Discussant's Speech

5th Congress of the World Conference on Constitutional Justice

Session A

"Sources and Jurisdiction"

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Chairperson,

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Distinguished guests,

Ladies and Gentlemen,

Allow me to thank the organisers of the 5th Congress of the World Conference on Constitutional Justice for inviting me to address such eminent participants and particularly for having the honour to follow after the keynote speech of the Honourable Anwar Usman, Chief Justice of the Constitutional Court of Indonesia, our distinguished host.

The topic of this World Conference on Constitutional Justice is timely and appropriate: debating on constitutional justice and peace means exploring the role of constitutional courts as actors of conflict resolution, and addressing what has nowadays become one of the

arduous issues of numerous democracies all across the globe, namely societal cleavage and political polarization.

This is not to say that one has to forget the vital meaning that the legal concept of 'peace' enjoys in international public law, particularly under current circumstances, but peace within the state remains the realm of constitutional courts and the World Conference on Constitutional Justice stays put within its sphere of activity.

Viewed as afflictions to social peace, cleavage and polarization are not new, but they have intensified over the past years, up to the point where each side in any given society perceives the 'other' no longer as an alternative or diverse version of itself, but rather as a danger. Pluralism tends to succumb and democracy is threatened. In such circumstances, a third, impartial actor becomes necessary in order to mediate peace and this can only emphasize the important role constitutional jurisdictions play in contemporary societies.

The first panel of this World Conference on Constitutional Justice is dedicated to sources and jurisdiction. The questionnaire addressed to all member courts asked them to:

(i) identify

a) explicit references to peace in their respective Constitution

and

b) constitutional provisions that (implicitly) cause problems for (social) peace

(ii) as well as to explain the way in which constitutional courts have interpreted

a) the concept of peace

and

b) the mandate - explicitly granted or implicitly assumed by the constitutional jurisdiction - to maintain social peace and help resolve conflict situations.

Let us attempt to discuss the wealth of ideas included in the general report presented in this section and scrutinise them though the lenses launched in the keynote speech.

Honourable ladies and gentlemen,

The Keynote address is focused on the multiple interpretations the concept of peace may acquire in constitutional texts. It underlines that "peace and justice are the spirit and heart" of any modern democracy and it eloquently presents the constitutional framework of Indonesia, which includes explicit references to the concept of peace no less than seven times in the Preamble of its Fundamental law.

In an attempt to synthetise the rich and fertile answers received from member courts, the keynote speech focuses on the universal dimension of the concept of peace considered as a plainly harmonious concept. This approach is expressively depicted in the concept of "civic harmony" used in the preamble of the Ukrainian Constitution. Under this broad umbrella, various *nuances* may be distinguished.

(i)a) Thus, some Constitutions seek to protect the concept of peace (defined as opposed to war) by simply *rejecting war as an instrument of aggression* against the freedom of other peoples. Let me give a normative example: article 11 of the Italian Constitution refuses war as an instrument for the settlement of disputes. Let me also give a normative and jurisprudential example: article 5 of the Korean Constitution obliges the state to "maintain international peace and renounce all aggressive wars", which allowed the Korean Constitutional Court to interpret it as imposing a fully-fledged obligation on the State to maintain peace and not fight wars of aggression.

Some other Constitutions take into account peace as the *main vocation of their State* and consider it under the angle of universal harmony that has to be actively promoted. The Constitution of Burkina Faso simply "desires to protect peace", while the Constitution of Cambodia values "the peaceful co-existence with neighbouring countries". In Europe several Constitutions declare their intent to participate in various forms of international cooperation in order to protect peace and human rights (*e.g.* Estonia, Finland, France or Germany).

Most often, Constitutions consider peace as a *major goal of the community of people* reunited within the state. To take only a few examples, in Côte d'Ivoire the preamble of the Constitution mentions "the building of a peaceful nation and the strengthening of national reconciliation", while the preamble of the Kazakh Constitution proclaims "the people of

Kazakhstan" to be "a peace-loving and civil society". Alike, the Constitution of Thailand declares peace and reconciliation "the common good of the nation and the happiness of the public at large".

Other Constitutions may refer to peace within a state that intends to *heal previous divisions* and *reconcile after armed conflicts*. Such is the case of Bosnia and Herzegovina, where the Dayton Agreements - that are still the Fundamental law of the land - clearly spell out that the Constitution is dedicated to "peace, justice, tolerance and reconciliation". Also, the Rwandan Constitution includes a preamble that declares "peace, unity and reconciliation" as pillars for development.

And even when Constitutions already include provisions obliging the state to heal wounds of past internal conflicts, revisions of those texts continue to stress the idea of peace. For instance, the Constitution of South Sudan – which already referred to a "peaceful and prosperous society" – has been revised and complemented by the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan. Or, in Macedonia, following the internal armed conflict of 2001, an amendment to the Constitution now mentions a political agreement (Ohrid Framework Agreement) viewed as a first step towards the reconciliation of the parties in that conflict.

Or, some other Constitutions envisage the concept of peace from the perspective of *social cohesion and the prevention of social conflicts*. The Dominican Constitution mentions peace as a "fundamental principle for social cohesion". The Swiss Constitution refers to "peace in labour relations and religious communities". Article 3 of the German Constitution or article 10 of the Spanish Constitution cite "social peace" with the meaning of social cohesion, as it has been explained by their respective constitutional courts. And, article 48 of the Constitution of Togo spells out "social order, peace and national cohesion" as main goal of the fundamental law.

Of course, many other nuances may be distinguished in the national reports, such as the "civic peace" stated in the Moldovan Constitution, the "peaceful political activity" in the Namibian one, or the obligation made to the Canadian Parliament to make laws "for peace, order and

good government". One has to take note of the fact that the Russian Constitution also explicitly mentions "civic peace" among its goals.

(i)b) On the other hand, at times, peace within the state may prove to be a difficult objective precisely due to less than clear constitutional or legal provisions. There are societal cleavages and conflicts in nowadays democratic societies that are rooted in constitutional provisions. Some of these problematic stipulations tend to give expression to issues predating the adoption of those Constitutions, such as institutional arrangements meant to preserve political equilibriums. The keynote speech addresses all these issues when stating that "there is nothing in the exercise of the authority of state institutions, or a policy or action of state officials, which is not based on a statutory provision".

This is the context in which the role of constitutional courts as mediators becomes crucial: when interpreting such constitutional provisions courts have to bear in mind that one of their main functions is conflict resolution. This includes, as we read in the Lithuanian report, a constitutional interpretation that allows for "a harmonious legal system, without any gaps or internal contradictions. Or, as the Lithuanian Constitutional Court put it, the constitutional interpretation has to be performed "in a manner that does not distort or deny any provision of the Constitution" and which does not disrupt the necessary balance among constitutional values.

Yet, some other constitutional provisions exist simply because they express the nation's or state history. In some cases, stock is taken by the constituent power and conciliatory clauses are added in order to accommodate past and future in one text. To take just one example, the plurality of sources mentioned in some national reports (Denmark, Gabon, Kosovo, Sao Tome and Principe etc.) succeeds in mixing domestic sources with international ones in order to promote peace as a global concept. To take another example, in Eastern Europe accession to the European Union has led to constitutional revisions which promoted the primacy of EU law over national law, and planted the seeds of a plurality of sources both with regard to social cohesion and concerning the collective engagement to promote specific common values such as peace or the rule of law.

Distinguished guests,

(ii)b) The keynote speech also emphasises the concept of the state governed by the rule of law and it highlights that the remit of the Constitutional Court of Indonesia is "to maintain the constitutionality of the state". The jurisdiction of constitutional and supreme courts is therefore essential not only when interpreting the constitutional provisions referring explicitly to peace, but also when accomplishing their most ordinary tasks, such as reviewing the constitutionality of laws, resolving conflicts of jurisdiction between public authorities or settling electoral disputes. To give just one example, in Romania – where I come from – the Constitutional Court has the specific constitutional task of solving "legal conflicts of constitutional nature between public authorities". Over time, the Romanian Constitutional Court has developed a constant case law in which it has interpretated this mandate as referring to both positive and negative conflicts of jurisdiction between public authorities explicitly mentioned by the Constitution.

In fact, like any other type of court, constitutional jurisdictions are instruments of conflict resolution: they bring social peace through reasoned arguments and appease state authorities and political actors, while constantly mediating between state power and civil society. As the Angolan national report suggestively states, contributing to social peace "is the specific mission of all courts" and particularly of constitutional ones. Or, as the Finish Supreme Administrative Court stated, although it does not have a specific mandate, it considers "maintaining social peace as crucial".

However, some constitutional courts do enjoy *an explicit mandate to guard and promote peace within the state*. This is the case of the Constitutional Court of Belgium with regard to "social peace between linguistic communities" and for the "federal democratic consensus", or the case of the Constitutional Court of Benin with regard to "social peace, protection of fundamental rights and functioning of public authorities". Also, the Constitutional Court of Bosnia and Herzegovina has an explicit mandate to maintain social peace and it did so when it established whether a contested act adopted by Parliament could be destructive for the vital interests of a constituent people.

On the other hand, even if they *do not have a clear mandate*, constitutional courts do provide solutions to issues that otherwise could have developed into conflicts. The concept of social peace has been instrumental for some constitutional jurisdictions which, sometimes, simply assumed a role in conflict resolution although they did not enjoy an explicit constitutional mandate. Such is the case of the Federal Court of Brazil, which "frequently finds legal or even constitutional provisions that conflict with the maintenance of social peace" or the case of Constitutional Court of Ukraine, with its "resonance cases", namely those dealing with the conviction of totalitarian political regimes or with the prevention of corruption. Or, such is the case of the German Constitutional Tribunal, which "measures every application of law and every administrative decision against the standards of the Constitution to ensure that social peace is not jeopardised". And that is also the case of the Serbian Constitutional Court, which has helped reducing social and political friction by making to prevail the protection of fundamental rights whenever solving electoral disputes. As the Austrian report states, "although the Constitutional Court has no explicit written mandate to maintain social peace, it is certainly its role to promote peace and order".

(ii)a) Finally, national reports also illustrate a relatively large range of interpretations of the concept of peace as enshrined in the Constitutions. At times this task has been accomplished not solely by constitutional jurisdictions, but also with the support of *traditional forms of justice*, as some national reports clearly pointed out.

In this respect there is also a wide variety of possibilities. Reports drafted by the representatives of Cameroon, Canada, Cyprus, the Dominican Republic, Egypt, Estonia, Finland, Indonesia, Mexico declared that traditional justice or aboriginal laws and practices may be used for conflict resolution, including at constitutional level.

Particularly contractual matters and the status of persons are settled according to traditional justice rules and these matters often include a human rights dimension. For instance, in Cameroon judgements delivered by customary courts on status of persons are binding and in Canada oral evidence describing past occupation of aboriginal land is legal proof considered valid by state courts (despite the written procedural rule contrary to hearsay).

The Angolan and the Rwandan reports stated that, while state courts do not apply rules of traditional justice, legal pluralism allows custom – which is different from traditional law – to be used in order to solve conflicts in various communities, but only as long as it does not contradict written constitutional law. The same is valid for Denmark and Georgia.

Or, in Korea customary law is one of the most important sources of law and it has been used in cases pertaining to cultural heritage or family law.

Distinguished participants,
The keynote speech ends on a positive and constructive note when advocating that justice and peace may only be realised if fundamental rights are optimally secured. The ultimate goal of constitutional jurisdictions when rendering justice in order to achieve social peace is the protection of human rights. And that is a thought we have to cherish and preserve.

Thank you for your attention!