



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

## **Report by the Rapporteur**

### **5th Congress of the World Conference on Constitutional Justice**

#### **Session C**

#### **"Limitation of the Role of Constitutional Courts in Maintaining Peace".**

by

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*Madrid, 5 October 2022*

Dear Colleagues:

On behalf of the Constitutional Court of Spain, allow me first of all to reiterate our thanks to the organisers of this Fifth Congress of the World Conference on Constitutional Justice. The Congress was, as expected, a resounding success.

Before I draw my conclusions, I would also like to express our deepest condolences for the tragedy that took place on 2 October at the Malang City Stadium on the island of Java. On behalf of the College of Magistrates of our Constitutional Court, I convey our deepest sympathy to the families and relatives of the victims and I hope for the full and speedy recovery of those injured and affected.

To return to the thread of our scientific discussions, I would like first of all to congratulate all the participants for the high level and the academic and practical brilliance of all the sessions of the Congress, which I had the opportunity to follow from Spain.

With regard to Session C, for which I am the rapporteur, I particularly salute the Vice-President of the Supreme Constitutional Court of Egypt, H.E. Mr. Adel Omar Sherif, for his guidance of the work of this session.

I am also grateful for his kindness in playing the video presentation sent from Spain after his introductory remarks.

In Session C we discussed "the limitations of the role of constitutional courts in peacekeeping".

I agree with Vice-President Sherif that talking about limitations is not a priori negative, insofar as it is a consequence of complying with the Constitution and the law, which by definition always impose limits.

Knowing the framework in which we move implies knowing its contours, and this is as basic as it is valuable.

The speeches made by my colleagues in Session C were also of outstanding quality.

Dear President of the Constitutional Court of the Kyrgyz Republic, H.E. Mr. Emil Oskonbaev,

Dear President of the Constitutional Court of Angola, H.E. Mrs. Laurinda Prazeres Monteiro Cardoso,

I would like to extend my warmest congratulations to you.

I agree with President Oskonbaev when he says that *it is extremely difficult to imagine a democratic state without a constitutional control body.*

And I share his diagnosis of the *challenge that the processes of computerisation and technological development may pose to constitutionally protected values.*

Similarly, I believe that President Cardoso's speech has captured the essence of the subject under discussion.

I found particularly interesting the references made to the Angolan Constitution - in particular the inclusion of the concept of "peace" in Article 1 - which make the Angolan Constitutional Court uniquely qualified to address an issue such as the one under consideration.

As we can see, the speeches of the dignitaries who have spoken at the Bureau of Session C have set the right tone for the issue under consideration, which is none other, as I say, than the frontiers we face as Constitutional Judges if we want to contribute to peace.

According to the answers provided by the participating Tribunals in their questionnaires, these constraints can be categorised into two classes:

1. Firstly, formal or procedural limits which depend on the competences of each Court and which have to do with the legal standing to bring or initiate proceedings.

In this case, it is essential to distinguish between those courts that allow citizens themselves to bring actions in defence of their fundamental rights, as is the case, for example, with the Constitutional Court of the Kingdom of Spain. And those whose task is more limited to the control of the constitutionality of laws, at the request of different state bodies.

2. Secondly, we have also looked at the material brakes or stumbling blocks to our decisions.

Consider, in this regard, the non-compliance of another state institution with one of our resolutions.

Or let us recall the social, media or State authorities' questioning to which some of our judgements are subjected.

As rapporteur, I note that the vast majority of the participating Constitutional Courts state that their action is limited to the successful maintenance of social peace or the regular functioning of state institutions, but not to more serious situations.

Some jurisdictions refer to serious institutional conflicts over the distribution of competences.

Others, such as the Constitutional Court of Bosnia and Herzegovina, cite commendable work in assisting a national reconciliation process after an internal conflict.

In line with these preliminary considerations, I can offer the following conclusions from this session C:

1. Most of the participating Tribunals can only act at the request of a party and not ex officio, and they rightly see this as a limitation on their ability to contribute to peace within their respective States.

Indeed, a large number of judicial bodies can only intervene when cases are referred to them, so they cannot act in any situation that - in their view - could pose a serious risk to peace.

In any case, most of the Courts consulted are careful to clarify that this is a general limitation in any conflict, and not only when it is a question of contributing to peace.

2. As an exception, some courts, such as those in Mexico, Pakistan or Serbia, do have the possibility to act ex officio in certain circumstances.

Thus, the Superior Chamber of the Electoral Tribunal of the Judiciary of Mexico may hear those matters that it considers to be of special importance and transcendence.

Similarly, the Supreme Court of Pakistan acts ex officio when it comes to the enforcement of fundamental rights of special public importance.

In the case of Serbia, the intervention shall be related to the assessment of the constitutionality and legality of the case upon a decision adopted by a two-thirds majority vote of all judges.

3. Beyond the procedural aspect, there are Courts that indicate that they do not have specific competences on the contribution to peace, as is the case in the Netherlands, Norway, Sweden, Ukraine, Andorra and Sao Tome and Principe.
4. From a material point of view, almost all participating Constitutional Courts reply that their decisions are final and not subject to appeal. They serve to settle disputes between litigants. Moreover, they are decisions to be applied by all organs and courts of the State.

However, when it comes to social, political or other conflicts, each Court's action varies according to its own tradition and circumstances.

For example, Slovakia explains the conflict that, in 2014 and 2017, pitted the President and the Parliament of the Republic against each other over the appointment of judges to its Constitutional Court.

5. A large number of countries respond that their role in contributing to peace has not been questioned in any case.

These are, for example, the courts of Andorra, Angola, Austria, Belarus, Germany, Hungary, North Macedonia, Norway, Portugal and Sweden.

There are, however, exceptions to this widespread situation. Cambodia's Constitutional Council does point out how its role in resolving disputes and contributing to peace after the 2003 general elections was rejected by political parties and posed a threat to the country's peace.

6. With regard to questioning by the media and society in general, not a few Tribunals argue that, in one way or another, the opinion towards them is usually positive, although there are occasions when their decisions are - inevitably - criticised.

In particular, the courts of the Czech Republic, Denmark, Germany, the Republic of Korea, the Netherlands, Norway and Thailand underline the high level of trust they enjoy among citizens.

7. Other countries mention more specific criticisms of their courts. Canada, in fact, indicates that the role of the Supreme Court has been called into question for alleged "judicial activism".

Brazil points to its fight against "fake news" as a way to guarantee the right to free access to truthful and accurate information.

8. In particular, most Courts also refer to the impact on their national companies of decisions on potentially divisive cases.

Georgia talks about the public censure it received after declaring unconstitutional the rules criminalising marijuana use.

Portugal points out that one of the few times its court has been criticised was in relation to its ruling on euthanasia.

9. Several courts mention in their replies that the main criticisms they may receive relate to the procedure and criteria for appointing judges, as is the case in Belgium or Côte d'Ivoire. Criticism of the alleged political affinity of the members of the courts is also frequent in this regard.

The criticism associated with perceived delays in the administration of justice is another negative aspect brought up by countries such as Cyprus.

Dear Colleagues,

These are the conclusions I can offer you from Session C of this Fifth World Congress on Constitutional Justice.

I hope they will be of interest to the conference organisers as well as to all of you.

The Constitutional Court of the Kingdom of Spain remains at your entire disposal to continue to build a truly global community of constitutional justice.

As a sign of this, I send you my warmest and most attentive greetings from Madrid, a capital in which you are and will always be welcome.

Thank you very much