



COMPARATIVE CONSTITUTIONAL INTERPRETATION AS A MEANS TO PROMOTE DEMOCRACY, THE PROTECTION OF HUMAN RIGHTS AND THE RULE OF LAW

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Mr President of the Constitutional Court of Turkey,
Presidents and Judges of Constitutional Courts,
Ladies and Gentlemen,

I am pleased to be with you in Ankara and to meet with you in person. The long period of online meetings was a very difficult one. Meeting in person is essential for substantive discussions, not only during the official session of the conference, but also in between. Let me start by congratulating the Constitutional Court of Turkey on its 60th anniversary.

I would like to thank President Arslan and all the Members of the Constitutional Court for their important work in safeguarding the Constitution and its principles as well as our common values. You do so in a difficult environment, and it is remarkable that your Court continues adopting judgments that protect human rights. The introduction in 2012 of the individual application to the Constitutional Court of Turkey under Article 148 of the Turkish Constitution was a success and you uphold this important achievement.

In our session of the conference, we discuss the Effect of International Human Rights Law in the Interpretation of Constitutional Rights and Freedoms. This topic goes right to the heart of the individual complaint. Article 90 of the Turkish Constitution establishes a system of human rights protection that is very open to international treaties: “In case of a conflict between the laws and international agreements duly put into effect in the field of fundamental rights and freedoms due to different in provisions on the same matter, the provisions of the international agreements shall prevail.”

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This means that human rights treaties prevail over ordinary Turkish national laws, but not over the Turkish Constitution. This provision of the Constitution is directly applicable and its hierarchy must be respected not only by judges and prosecutors but also by the police and any other state official. And it is your task, as Members of the Constitutional Court, to ensure respect for this hierarchy.

When we talk about international treaties in the field of fundamental rights and freedoms, alongside the International Covenant on Civil and Political Rights, it is of course the European Convention on Human Rights that is the most relevant treaty in this respect. And when we refer to the Convention, we mean the Convention as interpreted by the European Court of Human Rights. The Strasbourg Court gives life to the Articles of the Convention and decides authoritatively for all Parties to the Convention how the Articles of the Convention are to be interpreted.

When we talk about interpretation in the context of the European Convention on Human Rights, the principle of proportionality is of course also a formidable interpretation tool.

Before we come to proportionality, let me briefly touch upon other interpretation techniques and how they can relate to our topic, also in the light of Article 90 of the Turkish Constitution. In deciding on constitutional matters, notably in the framework of the constitutional complaint, you interpret several texts. Whatever the act is that caused the alleged human rights violation, as part of the decision on the individual application you also have to interpret various texts. You interpret the national law that is the basis for the act, you interpret the relevant Articles of the Turkish Constitution and – under Article 90 of the Turkish Constitution you do so by taking into account the European Convention on Human Rights.

In this exercise of interpreting texts, you will normally start with a literal interpretation; this first method, however, will, in many cases, not be sufficient to understand the full meaning and reach of a legal text. Often, in addition, the “historical interpretation” approach will be helpful. This method consists in exploring the manner in which an act was adopted, what the intentions of its authors were and, how the text fits into the constitutional framework and that of the other pre-existing legislation. A “systematic interpretation”, one taking into account the whole system of laws surrounding the one under consideration, will enrich the interpretative tools of the Court, and possibly enable it to have

recourse to an interpretation by analogy or to reason *a contrario*. Finally, a “teleological interpretation”, one which takes as a starting point the aim pursued by the legal act under analysis, will allow the Court to interpret it in the manner which best fulfils the original purpose of the normative text in the society.

All these techniques are at our disposal and the judge may apply them either alone or cumulatively, of course arguing why a specific technique is more appropriate than another in any given case. These techniques refer to the interpretation of *the text* but they do not yet relate to the result of the examination of *the case* by the constitutional judge.

There is another, finer tool, which has the advantage of avoiding the necessity of annulling a text which is found to be ambiguous, as unfortunately is often the case. Indeed, it may happen that the aforementioned techniques reveal that there is more than one possible interpretation, one being in conformity with the Constitution and the other not. In such cases, the constitutional judge may decide that the interpretation, which is in conformity with the constitution, must be applied by all state bodies. We can describe this method as the “power to ensure constitutionality through a specific interpretation”. In this concept, we see elements of the presumption of constitutionality and of the so-called “double construction rule”.

However, there can be serious drawbacks when the – correct constitutional – interpretation given by the Constitutional Court is not followed in practice by the other courts and State bodies. Conversely, and in order to overcome this problem, the Constitutional Court can invalidate a legal provision if it is consistently interpreted by the ordinary courts in an unconstitutional manner. This means that the legislator must adopt a new legal provision, which hopefully follows the correct constitutional interpretation and thus ends the previous unconstitutional interpretation of the law.

Mr President,

Let me come back to the technique widely used by the European Court of Human Rights and many other Constitutional Courts, notably the Federal Constitutional Court of Germany, which developed it. With a few exceptions - for instance torture which remains strictly prohibited in all cases - most human rights allow for some limitations. In the European Convention on Human Rights, references to these limitations are typically

found in the second paragraph of the relevant articles. Rights that may be limited are *inter alia* the right to liberty, fair trial, the freedom of expression, freedom of assembly and so on. However, to what extent may these rights be limited? Here, the principle of proportionality comes into play and provides important guidance.

Where the case concerns a negative obligation, the European Court of Human Rights usually assesses a series of questions to determine whether an interference in a right was justified under the Convention:

1. Is the interference in accordance with the law?
2. Was the interference in pursuit of a legitimate aim? and
3. Is it necessary in a democratic society?

Thus, these limitations must be made for legitimate reasons that do not constitute a disproportionate and unreasonable interference with the aim pursued, undermining the very substance of that right.

To take only a few examples, the right to freedom of assembly is not absolute; it may be subject to restrictions in accordance with paragraph 2 of Article 11 of the Convention. However, any interference with the exercise of that right must be necessary in a democratic society. An interference will constitute a breach of Article 11 unless it was “prescribed by law”, pursued one or more legitimate aims and was “necessary in a democratic society” for the achievement of those aims.

The proportionality test is also critical for the prohibition or dissolution of political parties, which is a very far-reaching measure that should be used with the utmost restraint. The European Court of Human rights takes into account whether there is a risk of democratic principles being undermined and whether this establishes a “pressing social need”. The Strasbourg Court takes into account the following points: (i) whether there was plausible evidence that the risk to democracy was sufficiently imminent; (ii) whether the party’s leaders’ acts and speeches taken into consideration in the case under review were imputable to the political party concerned; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”.

Recently, in a number of European countries, we have encountered problems with a wide interpretation of emergency powers, in the context

of the Covid pandemic. Constitutional Courts and equivalent bodies all over the world had to rein in excessive interpretations of emergency powers of the executive powers. The States' margin of appreciation in times of emergency is indeed larger than during normal times. This was particularly true in the situation where information about the virus and the most efficient ways of combatting it was scarce or uncertain. However, a larger margin of appreciation cannot make judicial review meaningless and –as we have seen– the Constitutional Court took that control very seriously.

Mr President,

Let me conclude that constitutional interpretation is a wide field. Traditional techniques of interpretation apply alongside specific techniques required for determining the scope of possible limitations to human rights. In this respect, the principle of proportionality, which is indeed an interpretation technique has a central role to play.

It is up to the Members of the Constitutional Court of Turkey to choose in each case the appropriate techniques of interpretation and to interpret the applicable texts. Notably in the framework of deciding on individual applications, it is upon you to decide which limitations to human rights are acceptable. In this choice you are guided by the values of the Constitution, by the principles of democracy, the protection of human rights and the rule of law.

You have given an oath to defend the Constitution of the Republic of Turkey and fundamental rights and freedoms and to abide by the understanding of the law in accordance with the fundamental principles upon which the Constitution is based to the best of your conscience and without being prejudiced by any influence and concern whatsoever.

I trust you to honour this oath.

Thank you for your attention.