society and facilitates social integration.

By adopting the Seoul Communiqué, we reached an understanding on the importance of strengthening the network between courts of constitutional jurisdiction, and shared our expectations for further promotion of dialogue on human rights cooperation at the international level, including the possibility of establishing a human rights court in Asia.

I hope we can build on this achievement based on constitutional justice of countries around the world and international human rights systems, and further deepen our academic research and studies.

Hopefully, this will allow human rights and democracy to be

protected more strongly worldwide, and the rule of law to take firm root in societies. This way, the World Conference will represent a new hope for the entire humanity aspiring to peace and justice.

In this Congress, new Courts have been elected to the Bureau, which has laid the foundation for continuity and development of the World Conference. I would like to express my congratulations to the Constitutional Court of Austria, the Constitutional Court of Turkey, and the Constitutional Court of Lithuania on their election, and I look forward to their commitment to further development of the World Conference.

Let me also thank the outgoing member Courts of the Bureau the Constitutional Court of South Africa, the Constitutional Court of Lithuania, the Constitutional Council of Algeria, and the Supreme Federal Court of Brazil for their hard work and contribution during their term, working alongside the Korean Constitutional Court.

Now, it is finally time to say goodbye. Although we do not have the venue yet, I already look forward to the 4th Congress, which will be held three years from now pursuant to the Statute.

I truly hope that our special relationship will continue and grow even stronger.

I also wish that your visit to Seoul during this Congress is remembered as a fruitful and beautiful memory for a long time.

Again, I want to thank all the delegations and distinguished guests for actively participating throughout the Congress despite their tight schedule.

Well, so this concludes the 3rd Congress of the World Conference.

Thank you.

Заседание Конференции органов конституционного контроля стран новой демократии

28 сентября 2014 года в рамках 3-го Конгресса Всемирной конференции по конституционному правосудию в Сеуле состоялась заседание Конференции органов конституционного контроля стран новой демократии, в которой приняли участие делегации Конституционных Судов Республики Армения, Республики Беларусь, Республики Молдова, Российской Федерации, Республики Таджикистан, Украины, Конституционного Совета Республики Казахстан и Конституционной палаты Верховного Суда Кыргызской Республики. Заседание проводилось под преседательством Председателя Конституционного Суда Республики Армения, члена Бюро Венецианской комиссии, док., проф. Г.Г. Арутюняна, который представил участникам заседания информацию о проделанной в рамках Конференции деятельности и предстоящих мероприятиях.

В рамках повестки дня заседания были рассмотрены вопросы особенностей социальной интеграции в контексте конституционного правосудия переходного периода. Участники совещания обменялись мнениями о практике органов конституционного контроля в области социальной интеграции, представили основные проблемы, с которыми сталкивались соответствующие органы конституционнго контроля в данной сфере, и подчеркнули важность включения и рассмотрения данной тематики в рамках проходящего Конгресса. Принимая во внимание то обстоятельство, что решением Всемирной конфренции конституционного правосудия вопросы независимости конституционных судов должны включаться в повестку дня всех Конгрессов, включая проходящий в Сеуле, в ходе заседания были рассмотрены также насущные вызовы независимости органов конституционного контроля стран новой демократии.

Обращаясь к основным направлениям сотрудничества в рамках Конференции органов конституционного контроля стран новой демократии, участники заседания подчеркнули важность углубления сотрудничества в области обмена информацией и поддержки участия в проектах, конференциях и мероприятиях, организуемых органами конституционного контроля стран новой демократии. Участники заседания отметили значимость и важность издания вестника "Конституционное правосудие" (печатного органа Конференции) как платформы для представления передовой практики органов конституционнго контроля и распространения теоретико-практических воззрений в области конституционного правосудия.

Участники заседания подчеркнули необходимость углубления сотрудничества с Европейской комиссией "Демократия через право" Совета Европы (Венецианской комиссией), активного участия в деятельности Всемирной конференции по конституционному правосудию и содействия ее укреплению.

Резюме Решения Конституционного Суда Украины

Резюме
Решения Конституционного Суда Украины от 23 декабря 2014 года № 7-рп/2014 по делу об официальном толковании положений пункта 13.1 статьи 13 Закона Украины "Об обязательном страховании гражданско-правовой ответственности владельцев наземных транспортных средств" по конституционному обращению гражданина Божка Валерия Витальевича

Выводы:

В аспекте конституционного обращения положения пункта 13.1 статьи 13 Закона Украины "Об обязательном страховании гражданско-правовой ответственности владельцев наземных транспортных средств" от 1 июля 2004 года № 1961-IV (далее - Закон № 1961) необходимо понимать так, что транспортными средствами, принадлежащими участникам боевых действий, инвалидам войны и инвалидам I группы, являются такие наземные транспортные средства, которыми указанные лица обладают как на праве собственности, так и на любом другом правовом основании.

В остальной части конституционное производство прекращено.

Краткое изложение:

Гражданин Божко В.В. обратился в Конституционный Суд Украины с ходатайством об официальном толковании положений пункта 13.1 статьи 13 Закона № 1961, в соответствии с которыми участники боевых действий и инвалиды войны, которые определены законом, инвалиды I группы, которые лично управляют принадлежащими им транспортными средст-

вами, а также лица, управляющие транспортным средством, принадлежащим инвалиду I группы, в его присутствии, освобождаются от обязательного страхования гражданско-правовой ответственности на территории Украины; возмещение убытков от дорожно-транспортного происшествия, виновниками которого являются указанные лица, осуществляет Моторное (транспортное) страховое бюро Украины (далее - Моторное бюро) в порядке, предусмотренном настоящим законом.

Субъект права на конституционное обращение просит растолковать содержание понятия "принадлежность" транспортных средств участникам боевых действий, инвалидам войны, инвалидам I группы и её виды, а также разъяснить, распространяется ли действие положений пункта 13.1 статьи 13 Закона № 1961 на указанных лиц, управляющих транспортными средствами на основании доверенности, и обязано ли в таких случаях Моторное бюро возмещать убытки от дорожно-транспортного происшествия.

При разрешении поставленных в конституционном обращении вопросов Конституционный Суд Украины исходил, в частности, из следующего.

Согласно Основному Закону Украины каждый имеет право владеть, пользоваться и распоряжаться своей собственностью; использование собственности не может наносить вред правам, свободам и достоинству граждан, интересам общества (части первая, седьмая статьи 41).

Общие основания и особенности возмещения вреда, причиненного, в частности, источником повышенной опасности, предусмотрены статьями 1166, 1167, 1187 Гражданского кодекса Украины. Согласно положениям части второй статьи 1187 этого Кодекса вред, причиненный источником повышенной опасности, возмещается лицом, которое на соответствующем правовом основании (право собственности, иное вещное право, договор подряда, аренды и т.п.) владеет транспортным средством, использование, хранение или содержание которого создает повышенную опасность.

Следовательно, лицо, которому причинен вред, в частности в результате дорожно-транспортного происшествия, в определенных законом случаях имеет право на его возмещение. Защиту этого права физических и юридических лиц в случае наступления страховых случаев, предусмотренных договором страхования или законом, обеспечивает гражданско-правовой институт страхования.

Закон № 1961 является специальным законом, регулирующим правоотношения в сфере обязательного страхования гражданско-правовой ответственности владельцев наземных транспортных средств. В этом Законе определено, что лицами, ответственность которых считается застрахованной, являются страхователь и другие лица, правомерно владеющие обеспеченным транспортным средством, то есть таким, которое указано в действующем договоре обязательного страхования гражданско-правовой ответственности, при условии его эксплуатации лицами, ответственность которых застрахована (пункты 1.4, 1.7 статьи 1).

Одной из задач Моторного бюро является осуществление выплат из централизованных страховых резервных фондов компенсаций и возмещений на условиях, предусмотренных Законом № 1961; в случае причинения вреда лицами, на которых распространяется действие пункта 13.1 статьи 13 этого закона, Моторное бюро возмещает его за счет средств фонда защиты потерпевших (подпункт 39.2.1 пункта 39.2 статьи 39, подпункт "г" пункта 41.1 статьи 41 Закона № 1961).

Как отметил Конституционный Суд Украины, для участников боевых действий и инвалидов войны, определенных законом, инвалидов I группы условием их страхования является личное управление принадлежащими им транспортными средствами, а для инвалидов I группы - также и управление принадлежащими им транспортными средствами другим лицом в их присутствии. Следовательно, лица, указанные в пункте 13.1 статьи 13 Закона № 1961, освобождаются от обязательного страхования гражданско-правовой ответственности на территории Украины, а потерпевшие лица имеют право на возмещение убытков от дорожно-транспортного происшествия, виновниками которого являются указанные в этом пункте лица, за счет средств Моторного бюро из фонда защиты потерпевших.

Из анализа положений статьи 13 Закона № 1961 следует, что одним из обязательных условий возмещения убытков от дорожно-транспортного происшествия, виновниками которого являются указанные в её пункте 13.2 лица, является управление транспортным средством, принадлежащим лицам на праве собственности, в то время как для лиц, указанных в пункте 13.1 этой же статьи, таким условием является управление транспортным средством, принадлежащим участникам боевых действий и инвалидам войны, которые определены законом, инвалидам I группы не только на праве собственности, но и на любом ином правовом основании.

Таким образом, Конституционный Суд Украины считает, что согласно пункту 13.1 статьи 13 Закона № 1961 транспортными средствами, принадлежащими участникам боевых действий и инвалидам войны, которые определены законом, инвалидам I группы, являются такие наземные транспортные средства, которыми они владеют не только на праве собственности, но и на любом другом правовом основании (договор подряда, аренды и т.п.).

Конституционный Суд Украины также обратил внимание на то, что в результате изменения редакции Закона № 1961 положения о доверенности на управление транспортным средством исключено из перечня правовых оснований, подтверждающих, что лицо является законным владельцем (пользователем) наземного транспортного средства. В связи с этим не нуждается в толковании и связанный с институтом доверенности вопрос об обязанности Моторного бюро возмещать убытки от дорожно-транспортного происшествия.

Особое мнение изложено судьями Конституционного Суда Украины Мельником Н.И. и Слиденком И.Д.

Конституционное
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органов конституционного контроля
стран новой демократии

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