



Strasbourg, 31 March 2021

CDL-WCCJ-GA(2021)002

Concept Paper and Questionnaire
5th Congress of the World Conference on Constitutional Justice
on “Constitutional Justice and Peace”
(Bali, Indonesia, 4-7 October 2021)
approved at the 14th meeting of the Bureau of the World Conference
on Constitutional Justice, Santo Domingo, 8 February 2019

Introduction

The World Conference on Constitutional Justice unites 116 Constitutional Courts and Councils and Supreme Courts (hereinafter, “constitutional courts”) in Africa, the Americas, Asia, Australia/Oceania 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. These fundamental principles are closely linked to peace.

The 5th Congress of the World Conference in Algiers in 2021 will deal with the topic “Constitutional Justice and Peace”.

Definition of peace

For the purpose of the discussions at the 5th Congress, the topic of “peace” is *not* the concept of public international law that relates to interstate conflicts because they are typically out of the remit of constitutional courts.

The concept of peace is perceived in the sense of peace within the state, as the peaceful settlement of conflicts. This notion therefore refers to foremost to social peace and thus relates to all countries, on all continents.

In some countries the constitutional courts also had an essential role in pacifying the situation following internal armed conflict and some constitutions explicitly refer to peace and reconciliation as a goal to be achieved. The topic of the 5th Congress includes discussion of such experiences.

Jurisdiction of Constitutional Courts

Many constitutional courts have in common the exercise of a multiple control mission, including that of the constitutionality of norms, the settlement of disputes between state bodies and that of the regularity of the electoral processes leading to the election of the authorities producing these norms. In all these functions, constitutional courts can be an actor of regulation and stabilisation of political life and thus contribute to achieving peace.

Constitution itself as a problem, role of the constitutional judge

While conflict often originates in the political sphere and can have numerous causes, even the constitution itself can – through its provisions or the absence of provisions - lead to deficiencies, which result in conflict. In interpreting the constitution, the constitutional judge can make a positive contribution by attenuating the cause of conflict. The constitutional judge can thus contribute to pacifying the political life by favouring solutions that remain within the framework of the constitutional order.

It may also happen that a constitutional interpretation of the Court is itself challenged and provokes violent reactions.

Fundamental principles: Human Rights protection / democracy / Rule of Law

Human rights are an essential part of modern constitutions and in countries without such explicit provisions the courts have developed human rights case-law. The protection of human rights is a precondition to the settlement of conflicts and to peace. As key actors in the promotion of human rights, constitutional courts directly contribute to social peace.

The safeguarding of democratic principles by the constitutional court too contributes to peaceful relations between majority and opposition and a peaceful transition of government following elections. By ensuring the regularity of the electoral process and that state actors respect the Constitution, the constitutional court can also contribute to the reinforcement of the legitimacy of the representatives of the citizens and of their acts and make them acceptable even to those who oppose these acts.

By ensuring the respect for the rule of law, the constitutional court contributes to the citizens' trust in the law and the courts. This confidence is further enhanced by the implementation of the individual's access to the Constitutional Court (direct access or exception of unconstitutionality). This is a precondition for peaceful recourse to the courts rather than to violent action.

Preventive function

Courts are usually called to settle conflicts between the parties and their – after any appeals – final judgment settles conflict with binding force. The settlement of past conflicts also has a preventive function. The knowledge about settled case-law often allows the potentially conflicting parties to know their rights and to come to an agreement on the basis of the existing case-law, without the need to bring a new case. The very existence of the courts and the knowledge about their function to bring a final settlement therefore contributes to social peace.

Limitations

While the role of constitutional courts in achieving and maintaining peace is undoubtedly important, there are also limits to what they can achieve. As opposed to political organs, constitutional courts cannot act upon their own initiative; they are limited by referrals. They cannot offer an “ideal” solution, they are bound by the law and they only settle the conflict that was presented to them. The courts may be aware of other similar cases but without referral, they cannot settle situations for which they have no jurisdiction.

Sharing of experience

These questions relate to all courts members of the World Conference on Constitutional Justice. The participants of the 5th Congress are invited to share their experiences on the role of their courts in preventing conflict, maintaining peace and settling disputes that otherwise result in conflict.

The global dialogue in the framework of the World Conference should enable the member courts to learn from successes but also from failures of their peers and should help them preparing for similar challenges in their own country.

In addition to the special session on the stocktaking on the independence of the Courts, the topic will be sub-divided into the following five sub-topics

- A. Sources and Jurisdiction
- B. Application
- C. Limitations of the role of constitutional courts in maintaining peace
- D. Fundamental principles: the protection of human rights, democracy and the rule of law as a precondition to peace
- E. Doctrine

Questionnaire, part I

“Constitutional Justice and Peace”

To the extent possible, please refer to your case-law)¹:

A. Sources and Jurisdiction

1. Does your Constitution make a specific reference to peace or to reconciliation? How has your court interpreted such provisions?
2. Has your Court been seized of draft constitutional amendments containing provisions related to peace and reconciliation?
3. Has your court a specific mandate to maintain social peace? Has your court interpreted its jurisdiction in a way as to include such a mandate?
4. Has your Court encountered constitutional or legal provisions that made maintaining social peace difficult? How has your court interpreted these provisions? Has it repealed them for being unconstitutional / interpreted them in a specific way?
5. Is traditional justice a source of law and has it helped resolve conflict situations?

B. Application

1. Has your Court interpreted constitutional provisions relating to peace and reconciliation?
2. Does your state have a law on peace and reconciliation? If so, has it been referred to this Court for the purpose of assessing its constitutionality?
3. Did your court adjudicate cases in which the social peace in your country was in danger? Did the judgment of your court pacify the situation / settle the conflict?
4. Did your court have to address post-(armed) conflict situations in its case-law? How did it approach these questions? Was your court confronted with the need to contribute to the implementation of political conflict settlement agreements that potentially contradicted the Constitution?
5. Did your Court have a role in adjudicating cases relating to peace and reconciliation as required by the Constitution?
6. What is the role of ‘intermediary bodies’, such as civil society organisations, trade unions, employers or consumers associations, etc., for maintaining social peace as applicants to your court, as *amicus curiae* or for shaping the context in which the court operates.
7. Has your Court been asked by a Court of another country about a conflict situation?

C. Limitations of the role of constitutional courts in maintaining peace

¹ If a case is available in the CODICES database, please indicate its CODICES identification number.

1. What are the limitations of your court in contributing to peace? (e.g. acting only upon request; limitation by the scope of the request)
2. Have issues that were supposedly finally settled by a judgment of Court remained in a state of conflict?
3. Has the role of your court in settling disputes and thus contributing to peace been challenged by other state powers, the media, etc.? (see also special session on the stocktaking on the independence of the courts).
4. Is your court confronted with a positive or rather critical attitude in society and in the media as far as the trust in reconciliation by your court and/or the judiciary in general is concerned.

D. Fundamental principles: the protection of human rights, democracy and the rule of law as a precondition to peace

1. Do you have case-law showing that the protection of human rights contributed to peace?
2. Do you have case-law showing that the protection of democracy contributed to peace?
3. Do you have case-law showing that safeguarding the rule of law contributed to peace?

E. Doctrine

1. Does your court interpret constitutional provisions in a way that contributes to social peace?
2. Has your court developed case-law that balances between legitimate interests of parties and thus contributes to social peace
3. Has your court developed any doctrine contributing to the peaceful settlement of conflicts?

Questionnaire, part II

“Stocktaking on the independence of the Member Courts”

The 2nd Congress of the World Conference on Constitutional Justice was devoted to the topic “Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies”.

In view of the importance of this topic and frequent threats to the independence of some Member Courts, the Bureau of the World Conference had decided to include a special stocktaking session on the independence of the Members for all future congresses. As a consequence, already the 3rd and 4th Congresses in 2014 in Seoul and 2017 in Vilnius included such a session and this will be the case for the 5th Congress in Algiers as well. The replies to the questions below will be important for the preparation for this session.

1. Has pressure been exercised on your Court by other state powers during the consideration (examination) of cases?
2. Has excessive pressure been exercised on your Court by the media during the consideration (examination) of cases?
3. Has your Court encountered resistance from other state powers following the adoption of decisions which they disliked?
4. Have the decisions of your Court been duly published?
5. Are the decisions of your Court being executed? Are there special mechanisms for the execution of the decisions of your Court?
6. Are there problems in the execution of specific types of decisions?
7. Have there been attacks on the Court following the adoption of decisions?
8. Have there been any legislative initiatives or actions leading to creating obstacles to the activity of your Court?
9. How did your Court deal with cases of pressure from other state powers, media, etc.?
10. Has your Court received assistance from other bodies at the national or international level? Please specify the provided assistance.
11. Does your Court consider that it is prevented by judicial restraint from defending itself in the media or from seeking assistance?

* * *