Key-note Speech

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Session B

"Application"

Zühtü Arslan

President

Constitutional Court of Turkey

The Role of Constitutional Courts in Maintaining Social Peace: A Comparative Review of the 'Application'[*]

Mr Chairman,
Honourable President of the Constitutional Court of Indonesia,
Distinguished colleagues,
Ladies and gentlemen,

It is a great pleasure for me to address such eminent participants at the 5th Congress of the World Conference on Constitutional Justice (WCCJ). I remember I was also a keynote speaker at the 3rd Congress that was successfully held eight years ago in Seoul, Korea.

[*] This keynote speech, prepared on the basis of the questionnaire responses of the member courts of the WCCJ, is to be delivered at the 5th Congress of the WCCJ in Bali, 5-7 October 2022.

I am sure the 5th Congress will also be very successful and fruitful. Taking this opportunity, I would like to congratulate President Anwar Usman and his colleagues at the Constitutional Court of Indonesia for hosting the Congress.

Distinguished participants,

You all are familiar with the format of keynote speeches at the Congresses of the WCCJ. The speakers are requested to reflect the responses of the member courts to the questions asked beforehand about the main topic of the Congress. Therefore, today I am going to talk about the role of constitutional courts in maintaining social peace by referring to the responses of relevant courts.

My presentation is divided into three parts. In the first part, I would like to say a few introductory words about the necessity of constitutional justice for maintaining social peace. The second part will deal with the major issues relating to the powers of the constitutional courts to prevent or settle social conflicts under the framework of the replies to the questionnaire. The third part of the speech addresses the responses of some constitutional courts to the problem of wearing a headscarf in public spheres.

Based on the replies to the questionnaire, I would like to underline that many courts have reviewed cases in which social peace was in danger or have dealt with issues that have an indirect bearing on social peace. In this regard, they have in general reported that politically and socio-politically controversial or sensitive issues were at stake. The scope of cases examined by the courts is broad and quite diverse, including post-armed conflict situations in some countries.

I. INTRODUCTION: CONSTITUTIONAL JUSTICE AND SOCIAL PEACE

Let me start with a simple but quite comprehensive definition of justice, which is the precondition for maintaining and sustaining social peace. Rumi asked the question "*What is justice?*" about seven centuries ago. He responded that justice is "*giving water to trees*",

whereas injustice is *"to give water to thorns*." According to Rumi, "*Justice is (consists in) bestowing a bounty in its proper place*".[1]

This simple definition of justice appears to be based on the diversity of human world. Indeed, diversity is the "*inescapable and permanent feature of human societies.*"[2] In other words, we live in a world which "*is marked by such a diversity of culture, traditions, and ways of life*…"[3] Irrespective of the argument whether this nature of social life is good or bad, it is a fact of our lives.

Now the question is how we as human beings tackle with this factual feature of human societies. For the sake of argument, I would discern two main responses to social diversity. First response may be described as the position which aims to repudiate diversity, which has been regarded as the main source of political conflict. Carl Schmitt was the prominent defender of this view of homogeneity. He argued that since democracy requires "unity", diversity must be eliminated, if necessary, by the use of force.[4] History proved that this kind of response to the fact of diversity resulted in oppressive tyrannical regimes.

The second response is to manage and live with diversity, not because it is intrinsically valuable. On the contrary we know that diversity and group differentiation are the grounds of social conflicts. We need to maintain diversity simply because "*it is so fundamental a feature of the human condition that any serious attempt to suppress it will require the disruption of individual lives, and a denial of people's wish to live by their own lights- according to conscience.*"[5]

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[1] *The Mathnawî of Jalâlu'ddîn Rûmî*, trans. Reynold A. Nicholson, II Volumes (Konya: Konya Metropolitan Municipality Book, 2010), Book V, §§ 1085, 1090, Vol II, p.277.

[2] Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom,* (Oxford: Oxford University Press, 2003), p. 41.

[3] *Ibid*., p. 74.

[4] See Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. E.Kennedy, (Cambridge: MIT Press, 1988), p.9.

[5] Kukathas, *The Liberal Archipelago*, p.219.

So, constitutions as social contracts cannot be silent against, or remain indifferent to, the fact of diversity. Justice requires constitutions to recognize different cultures of individual,[6] and provide a legal and political environment to keep and maintain this social and cultural diversity. This is the only plausible way of maintaining the peaceful co-existence of individuals with their different conceptions of good. In this sense, constitutional justice, through its function of protecting basic constitutional values, contributes significantly to the peaceful coexistence of individuals living in a given society.

When we start talking about the main threats to the peaceful coexistence, the issue of "power" has always been on the top of the list. This may be better understood if we see that the most of the conflicts among different groups in a society is related to the power-sharing demands.

Therefore, the nature of power is of paramount importance. Let me cite Lord's Acton's famous saying: "*Power tends to corrupt; absolute power tends to corrupt absolutely*". Unfortunately, history has confirmed Lord Acton's realist view of power. However, historical experiences also taught us that the power must be restricted effectively to protect rights and liberties of especially those who are not in power. At the end of this road, we have also met the smiling face of constitutional justice.

To sum up, I would say that constitutional justice emerged in order to (a) curb the excessive political power, and (b) maintain peaceful coexistence of people by protecting fundamental rights and liberties. With these two functions, constitutional courts make a great deal of contribution to appeasing social tension and sustaining social peace.

II. MAJOR CONSTITUTIONAL ISSUES OF SOCIAL PEACE

Distinguished participants,
Ladies and gentleman,

[6] James Tully, *Strange Multiplicity: Constitutionalism in An Age of Diversity*, (Cambridge: Cambridge University Press, 2002), p.8.

Now, I would like to touch upon some major issues brought before the constitutional courts in respect of social peace, as mentioned in the replies to the questionnaire. In this regard, they have in general reported that politically and socio-politically controversial or sensitive issues are at stake. The scope of cases examined by the courts is broad and quite diverse, including post-armed conflict situations in some countries.

Many countries have reported issues on political and electoral matters brought before the constitutional courts. In this regard, they all agree upon the fact that the decisions of the courts have in some way "appeased" the situations in their respective countries. It is also interesting to note that, in some countries, the constitutional courts have acted as a "justice of constitutional peace" in different social conflict areas such as linguistic cleavages in the same country, divide between employers and employees or national minority issues.

In most of the cases the courts are required to keep an appropriate balance between different constitutional principles. In fact this is "*the central task of confronting constitutional courts in heavily diverse democracies today*."[7]

Let me begin with the decision of the Supreme Court of Canada on the controversial issue of Quebec's secession. As indicated in the summary of replies, the Supreme Court underlined the constitutional principles such as constitutionalism and democracy in responding to the question of the government whether under the constitution the legislature and government of Quebec effect the secession of Quebec from Canada unilaterally.[8]

The Supreme Court responded this question by simply saying "*no*". This was, however, by no means a simple "*no*". The Court based its decision on a complicated constitutional architecture with the pillars of written and unwritten constitutional principles. Having emphasised the mutually reinforcing nature of the principles of constitutionalism and rule of law on the one hand and democracy on the other, the Supreme Court of Canada reached the conclusion that the legislature and government of Quebec had no right to unilaterally secede from Canada, while acknowledging their right to initiate a constitutional amendment in this way.[9]

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[7] See Stephen Tierney, *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2006), p. 251.
[8] See the reply of the Supreme Court of Canada to the questionnaire *'Constitutional Justice and Peace'*, https://cs.coe.int/team10/WCCJ_Congress/Shared%20Documents/CAN_SC.docx Retrieved on 19 September 2022, p.5.
[9] *Reference re Secession of Quebec* [1998], 2 S.C.R. 217, §§ 78, 87.

To give some other examples, in North Macedonia, ethnic tensions linked to the display of Albanian and Turkish flags in addition to the state flag were temporarily resolved following a decision of the Constitutional Court and later, ultimately with the adoption of a Law by Parliament which regulated the right and the manner of use of the flags of the communities.[10]

In Switzerland, the Federal Court ruled in cases related to the French-speaking minority, living in a German-speaking canton. Due to existing tensions, the administration has prohibited meetings in the public domain by separatist movements. The Federal Court ruled that the prohibitions were compatible with the principle of proportionality due to serious risk of danger.[11]

Moreover, the Belgian Constitutional Court decided that the difference of treatment and categorisation as “manual” or “intellectual” between workers and employees were unconstitutional. After the single statute for blue- and white-collar workers was introduced, the Court has settled numerous disputes and thus continued to safeguard social peace.[12]

On the other hand, increasing internal conflicts, inter-state wars and environmental crisis in many regions of the world are forcing people to leave their own countries on ethnic cleansing, minority and socio-economical grounds. Naturally, this gave rise to new social tensions and divide our modern societies. Nowadays, minority- and refugee-related issues are among the most important issues that constitutional courts have to deal with, especially with respect to the living conditions and the private and family rights of refugees and asylum seekers.

III. JUDGMENTS REGARDING HEADSCARF AND SOCIAL PEACE

Ladies and gentlemen,

The reports of the constitutional courts have revealed that social conflicts based on religious matters were among the most formidable challenges before them. In cases involving the use of religious symbols like headscarf in public sphere, some constitutional courts delivered judgments having an effect on the social tension in different ways.

For instance, the Federal Constitutional Court of Germany had the opportunity to examine cases regarding the religious freedom of Muslim teachers to wear headscarves while teaching

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[10] For further explanations, see the *“*Summary of replies to the questionnaire *‘Constitutional Justice and Peace’,* 5th Congress of the World Conference on Constitutional Justice, Session B. Application*”* (hereinafter: *Summary of Replies*)*,* pp. 36-37.

[11] See the *Summary of Replies*, p. 42.

[12] See the *Summary of Replies*, p. 26.

at school. The cases of 2003 and 2015 concerned a candidate teacher and two teachers who challenged the authorities' decisions whereby they had not been allowed to wear headscarves at schools. The authorities interpreted the headscarf as a political symbol of cultural delimitation and decided that to wear a headscarf while performing their profession was not compatible with the requirement of state neutrality.

Upon the constitutional complaints, the Federal Constitutional Court held that imposing a blanket headscarf ban was unconstitutional. It reasoned that introducing a ban on manifesting religious faith through external appearance was not compatible with the fundamental right to freedom of faith and belief, except in cases where it would endanger the peace at school or the neutrality of the state in a sufficiently specific manner. In sum, the Court pointed out that there was no sufficiently precise statutory basis justifying the restriction imposed on teachers wearing a headscarf at school and during classes.[13]

On the contrary, in 2020, the Federal Constitutional Court found the ban on female legal trainees wearing headscarves in the courtroom compatible with the Basic Law. The Court pointed out that unlike state schools, which were meant to reflect society's pluralism, "*public authority exercised in the justice system gives rise to more serious impairments, as the state exercises public authority vis-à-vis the individual in the classic hierarchical sense*."[14] The Court concluded that the legislator's decision to establish a duty of neutral conduct with respect to ideological and religious matters for legal trainees must be respected.[15]

In France, the ban on headscarf and other religious symbols has been the subject of heated debate from the very beginning. The laws of 2004 and 2010 imposed certain bans on wearing *hijab* in schools and public spaces respectively. Generally speaking, the French judiciary supported the ban on wearing a headscarf or full-face veil in public sphere including schools and courts.

Most recently the Court of Cassation of France upheld the ban on barristers wearing the headscarf and other religious symbols in courtrooms. The case was brought by a French lawyer, who challenged a rule set by the Bar Council that banned religious symbols in its courtrooms on the ground that it was discriminatory. The Court of Cassation concluded that

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[13] BVerfGE 108, 282 [Headscarf I, 2003] = GER-2003-3-018 [CODICES]; BVerfGE 138, 296 [Headscarf II, 2015] = GER-2015-1-004 [CODICES].
[14] BVerfGE 153, 1 [Headscarf III, 2020] = GER-2020-1-002, § 95 [CODICES].
[15] *Ibid*.

the ban was "*necessary and appropriate, on the one hand, to preserve the independence of the lawyer and, on the other, to guarantee the right to a fair trial*."[16]

When it comes to Türkiye, a Muslim-majority country, intense discussions had taken place on the constitutionality of headscarf ban in universities and in public offices. In 2008, the Turkish Constitutional Court annulled constitutional amendments which Parliament had enacted to abolish the headscarf ban in universities[17]. The Court ruled that the amendments infringed the constitutional principle of secularism.

With the introduction of individual application system in 2012, the Court has shifted its direction to apply constitutional principles to favour the individual and human rights rather than state ideology. The Turkish Constitutional Court has adopted a rights-based approach and started to interpret secularism as a principle in harmony with fundamental rights and democratic society, thus contributed to social peace.

In this regard, let me briefly mention the 2014 decision on the headscarf issue, which is a leading judgment[18]. The case concerned a lawyer's exclusion from a courtroom for her wearing a headscarf. The trial judge decided that the lawyer's presence in the hearing with her headscarf was contrary to the principle of secularism under the case-law of the Constitutional Court and the European Court of Human Rights. Like the German Constitutional Court in its judgment of 2003 (Headscarf I), the Turkish Constitutional Court concluded that intervention in the applicant's freedom of religion did not meet the constitutional requirement of "*lawfulness*". This was so because there was no statutory provision preventing any lawyer from wearing a headscarf at courtrooms.[19]

The Turkish Constitutional Court held that no reasonable and objective basis was presented for preventing the applicant from being present at the courtroom with a headscarf due to her religious convictions. Therefore, the prohibition of discrimination was violated since the

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[16] Arrêt de la Cour de Cassation, Première Chambre Civile, du 2 Mars 2022, https://www.actu-juridique.fr/app/uploads/2022/03/De%CC%81cision-pourvoi-20-20.185.pdf. See also https://www.reuters.com/world/europe/frances-highest-court-upholds-ban-barristers-wearing-hijab-lille-law-courts-2022-03-02/ Both retrieved on 19 September 2022.
[17] AYM, E. 2008/16, K. 2008/116, 05/06/2008.
[18] *Tuğba Arslan* [Plenary], no: 2014/256, 25/06/2014 = TUR-2014-3-004 [CODICES]
[19] *Tuğba Arslan*, §§ 98, 99. See also *B.S.*, No:2015/8491, 18/7/2018 for dismissal from public office of a female civil servant for wearing a headscarf.

applicant was put in a disadvantageous situation when compared to the female lawyers not wearing headscarf.[20]

Finally, I must note that the European Court of Human Rights has granted a wide margin of appreciation to the Contracting States regarding the headscarf ban. The Strasbourg Court found the bans in France and Türkiye compatible with the European Convention on Human Rights on various grounds, such as the protection of "*secularism*", "*gender equality*", and "*rights and freedoms of others*" formulated as "*living together*".[21]

On the other hand, the Strasbourg Court found that the exclusion of a Muslim woman wearing Islamic headscarf from the courtroom was not justified in a democratic society. The Court ruled that the applicant was an ordinary citizen, and her behaviour, namely entering the courtroom with a headscarf, was not disrespectful and posed, or was likely to pose, no threat to the proper conduct of the hearing.[22]

It wouldn't be wrong to conclude that a rights-based approach requires the authorities, notably courts, to remove the bans on individual rights and liberties, rather than enforcing the restrictive functions of these prohibitions. In this regard, following the above-mentioned judgment of the Strasbourg, the respondent state (Belgium) took a positive step to remove the ban on wearing a headscarf in courtrooms and accordingly amended the law that was the source of violation.

Conclusion

We can draw four main conclusions from the summary of replies. First of all, there is a universal consensus on the necessity of pluralism and diversity. As indicated in the case-law of the European Court of Human Rights, "*a healthy democratic society needs to tolerate and sustain pluralism and diversity*".[23]

Secondly, the decisions and judgments of constitutional courts have had a "*calming effect*" on social tensions. They have played a significant role in mitigating and resolving social conflicts, as well as in maintaining and sustaining social peace. Even if most of the

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[20] *Tuğba Arslan*, § 153.

[21] See, for instance, *Leyla Şahin v. Turkey* [GC], *App. no.* 44774/98, 10/11/2005, §§ 116, 122; *S.A.S. v. France* [GC], App. No. 43835/11, 01/07/2014, §§ 142, 157.

[22] *Affaire Lachiri c. Belgique***,** App. no. 3413/09, 18/9/2018, § 46.

[23] See, for instance, *Eweida and Others v. The United Kingdom*, App. nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15/01/2013, § 94.

constitutional courts have not directly adjudicated cases relating to peace and reconciliation, they have contributed to peaceful co-existence of society by securing and promoting the constitutional principles such as separation of powers, rule of law, democracy and human rights.

Thirdly, this role of constitutional courts is limited because not only most of the constitutional cases involve politically sensitive and extraconstitutional problems, but also the courts cannot act on their own initiatives. The limitations on the courts are more visible when it comes to the effective execution of their judgments. Obviously, they need legislative and executive powers for the enforcement of judicial decisions. Moreover, the justices of constitutional/supreme courts are not "Hercules" of mythology.

Finally, the ultimate success of maintaining social peace lie in the belief that just and rights-based decisions of the courts can resolve deeply sensitive problems of social conflict. In this regard, public trust in judiciary in general and constitutional courts in particular will help them to appease social tensions and sustain peace in society.

It must also be noted that to maintain peaceful co-existence, we need to tolerate and recognize the ontological status of "*others*", who are different from us. We must embrace the "others" as human beings without forcing them to resemble us.

In this regard let me conclude my speech by citing some words of Saadi's poem "*Bani Adam*" (Children of Adam) written nearly 1000 years ago. Saadi Shirazi says:

If you have no sympathy for the sufferings of others,

Deserve not the name, human being![24]

In order to ensure social peace to go beyond a mere rhetoric, we must not only inscribe Saadi's expressions on the entrance of the United Nations building but also wholeheartedly adopt and realize them.

Thank you for your attention.

[24] Sadî Şirâzî, *Bostân ve Gülistân*, (İstanbul: Beyan Yayınları, 2016), p. 246.