



N.B This is an unofficial translation in English of the original speech in French

Rapporteur's report

5th Congress of the World Conference on Constitutional Justice

Session B

"Application"

Nadir ELMOUMNI

Judge

Constitutional Court of Morocco

Mr. Chairman of the meeting,
Ladies and Gentlemen,

I would first like to express my warm thanks to my President, the President of the Constitutional Court of the Kingdom of Morocco, who was kind enough to propose me as a session rapporteur at this prestigious conference. I would also like to express my gratitude to the Secretariat of our continental forum, the CICA, and to the Secretariat of the World Conference, which have endorsed this proposal and have thus enabled me to make a modest contribution, through the presentation of this report, to the collective effort to reflect on the role of constitutional courts in the promotion and consolidation of peace in its various internal aspects.

I cannot begin this exercise without commending and congratulating the Constitutional Court of Indonesia and its President, His Excellency Anwar Usman, for the excellent, exemplary and

remarkable organisation of this great world event which will remain in the annals of constitutional justice.

Ladies and Gentlemen,

As indicated in the programme, it is my task to present the report on the work of the second session, which was devoted to the applied aspects of the intervention of constitutional courts in the resolution of conflicts of different orders at the internal level. This session was masterfully moderated by President Kairat Mami, brilliantly introduced by President Zuhtu Arslane's framing note, enriched by President Aldis Lavins' forceful discussion, and enriched by the debate of the members of the participating constitutional courts.

This report therefore attempts to summarise this work, and in this respect I would like to pay tribute to the skilful work carried out by the General Secretariat of the World Conference, which diligently made available to us the texts of the speeches¹ as well as the questionnaires from the constitutional courts, thus enabling us to make the best possible use of the wealth of information available, while at the same time facilitating the drafting of this report.

To this end, the report will deal with the foundations, determinants and peacemaking activities of the constitutional courts, as well as the jurisprudential policies and interpretative strategies used by these courts in this context.

1- the exercise of the peacemaking powers of the constitutional courts in practice (foundations and determinants)

One of the central questions addressed in this session is whether the foundations of the preventive, regulatory, reconciliatory and peacemaking missions of the constitutional courts as actors of social peace are directly derived from the enunciation of peace as a value, principle or objective in the constitutional texts? Or do they depend on the explicit recognition of the constitutional courts' mission in this area by a hierarchically superior norm? Or are they

¹ Zühtü ARSLAN, President, Constitutional Court of Turkey: "The Role of Constitutional Courts in Maintaining Social Peace: A Comparative Review of the 'Application'; Aldis LAVIŅŠ, President, Constitutional Court of Latvia.

defined by the nature and scope of the competences devolved to the constitutional courts in terms of *a priori* or *a posteriori* constitutionality review? Or are they rather '*constructed*' through the strategies of reasoning and interpretation deployed by the constitutional courts in the exercise of their functions?

The work of this session showed that :

- "The 'horizon of action' - in the double hermeneutic sense² and pragmatically - of constitutional courts as actors of social peace could not be perceived, conceived or apprehended without admitting certain preconditions or 'postulates', including in particular (a) justice, including constitutional justice, as a prerequisite, indeed a necessary condition, for the maintenance of lasting social peace and the regulation of divergent interests (b) the recognition of diversity and otherness as a condition for peaceful coexistence in an open society (c) the contractual nature of democratic constitutions, as well as their axiological scope as enunciators of fundamental values of living together, (d) the role of constitutional justice in the protection of fundamental rights, the regulation of public powers, and the resolution of related conflicts
- In exercising the competences devolved to it according to the reference norms adopted, the 'horizon of interpretation'³ open to the constitutional courts obviously extends, depending on the case, to all constitutional statements of peace, as a value, principle, basis of general internal or external policy, objective of legislative, cultural or educational action by the State, a vehicle for the state's position with regard to religions and beliefs, or the *raison d'être* of participatory mechanisms, regardless of the type of statement, whether it is performative or carries obligations and

² Vicki C. JACKSON and Jamal GREENE: "*Constitutional interpretation in comparative perspective: comparing judges or courts*"; in Tom GINSBURG and Rosalind DIXON (eds.) "*Comparative Constitutional Law*"; Edward Elgar (2011) (pp.599-623); Aharon BARAK: "Hermeneutics and constitutional interpretation"; in *Cardozo Law Review*, Vol.14, 1992-1993 (pp.767-774); Chaïm PERELMAN: "*Logique juridique. Nouvelle rhétorique*", 2^{ème} éd., coll. "Méthodes du droit", Dalloz, Paris, 1978, p. 184; Alain PAPAUX: "Herméneutique juridique, qualification et abduction"; in *Revue interdisciplinaire d'études juridiques* 1999/1 (Volume 42), pages 85-123; Francesco VIOLA: "Herméneutique et droit"; in *Archives de Philosophie de droit*, T.37, 1992, (pp. 331-347); Dennis KURZON and Barbara KRYK-KASTOVSKY (eds.): "*Legal pragmatics*", John Benjamins Publishing Company, 2018 (p. 288).

³ Gustavo JUST: "La " jurisprudence herméneutique " et son horizon : l'interprétation entre ses conditions et ses possibilités", in *Revue Droits* 2004/2 (n° 40), pp. 219-243.

authorisations⁴ (for example, a lexical search of the *Constitute project database*⁵ revealed that peace in all these senses is stated in 186 constitutional texts in force). However, this horizon extends to encompass, through interpretation, other principles that are as fundamental as they are necessary for the design of a just, inclusive and sustainable social peace. In this respect, the participants in the session referred to the principles of the separation of powers, the rule of law, democracy and human rights, in other words, principles that are necessary for the existence of a democratic and open society.

- The 'window of action' of the constitutional courts in terms of the regulation of powers, the preservation of social peace and peaceful coexistence depends essentially on their respective powers and the choices of jurisprudential policy they adopt (restraint or judicial activism). However, the width of this window is also defined by two factors identified by the participants: (a) The modalities of access to constitutional justice. The participants agreed that the mechanisms of individual, concrete, *a posteriori* access to constitutional justice represent an effective way of regulating societal conflicts, provided that these mechanisms are equipped with effective and appropriate procedural arrangements. Broadening access to *a priori* constitutionality review mechanisms, by reducing the quorums and procedural requirements, contributes to the same objective. (b) the nature of the societal problems brought before the constitutional court in a judicial form, the positioning of the parties in the constitutional proceedings, and in general everything that falls within the scope of strategic recourse to constitutional justice.

2. The exercise of the constitutional courts' peacemaking action in practice (jurisprudential policies and interpretation strategies)

Although most of the courts presented at the session did not always have the opportunity to rule on the concept or value of peace *per se*, these experiences testify to the diversity of

⁴ Herbert Lionel Adolphus HART and Penelope A. BULLOCH: "The concept of law"; Clarendon Press, 1994 (p. 315)

⁵ <https://www.constituteproject.org/> (accessed on 06.10.20220)

intervention registers and reasoning strategies deployed by the constitutional courts in the examination of appeals involving issues relating to the consolidation of social peace.

With regard to the **areas of intervention (A)**, it emerges from the valuable contributions of the participants, but also from the overall analysis of the case law contained in the replies to the questionnaires, and with all the methodological precautions that a correct exercise of comparison requires, that the constitutional courts have been called upon to rule on problems as diverse as electoral disputes, relations between the constitutional powers, social conflicts labour relations and the exercise of trade union rights, the protection of linguistic and cultural rights, the protection of minority rights, the preservation of national unity, the exercise of religious freedoms, the question of wearing religious symbols in the public space, the fight against discrimination and hate speech, the inclusion of certain vulnerable groups and the empowerment of the poor, reconciliation in the context of transitional justice.

In their interventions, the constitutional courts have often been confronted with questions involving extra-constitutional underpinnings that need to be problematized in legal and constitutional terms before they can be dealt with by constitutional justice. At the same level of complexity, the constitutional courts have in some cases been called upon to deal with complex issues involving the constitutional identity of the state, or relating to the non-derogable core of rights or to areas materially excluded from constitutional revision.

In response to these challenges, and in view of the fact that most constitutional cases involving the issue of social peace are frequently presented as a question of rights protection, constitutional courts resort to the usual techniques such as balancing constitutional principles, objectives and values, proportionality tests, mobilisation of written and sometimes customary norms of reference, and the use of the "best interests of the child" as the basis for their decisions. Constitutional courts resort to the usual techniques of balancing constitutional principles, objectives and values, proportionality tests, mobilisation of written and sometimes customary norms of reference, while trying to find a middle ground between restraint and judicial activism in most of the experiences presented.

In their reasoning and interpretation, the constitutional courts interact, directly or indirectly, explicitly or implicitly, with the supreme courts of the judiciary and, as the case may be, with the regional judicial mechanisms for the protection of human rights. In these situations in particular, the human rights-based approach is used and the interpretative framework of international human rights law, such as the general comments of the treaty bodies, is often mobilised.

Participants also stressed that social peace and its synonyms, generally stated as principles or values in constitutions, imply, by virtue of their status of enunciation, recourse to less literal techniques of interpretation such as teleological, axiological and systemic interpretation.

Dealing with issues that are often located at the edge of the respective spheres of competence of the constitutional powers, the constitutional courts obviously resort to various techniques appropriate in these cases, such as the review of negative incompetence (also known as the review of legislative omissions), reservations of interpretation and other approaches aimed at defining the scope of the positive or negative obligations of the state in relation to the various issues of social peace. One of the examples presented in this sense is the jurisprudential construction of certain concepts such as the neutrality of the state in relation to the exercise of religious freedoms.

Finally, and beyond the *erga omnes* or *interpartes* effects of the decisions rendered by the constitutional courts, on the basis of questions relating to social peace and their modulation over time, these decisions produce an effect of appeasement, reconciliation and societal pacification, and often have a pedagogical role at societal level.
