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NEW CHALLENGES AND OPPORTUNITIES IN CONSTITUTIONAL JUSTICE

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Dear President and Members of the Turkish Constitutional Court,

Dear Hosts,

Ladies and Gentlemen,

It is a great pleasure and an honor for me to address you today in this marvelous city, allying modernity to antiquity, Asia to Europe, and so much more.

Let me first introduce myself, as my sheer existence and presence here may raise some confusion as to my origin and function. I already apologize to those to whom everything is clear, not meaning to take them for fools. So I am now the judge elected in regard of the Grand Duchy of Luxembourg, which is one of the smallest countries of Europe, and just like Türkiye, a Member State of the Council of Europe, at the European Court of Human Rights. Basically, and despite our very different looks, I am the Luxemburgish equivalent of Judge Yüksel for Türkiye. I have nothing to do with the so-called Luxembourg courts, which are the Court and Tribunal of the European Union, located in Luxembourg. Although I may have visited them as a tourist, I never worked there. Instead I am a real Luxembourgish Judge from the Luxembourgish judiciary, and, before moving to Strasbourg, I worked at a real Luxembourg court called Superior Court of Justice, the one of the country applying Luxembourgish law and located in the city of Luxembourg, unlike the European one, which in

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Luxembourg we call the Kirchberg court as this is the part of the city where it is actually located and that applies European law, which although partly similar, has legally nothing to do with European Convention on Human Rights law, applied by the European Court of Human Rights, located in Strasbourg, a city of France. I hope everything is clear so far.

The subject of my today's intervention is, I believe, one that haunts my current court, the Strasbourg one, since it gained notoriety a generation ago. So be aware that you are not the only ones confronted to the divisive question of constitutional review versus individual application.

Not being a constitutional judge or a scholar, I would not avail myself to pretend teaching to anyone what constitutional review is about, instead I will be preaching what it should be in the conventional sense.

Six years ago, in this very same city, Mr Gianni Buquicchio, the then President of the Venice Commission, addressed the members of your Constitutional Court, for the seventh birthday of the introduction of the individual application system before your institution. What was the most important point at that time, from the point of view of my institution, was that since the 2013 *Hasan Uzun v. Turkey*, the European Court of Human Rights found that the individual application procedure to the Constitutional Court of Türkiye afforded an appropriate mechanism for the protection of Human Rights, making it a remedy to exhaust, in the sense of Article 35 of the Convention, before application to the Strasbourg Court.

So what I believe is that your utmost challenge today, as it was yesterday, is to put my court in a position to uphold *Hasan Uzun v. Türkiye*. To sense what this means, looking at this decision is, in this regard, not very helpful as its content outlines general criteria which I believe will not vanish. Were it for the accessibility, the provision for use or the intention of the legislature.

The most interesting criteria for us would be the somewhat obscure sounding*: Provisions for use of the remedy*, which I looked up in the original French wording of the decision, were it is named "les modalités du recours individuel devant la Cour Constitutionnelle turque". I will not pretend that it is any clearer than the English translation, but I understand it better. "Les modalités", which I would personally translate by modalities and not provisions, but whatever –I am not a translator– is interesting insofar it may imply as much the spatial or temporal application, opening criteria and the application by the Turkish Constitutional Court. And this is, strangely enough, for one sole criteria exactly what the European Court of Human Rights analyzed: The Court took note of the following factors: the new rules of the Constitutional Court had become effective well before the entry into force of the legislative provisions concerning individual applications; the Constitutional Court had jurisdiction to ask any authority for information or documents that it needed for its examination of the appeal and for the purposes of a hearing; a system was in place to rectify any discrepancies in the case-law; the Constitutional Court was entitled to indicate interim measures, of its own motion or at the request of the applicant, when it found this necessary for the protection of his or her rights; lastly, the scope of the Constitutional Court's jurisdiction *ratione materiae* extended to the Convention and to the Protocols thereto ratified by Türkiye. In view of the foregoing, the Court found that the procedure before the Constitutional Court afforded, in principle, an appropriate mechanism for the protection of human rights and fundamental freedom.

What matters most of course from the conventional point of view, are our human rights, it is the continuous application of the convention standards, such as they are set out by the European Court of Human Rights. But it is not only a matter whether you apply our case-law, and from what I can see in

my everyday work in Section Two at the Court, which handles Turkish cases to a large extend you do. I even encounter, were it in actual judgments of your Court or in some dissenting opinions of its members, some progressive steps, tending, such as you are entitled by our instrument, to go further than what the minimum standard we set imposes.

Very interesting in this regard would be that while, among these provisions, the European Court of Human Rights mentions the possibilities the Turkish Constitutional Court has to indicate interim measures, which I would believe to be a sign that our Court requires some kind of efficiency as, for example, it will do in the case of expulsion of foreigners, where interim measures are also a criteria for them to be considered efficient, execution of the judgments is not mentioned.

This might be because it goes without saying. Since *Hornsby* in 1997, we know that the "right to a court", of which the right of access, that is the right to institute proceedings before courts, constitutes one aspect would be illusory, if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.

Since then, of course things evolved, and the court judged explicitly that a remedy must be effective in the sense that it must be followed by a consequence. An example of this would be *Torreggiani and Others v. Italy*, 2013, § 50, where it concluded that an effective remedy must be capable of preventing the alleged violation to continue as here was the case for a detention. In other words, if a person is detained unconstitutionally and/or unconventionally, the constitutional court's judgment recording this must be followed by a liberation. Mere indemnification will in this case not be sufficient, while it would be in a posterior action intervening after freeing and will also be for various other claims related to or implying state or private liability.

Coming back to Uzun, we also know by now that the

consideration of effectiveness is not given once and for all, it is linked to sheer materiality. Meaning that once constitutional judgments are no longer followed by execution, were it by administration or other judicial bodies, it will cease to be considered effective as we learned from Ferreira Alves v. Portugal (no. 6), 2010, §§ 27-29.

One of the main challenges for constitutional courts in a world where the rule of law and their authority is ever more defied, is one that it is rather unfair to blame them for. Because, beyond the mere judicial application, the most important question is the enforcement of authority. As you all know that the European Court of Human Rights requires not only theoretic and illusory rights, but practical and effective ones. What matters in the end is the respect, by other authorities, of constitutional courts decisions.

It is a rather general issue too, which the European Court itself is confronted to, as not so rarely nowadays its judgments or interim indications are no longer or only partly executed. Admittedly, this appears to be more a challenge to the rule of law than to constitutional justice, but as the latter is the guarantor of the earlier, they are intimately linked. The question then is: what to do in such circumstances, persevere or step back? As a judge, my first, quasi-innate reflex would radically exclude the latter, as having spoken the truth how may I consider review, for as such I would indirectly admit having erred. Especially knowing that the legislature could always gag me by a change in law if one day ever one would consider that I have overstepped the true political intention behind a law. Even a constitutional or, as the case may be, an international one by simply denouncing the instrument if the legal framework allows to do so. But, beyond the inherent questionable democracy of this pretention what will we then have won? Not for us, but in our function as defenders of the Human Rights of people. The unsolved dilemma that the difficulties of execution raise thus in front of us is whether

we should choose to be the guarantors of minimal applied rights, or the preachers of maximalist ignored ones. Legally speaking you do not have but one choice, the first frontier of which remains with those entrusted by the law to set it. Your only opportunity to mark is to go beyond. Stepping back will imply no more for you than to choose to bear the burden of unconformity which otherwise weighs on the shoulders of those whose function it is, unlike yours, to make political choices. You may, just like us, as is legally possible for every supreme court, take this bet and abandon the secured ground for the sake of the belief in your own efficacy. But there will be nothing of the kind, as by unlocking already opened doors in your back you will see vanishing those that allowed your existence itself.

Turning then to the other aspect of our subject which is twofold, I will now spend a few words on opportunities, since I do not know if perseverance in the current complying stance, and possible extension to where it may still be dragging the paw is to be considered a challenge, but it is, if so required, for sure an opportunity. An opportunity for every constitutional court which has the luck like yours to possess the instrument of a direct application, which is e.g. not the case in my home country, the real Luxembourg courts, to emancipate from the minimalistic approach that represents the mere control of laws. Because laws, like paper, are very patient. What matters for efficiency is their application. A constitutional court review, unlike in a civil law country any other one, has the peculiarity of being inherently applicable erga omnes, not in its operative parts of course, if its acts on individual applications, but its determining reasons must have an effect leading to the, if not legal at least factual, inapplicability of rules. Cynically speaking, the least respectful a country is to the rights of its justiciables, and the more extensive the possibilities of constitutional review are, the more powerful the organ in charge gets, in theory.

At a national level, one that is bound by international instruments, this power is tunneled by the framework set out by the institution in charge of this covenant, if there is one provided for, such as is the case for Human Rights in the signatory States of the European Convention on Human Rights on one hand, and the national constitutional order on the other. Notably these two organic outlines hold each other reciprocally. As the former exists only through the latter which in turn requires the respect of the second as a summit of the rule of law. The opportunity offered by this context in a world of challenges to legality lies in the edification of a construct based on the arches of this mutual backbone, where violation of the one implies that of the other. In this context were the international court profits from the legitimacy of the application of its principles by a national constitutional judiciary, the latter can draw authority from the democratic legitimacy distilled by the endorsement of a broad panel of international judges elected, though indirectly, by the members of parliament of the very same contracting party whose rules are at stake.

But before I lose you out of boredom, I will now drag you away from these theoretical conceptions to the more practical outlines of the opportunities our mutual future bears. These opportunities are, I believe, immense, as a challenged constitutional court is the most needed one, since in a state – though I do not believe such one to exist– where no violation of rights occurs, who would wish to be burdened by another layer of judicial review?

The opportunity your own constitution and the contemporary principle of subsidiarity offers you, is to make you, national Judges in general and the Constitutional Court in specie, not only the first, but the most thorough, and if you do so, the ultimate level of human rights protection in your country.

Since the introduction by Protocol no. 15 of the subsidiarity principle and the margin of appreciation in our instrument, the European Court of Human Rights has tried to develop a further concept, that is process-based review. This policy, which appears new in its formulation, is in the end as old as the Convention's application. It has always been clear that the European Court of Human Rights should not be a further appellate court ensuring a fourth or even fifth instance review for applicants.

Under this newly outlined doctrine, national courts, should, for as long as they pass the threshold of the minimal Convention application such as determined by the European Court of Human Rights, be the only authority to examine compliance. The most challenging opportunity for our hosts as a Constitutional Court, is that this will transform them in the effective implementers of the national margin. It will be up to you to determine what are, in the realm of your society, the acceptable limits of the Convention concepts such as they will have to be put in balance in competing rights, more specifically in qualified rights as are Articles 8-11 or 1, Protocol no. 1, when the freedom of speech of an satirist or opponent will confront to the religion or privacy of an official, when the freedom to demonstrate on a place or a mall, to public order or ownership. I will even dare to suggest that in a legal world were the tentacles of our jurisprudence tend to seize ever more substances, relativization will end up contaminating the most fierce absolute rights, thus expanding your realm to the determination of the tolerable humiliation in Türkiye in a given period, what will the boundaries of endurable work to be required in your society be it once hit by a catastrophe and how immediate the presentation to a judge must be in the specific circumstance you will be confronted to.

This of course only works under several conditions:

1. the cognizance of facts, on the contrary of national

supreme courts, mine has always been one of the appraisal of facts, not merely of law, quite to the contrary, national law we often ignore, and deduce the violation of our own principles form the facts brought before us. Now with our withdrawal from the realm of factual appreciation and the introduction of the shared responsibility, this task, I am sorry to say, will lay on the shoulders of the constitutional court.

This must however not be seen as a burden, but as a further formidable opportunity to plunge into the reality of your society and to scrutinize the work of national authorities. The extension of the scope of constitutional review, which cannot be delegated to lower courts as this would void the effectiveness of your scrutiny, transforms constitutional courts armed with the weapon of conventional assessment in the real supreme courts of their judicial systems. The reality of Human Rights resides in the facts brought by the applicant, if these bear a violation, no matter how legally compliant who ever acted, the constitutional judge must censor.

2. the material reasoning, I distinguish this from the legal outline. What I frequently encountered as a national judge once I reached a superior level, were it from my first or second instance colleagues, is their passion for case-law citations. One could have pages of it, and to be honest, the institution I now work in does so itself. Except for the questionable application of our Klimaseniorinen case-law, this waste of paper, were it real or virtual implies, there might be nothing wrong in this if it is completed with a material application to the facts. Unfortunately, this hurdle often is forgotten. A constitutional-conventional review must necessarily confront the facts the applicant complains of to the principles of the Convention he invokes, and not leave itself satisfied by the mere fact that its preceding legal institution appears to have an in- depth knowledge of Human Rights law.

3. application of the threshold principles, the delegation

in the application of the Convention, does not imply an indentation of the interpretation sovereignty nor of the rachet tenet. Similarly, to what applies in a national system, the international convention system only functions for as long as there is a coherent and uniform interpretation and application, for otherwise our own constitutionality vanishes to the benefit of a pure casuistic. Admittedly, it would be contradictory if the constitutionalization of Convention rights would go par with the deconstitutionalization of the Convention instrument of which it is supposed to be a tool.

To conclude, I believe that seizing this opportunity, will not only make you the guiding light for your own judiciary, but also a global player in the human rights system. Since through the consensus doctrine, constantly expanding via the Superior Courts Network, to which you, as other Turkish Supreme Courts are members, your voice, the one of your country and culture will be heard far beyond the boundaries of your system. On the contrary, if you refuse the challenge, and let the door to close, you will lose the opportunity the combination of your constitution and our Court offers you and take the risk to fade away form the European legal scene.

Thank you.