Second Annual Conference of the
BALKAN CONSTITUTIONAL COURTS FORUM

Evolutions in Contemporary Constitutional Justice: Example of the Balkan Region

23-26 October 2024
Prishtina, Kosovo

Second Annual Conference of the BALKAN CONSTITUTIONAL COURTS FORUM

Evolutions in Contemporary Constitutional Justice: Example of the Balkan Region

23-26 October 2024
Prishtina, Kosovo

PROGRAM

24 October 2024

08:30 - 09:15	Registration
09:15 - 09:30	Welcome and Opening Remarks by Ms. Gresa Caka - Nimani President of the Constitutional Court of the Republic of Kosovo
09:30 - 09:40	Opening remarks by H.E. Dr. Vjosa Osmani - Sadriu President of the Republic of Kosovo
09:40 - 09:50	Opening Remarks by Ms. Holta Zaçaj President of the Conference of European Constitutional Courts/ President of the Constitutional Court of the Republic of Albania
09:50 - 10:00	Opening Remarks by Ms. Pavlina Panova President of the Constitutional Court of the Republic of Bulgaria
10:00 - 10:20	Key-note address by Prof. Rainer Arnold, University of Regensburg Director of the International Congresses on European and Comparative Constitutional Law "The Role of Constitutional Justice in Contemporary Constitutionalism"
SESSION I	Constitutional Courts as Guardians of Democratic Values and Principles: Balancing Executive, Legislative and Judicial Powers in Modern States
Moderator:	Ms. Remzije Istrefi-Peci, Judge of the Constitutional Court of the Republic of Kosovo
10:45 - 11:00	Mr. Kadir Özkaya, President of the Constitutional Court of the Republic of Türkiye "The Role of the Turkish Constitutional Court in Protecting Democratic Values under the Principle of Separation of Powers"
11:00 - 11:15	Ms. Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria "The Protection of the Separation and the Balance of Powers in the Jurisprudence of the Constitutional Court of the Republic of Bulgaria"
11:15 - 11:30	Mr. Darko Kostadinovski, President of the Constitutional Court of the Republic of North Macedonia "Constitutional Courts as Guardians of Democratic Values and Principles: Balancing Executive, Legislative, and Judicial Powers in Modern States"

11:30 - 11:45	Mr. Mato Arlović, Vice-President of the Constitutional Court of the Republic of Croatia "Constitutional role of the Croatian Constitutional Court in Realizing the Constitutionality and Legality through an Ex-Ante Procedure"
11:45 - 12:00	Ms. Valerija Galić, Vice-President of Constitutional Court of Bosnia and Hercegovina "The Constitutional Court of Bosnia and Herzegovina as a Guardian of Democratic Values and Principles"
12:00 - 12:15	Mr. Martin Kuijer, Vice-President of the Venice Commission "Constitutional Courts as Guardians of Democratic Values and Principles: a Perspective from Venice"
12:15 - 12:30	Session I: Open discussion
SESSION II	The Impact of Supranational Courts' Jurisprudence in Shaping Local Constitutional Contexts
Moderator:	Mr. Sokol Sadushi, President of the Supreme Court of the Republic of Albania
14:00 - 14:15	Mr. Nexhmi Rexhepi, Judge of the Constitutional Court of the Republic of Kosovo "The Impact of ECtHR Jurisprudence in the Review of Legislation by the Constitutional Court of the Republic of Kosovo"
14:15 - 14:30	Ms. Marsida Xhaferllari, Judge of Constitutional Court of the Republic of Albania "The Albanian Constitutional Court as a "Compliance Partner" of European Court of Human Rights"
14:30 - 14:45	Mr. Alexander Arabadjiev, Judge of the Court of Justice of the European Union "The European Constitutional Order and the Case-Law of the Court of Justice of the EU: Interrelation, Cooperation and Dialogue as Distinctive Traits"
14:45 - 15:00	Ms. Anna Austin, Jurisconsult of the European Court on Human Rights "Impact of the ECtHR on National Constitutional Contexts"
15:00 - 15:15	Ms. Teodora Toma, Executive Director at World Jurist Association "The Role of NGOs in the Dissemination of the Decisions of the Supranational Courts. World Jurist Association and the World Law Congress"

Table of Contents

SESSION I

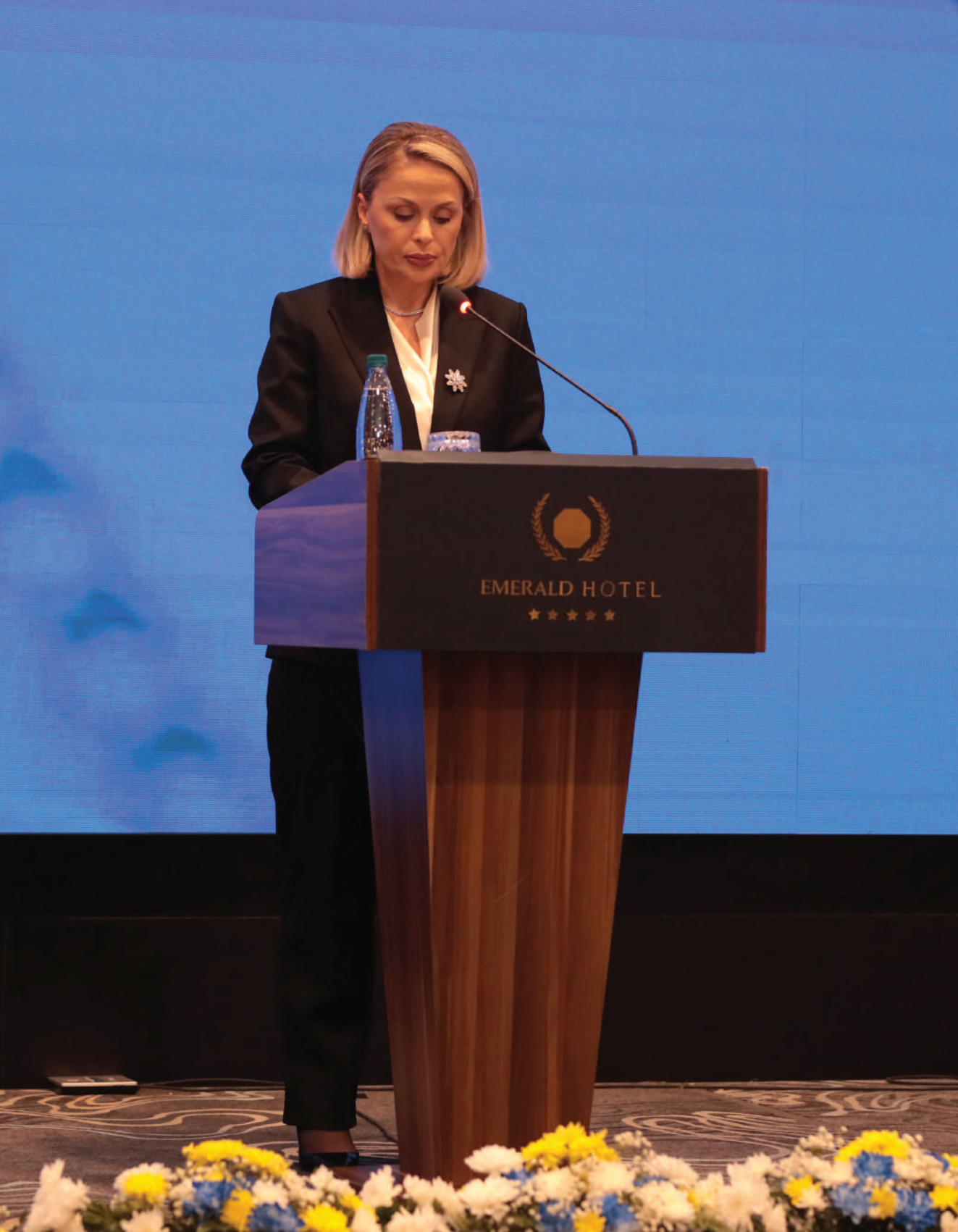
Constitutional Courts as Guardians of Democratic Values and Principles: Balancing Executive, Legislative and Judicial Powers in Modern States

Moderator: Ms. Remzije Istrefi-Peci, Judge of the Constitutional Court of the Republic of Kosovo

SESSION II

The Impact of Supranational Courts' Jurisprudence in Shaping Local Constitutional Contexts

Moderator: Mr. Sokol Sadushi
President of the Supreme Court of the Republic of Albania


EMERALD HOTEL

OPENING REMARKS OF BALKAN CONSTITUTIONAL COURTS FORUM

Ms. Gresa Caka - Nimani

President of the Constitutional Court of the Republic of Kosovo

Good morning everyone! Welcome to the Conference of the Balkan Constitutional Courts Forum

Honorable President of the Republic of Kosovo, Mrs. Vjosa Osmani-Sadriu;

Honorable Presidents and Vice-Presidents of the Constitutional and Supreme Courts of Bulgaria, Bosnia and Herzegovina, Croatia, North Macedonia, Republic of Albania and Republic of Türkiye;

Honorable representatives of the Court of Justice of the European Union, the European Court of Human Rights and the Venice Commission;

Honorable national and international professors of constitutional law and public international law; Honorable Professor Rainer;

Honorable participating members of the delegations, leaders of the judiciary and independent institutions of the Republic of Kosovo, members of civil society and the media;

Honorable Ambassadors and representatives of international institutions;

Former Presidents, Judges and colleagues of the Constitutional Court of the Republic of Kosovo,

Dear participants/ladies and gentlemen,

Allow me to first express my gratitude that the Constitutional Court of the Republic of Kosovo welcomes the member-states of the Balkan Forum of Constitutional Courts for the first time after the establishment of this Forum in October last year.

A year ago, our Constitutional Court became for the first time a founding member with full and equal rights of a professional forum/association of Constitutional Courts. In the following year, this Court is the host of this Forum.

I am deeply grateful that all member courts have respected and supported our initiative to host the Forum in Prishtina, including symbolically on the occasion of the fifteenth (15) anniversary of the establishment of the Constitutional Court of the Republic of Kosovo.

Such solidarity comes in the light of the intensive work, but also of extraordinary support - notwithstanding the difficulties - for the Constitutional Court of the Republic of Kosovo to become next year an equal member of the Francophone Association of Constitutional Courts and the European Conference of the Constitutional Courts.

This is essential for our Court, but also for the missions of the aforementioned associations because today at a time when the fundamental values of democratic systems may be subject to the risk of erosion, among others, as a consequence of (i) increased ideological and political polarizations; (ii) growing trends of populist movements; (iii) increasing economic inequalities; but also (iv) subsequent risks for the civil rights and freedoms, increased solidarity and cooperation between the constitutional courts, is more important than ever.

In such a context which today characterizes not only the region but the entire globe, the missions of the Constitutional Courts in their entirety cannot be accomplished only within national borders. Maintaining, strengthening and cultivating the values of democratic constitutional systems for a just and secure society in peace, can only be achieved together.

The Balkan Constitutional Courts Forum itself has been created based on this very premise, uniting the Constitutional Courts of the region around a common platform, which aims to advance the values of constitutional justice in a region whose democracy, taking into account its historical features, has been marked by many sacrifices.

The constitutions of our states reflect moments of great historical turning points. Moments which have separated the future from the past and transformed the suffering and the lessons learned from the previous systems into commitment and aspirations for the future. Certainly, the journey of our states and Courts entails essential differences as well. The Republic of Türkiye, among others, has already left behind six (6) decades of building constitutional justice. The Republic of Bulgaria and the Republic of Albania, have made fundamental historical and constitutional turns in the early 90s, leaving behind harsh communist systems and starting to navigate through the challenges of building the respective democracies. The states emerging from the former Yugoslavia, on the other hand, carry on their shoulders severe wounds and experiences from the wars during the 90s, but also moments of hope in building new democratic orders, with our Republic concluding this cycle after decades of sacrifice and resistance, with the declaration of its independence in 2008. Most of them have undergone profound transformations of governance systems and challenges in the democratic consolidation, based on the principles of individual freedom, separation of powers and political pluralism.

The progress towards the realization of respective aspirations is not linear either. Today, among us, there are countries that have already joined NATO, the European Union and the Council of Europe, but also countries that are still working towards achieving this objective. And, as we cultivate the dream that one day we will all meet as equals around the decision-making tables in Brussels and Strasbourg, in the meantime we also strengthen our commitment to address all the challenges that may slow down this journey.

Having said this and noting the differences in the respective journeys and the corresponding accomplishments, in principle, all our states (i) are subject to the obligation to continuously strengthen the values that the constitutional democracies contain, in one hand; while (ii) on the other, they face the challenge of strengthening the mechanisms designed to resist all the forces and/or phenomena that can jeopardize these values, including the proper separation and balance of powers and the fundamental rights and freedoms in our Republics. And, at the center of addressing these challenges, are the Constitutional Courts.

The latter are not merely another institution in the institutional chain of a state. Their role encompasses the entirety of the perspective of our common values - of democracy, freedom and peace. Their role involves converting the text of the Constitution into constitutionalism that originates therefrom.

Without a deep culture of constitutionalism, democracy risks remaining superficial and merely formal. Democracy risks being reduced into its narrowest definition, the power of majority. This, contrary to the definition of constitutional democracy that our Constitutions embrace, centered on individual freedoms and balance of separated powers - in the power of the Constitution; in the power of the law.

Of course building a tradition of functional constitutionalism is a long process which in the younger democracies may also entail an overall re-dimensioning of political forces and powers, in order to subject them to the control of the Constitutional Court. This may consequently result in the contestation of the constitutional control. All the courts that are present here today – and not only - have been subject to such a challenge.

Moreover, the consequence of the political contestation of the constitutional and judicial review not necessarily remains at the theoretical level only. The Constitutional Courts present here today, have also faced (i) deep reforms - at times - designed to undermine the independence of the respective judicial systems; (ii) at times - lack of decision-making quorums as a result of delays in appointing judges; (iii) difficulties in the enforcement of judicial decisions; but also (iv) accusations directed against their decision-making legitimacy and which, may also affect public trust in the respective judicial systems.

Addressing these challenges is certainly subject to a gradual and step-by-step process of building a tradition of constitutional control. In national contexts, this process has been facilitated, to a large extent, also through the role and jurisprudence of supranational courts which have also played a very significant and at times a decisive function in (i) disseminating the fundamental values of democracy throughout the European continent; and (ii) in shaping national constitutional traditions. Having said this and based on the principle of subsidiarity, the primary burden of building a functional constitutionalism, falls precisely on the Constitutional Courts.

And, as it pertains to the weight of the latter, in closing, I would like to emphasize the importance of the preventive effects of a consolidated tradition of constitutional justice which are, in principle, underestimated in the daily public discourse. In fact, the consequences that our democracies can suffer in the absence of a constitutional control, are extremely comprehensive. The fact that the European continent will soon, in principle, mark eight (8) decades of peace and prosperity, is largely attributed to the deep roots of constitutionalism in Europe after the Second World War. And this

fact, also speaks volumes, about the power of judicial and constitutional control; the power of constitutional justice and of our Courts.

Dear participants/ladies and gentlemen,

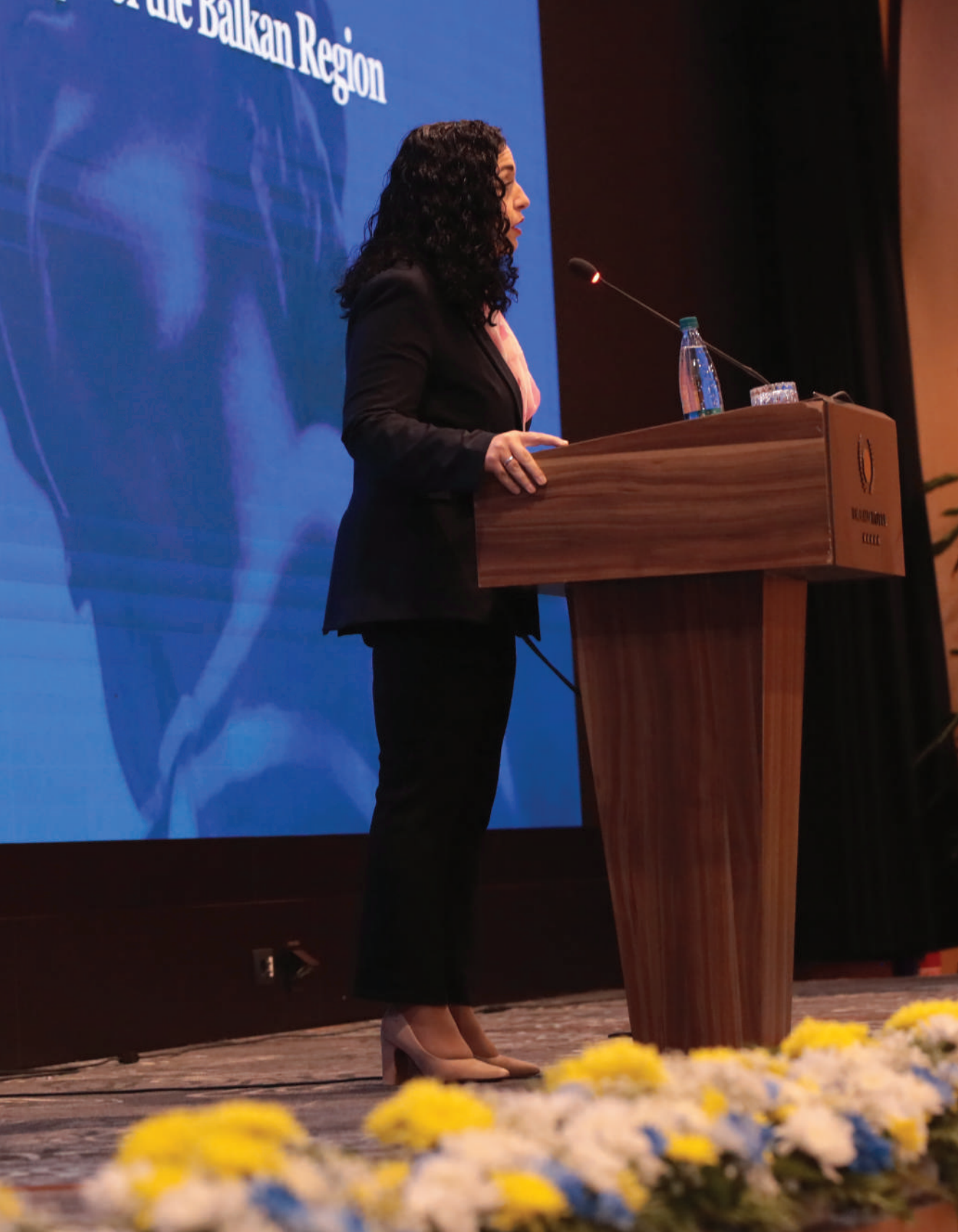
The challenges and achievements of constitutional justice in the Balkan region will be discussed today from the perspective of all the courts of the region, including (i) the European Court of Human Rights; (ii) the Court of Justice of the European Union; and (iii) the Venice Commission, and I am delighted that this discussion will take place among friends in Prishtina - the newest capital on the European continent. I am equally delighted that this capital is once again at the center of the discussions on constitutional justice.

I hope that our discussions today will result in the identification of the lessons learned that we can take from each other, but also of areas that could benefit from enhanced cooperation in the future. Above all, I hope that this seemingly entirely theoretical discussion, will inspire us. Inspire us, for cooperation and solidarity. Inspire us, for durability in the struggle and dedication for the realization of great aspirations.

Remind us, that cooperation between us reinforces our common values with the result of contributing to peace, equality and prosperity. Remind us, that the challenges and achievements of constitutional justice, are neither merely theoretical nor isolated issues that characterize the day-to-day operations of the Constitutional Courts alone. Taking into account their function, the challenges and achievements of our Courts, in fact, represent (i) the main indicators of the quality of our democracies; and (ii) the main indicators of the realization of our aspirations to be equal participants and contributors in preserving and advancing the democratic heritage of the European continent.

Constitutional justice is also an ideal – a long-term commitment - to the protection and advancement of the values of democracy.

As I thank you for your attention, I hereby declare this Conference open, with the best wishes for successful proceedings. Thank you and - once again - welcome to the Republic of Kosovo.


the Balkan Region

OPENING REMARKS OF BALKAN CONSTITUTIONAL COURTS FORUM

H.E. Dr. Vjosa Osmani - Sadriu
President of the Republic of Kosovo

Honorable President of the Constitutional Court, Mrs. Caka-Nimani,

Honorable Presidents of Constitutional Courts from various Balkan countries,

Representatives of the European Court of Human Rights, professors of constitutional and international law, former judges,

Honorable ambassadors accredited to the Republic of Kosovo,

Distinguished attendees,

I have the honor to address you today at the second annual conference of the Balkan Constitutional Courts Forum and to join the President of the Court in welcoming you to the Republic of Kosovo.

I would also like to take this opportunity to congratulate the establishment of the Forum of the Courts, as well as the organization of the annual conferences, such as this one today. I am convinced that the establishment of this Forum will further enhance cooperation among constitutional courts towards the highest standards of constitutional interpretation, in the service of protecting and guaranteeing human rights and freedoms.

I am pleased that the second conference of this Forum finds the participating courts gathered in the capital of our Republic, which also coincides with the 15th anniversary of the establishment of the Court. The Republic of Kosovo remains committed to the fundamental principles of democracy, the rule of law and respect for human rights and freedoms, which are embodied as core values of our constitutional order and are laid in the very foundations of our country.

Our Constitution is highly unique, among other reasons, for the fact that it vests in the President of the country an exceptionally significant and substantial duty: the duty to guarantee the constitutional functioning of all institutions of the Republic of Kosovo. This is among the main duties of this institution, and during these years of my term, I have been guided each day by this sacred duty while exercising all competences.

In the interpretation of the Constitution, its letter and spirit, the constitutional courts today represent the highest institution. They bear an extraordinarily important mission and responsibility, especially in new democracies such as our Republic, to guarantee but also to affirm constitutional principles, arising from the very constitutions from which they derive their legitimacy. As Judge Traja so rightly stated, "a constitution only makes sense when it is both the foundation and the pinnacle of a legal system, when it is protected from norms and acts that jeopardize its unity, that is, when there is a guarantor and supervisory function and a specific institution that carries out this supervision, namely the Constitutional Court".

The development of constitutional justice is inevitable and intertwined with the development of legal sciences, therefore, when we find ourselves before conferences and forums of this kind, we are obliged to reflect on the idea of the renowned German jurist, Kotz, who stated that: "No study deserves the name of a science if it limits itself to phenomena arising with national boundaries".

Hence, collaborations such as today's conference increase the possibility that the interpretation of the Constitution, which is at the core of the activity of a constitutional court, may also be a comparative interpretation.

Can we imagine a court decision today, in isolation! How could such a decision be advanced by contemporary standards of guaranteeing human rights and freedoms, if it does not undergo a comparative assessment with the practices of other

countries? Moreover, today we are all witnesses to decisions of constitutional courts that, at the essence of their interpretation, involve comparison and correlation of the constitutional facts and arguments with the practice of one or more other courts.

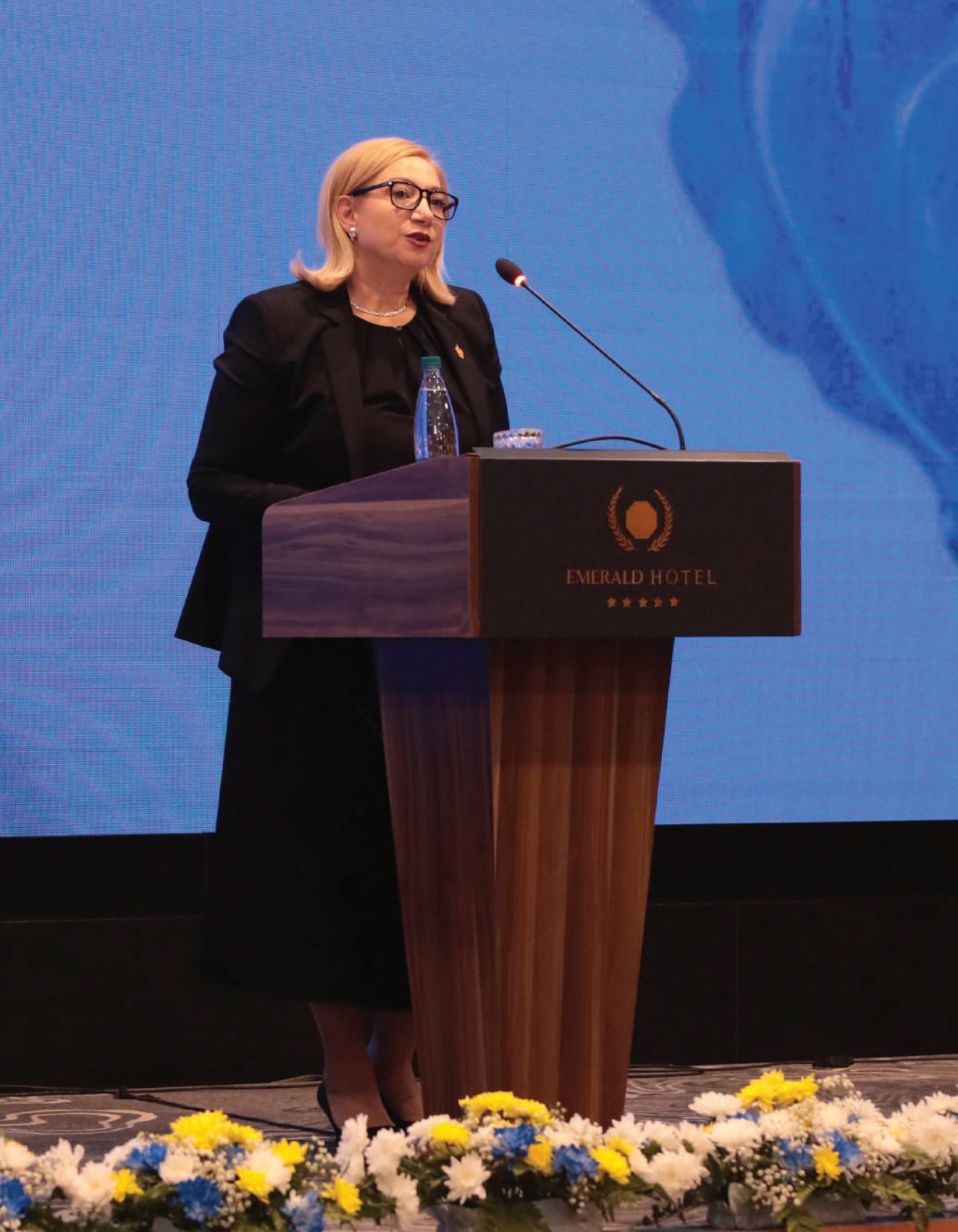
Therefore, a roundtable like this one today, where, as I have observed from the agenda, constitutional issues are addressed from different perspectives and practices, also represents a good opportunity to benefit from the experiences of courts among themselves – experiences that are undoubtedly of great help to every judge in a particular case.

Allow me to reaffirm that the Republic of Kosovo, during its 16 years of existence and the 15 years of existence of the Constitutional Court, has set an extraordinarily good example of the rule of law, and in particular the institutions of the Republic of Kosovo have demonstrated a high institutional culture and responsibility in respecting the decisions of the Constitutional Court, even though there are many cases in which they were not found pleasing.

On the other hand, this Court's case law has been enriched with the principles and standards established by the European Court of Human Rights, which continues to serve as a guide in fostering values and increasing legal certainty for the citizens of our Republic. As you know, this standard is also enshrined in our Constitution itself, which requires that decisions of public institutions of our country pertaining to human rights must be in accordance with the standards of the European Court of Human Rights, and this has been and continues to be respected, and it is likewise an additional argument as to why Kosovo has deserved and continues to deserve full membership in the Council of Europe.

Finally, as we mark this 15th anniversary, I wish to express my readiness, as President of the Republic, to continue cooperation with all of you in the service of the Constitution and in the interest of our country and our citizens, without distinction. A democracy and a constitution can be said to have fully succeeded only when all of us, whether in political institutions or in courts, including the Constitutional Court, understand that none of us is above the Constitution.

Thank you!


EMERALD HOTEL

OPENING REMARKS OF BALKAN CONSTITUTIONAL COURTS FORUM

Ms. Holta Zaçaj

President of the Conference of European Constitutional Courts/
President of the Constitutional Court of the Republic of Albania

Honorable President of the Republic of Kosovo,
Honorable Presidents,
Honorable Colleagues, Participants and Esteemed Guests,

In my capacity as the President of the Constitutional Court of the Republic of Albania, as well as the President of the Conference of European Constitutional Courts, it is a privilege to be here today in Kosovo, in the country that we unanimously chose to host our new Forum of the Balkans' Constitutional Courts, at its second annual conference.

The organization of this forum in the newest state of our region and continent reflects an important symbolism: This new Republic, despite the natural and comprehensible difficulties, has also the opportunity to build not only a democratic system, but above all and most importantly a constitutional democracy.

Gathered here today in the heart of the Balkans, a region with a significant history, culture and values, firmly committed toward its European perspective, we are reminded of the vital role that constitutional courts play in safeguarding democracy, protecting fundamental human rights, ensuring the supremacy of the rule of law.

The Balkans are integrated into the heart of Europe, and we all share our responsibility to contribute to a peaceful, united, stronger and just Europe.

The principle of "democracy under the rule of law" presumes first of all a democracy guided by the Constitution. Therefore, the constitutionality and safe implementation of the rule of law are vital to the integrity of our legal systems, institutions, and democratic values.

This conference, as an annual gathering of our Courts, reaffirms our common commitment to principles and fundamental democratic values that are essential to maintaining social cohesion, peace, and justice in our societies.

As you already know, Constitutional Court of Albania has been chosen in May 2024, to preside the Conference of European Constitutional Courts for three years. The mission of this Conference is closely aligned with the vision, spirit and aim of the Balkans' Forum, as they both seek to guarantee the respect for the law, promote dialogue and safeguard democratic principles and human rights.

Moreover, as countries in the Balkans are moving closer to the European Union membership or Euro-Atlantic integrations, (I seize this opportunity to share with you the good news of the opening of negotiations with Albania on Chapter 1), Constitutional Courts have a key role in ensuring that our national legal systems reflect the western democratic values.

This conference, as well as every activity of such nature, does not serve only as a model and practice of productive cooperation between our systems and institutions, which are quite necessary in order to deal with our common political, legal, economic and cultural challenges, but also as a joint effort of Western Balkans' citizens to guarantee equality and approach the same standards.

As President of the Conference of European Constitutional Courts, I invite you all to continue working in synergy with each other and with our Euro-Atlantic partners as well, since only together can we build stronger and more stable systems of democracy and governance, which are based on constitutional principles and values and guarantee the respect for fundamental human rights.

Esteemed Colleagues,

Taking advantage of this special occasion and the great hospitality shown by the Constitutional Court of Kosovo, I would like to bring to your attention that Kosovo's application for membership in the Conference of European Constitutional Courts is currently in process, and that this forum could also serve as an opportunity to underline its commitment to constitutional democracy, respect for the rule of law and individual rights, values which constitute the basis of the Conference of European Constitutional Courts and of its member Courts.

As the Founding Fathers of the American Constitution have emphasized, freedom is always threatened by tyranny and, therefore, it is more difficult to preserve and guarantee such freedom rather than to establish it. Constitution is the guarantor and protector of freedom, while the Constitutional Courts are its guardians.

Ladies and gentlemen,

This year's conference on the topic "Evolutions in Contemporary Constitutional Justice: Example of the Balkans Region", provides an excellent opportunity to reflect on significant developments in our societies nowadays.

The distance that separates us from the rest of the continent, the European Union, is not only political, economic, and cultural, but also legal in nature. As a matter of fact, it is through our commitment to constitutional values and protection of human rights that these distances can be narrowed, and potentially lead us to the same point.

I would like to quote Professor Kristaq Traja, who has said that "Constitutional justice is an intellectual revolution of civilization," since it implements in practice the equality among the values that lie at its foundation. Practically, such justice is based on the Constitution, however, the Constitution is not merely a law imposed by the government. It represents a concept almost similar to the law itself – namely, to the set of rules that are the outcome of the fundamental agreement to coexist, for the purpose of which laws are and should be enacted.

Constitutional justice in our countries is undergoing a transformative phase, adapting itself to profound social changes and international standards.

The more rapid, more efficient and with higher standards this transformation is, the more swiftly our societies will progress toward the ideal of a democratic society.

The needs of citizens for transparency, responsibility, accountability and protection of their rights continue to present a persistent challenge for our democracies, representing an integral component and a driving force of this transformation.

While constitutionalism is an expression of the rule of law, constitutional justice represents the mechanism of its implementation. The main challenge faced by our Constitutional Courts is to ensure and give effective justice to our citizens through constitutional justice. This is essential to prevent constitutionalism from becoming merely ornamental, which would be more detrimental than the absence of constitutional system itself. Therefore, we should make the Constitution a living instrument, making it tangible, and struggle to ensure that the supreme principles it enshrines are materialized and not reduced to a mere façade.

For this reason, such forums and activities are important and useful since they enable us to work together in a complementary way, in order to address the present and future challenges.

Our commitment and contribution to the speed, depth and dimensions of changes to the constitutional justice in our countries reflect our unwavering dedication to establish a democratic system, independence of powers and the rule of law.
I would like to reiterate my deep gratitude and appreciation to the Constitutional Court of Kosovo for the outstanding organization of this conference.

The meticulous planning and commitment to this event reflect the great importance that the new Republic of Kosovo attaches to the role of Constitutional Court, in guaranteeing justice and functioning of the democratic system.

To conclude, please allow me to reaffirm the great responsibility that we bear as constitutional judges.

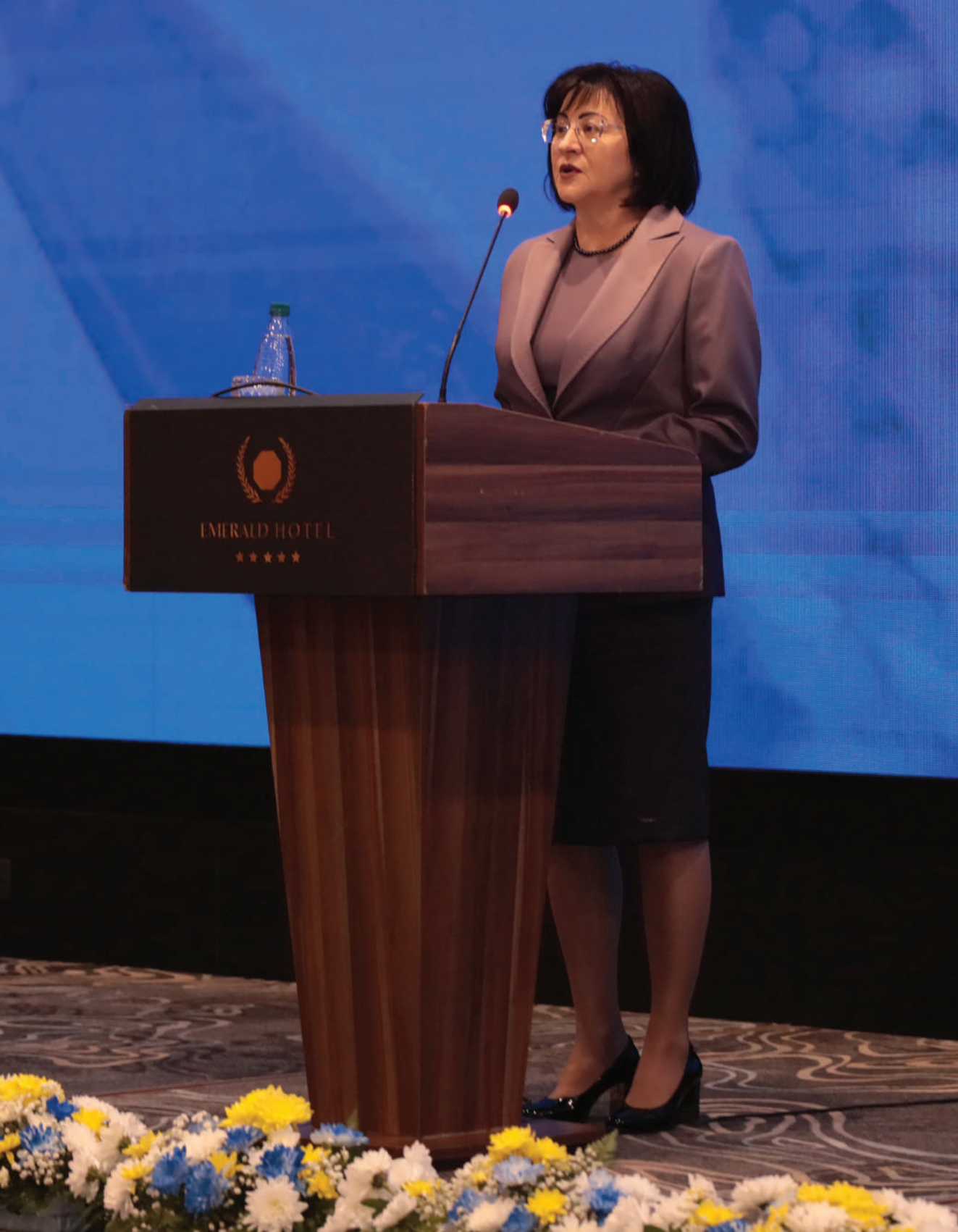
I am quite convinced that discussions we are having here today will be enriching and constructive, further contributing to the consolidation of constitutional justice in our respective countries, as a response to the demands of our citizens and the aspirations of our peoples.

Let us all work together in order to ensure constitutional justice, as a means of effectively protecting fundamental rights, towards a future where all the citizens are equal before the law, where no one stands above the law, and no one is below it.

Constitution belongs to the state, but in the first place it belongs to the citizens. It is very significant that many constitutions, including ours, begin with the words "We, the people...", which implies that the Constitution, the laws and the government established on their basis, derive from the citizens and serve to them.

The Constitution represents an agreement among all the members of a community, to uphold and share those values worthy to human beings.

Thank you!


EMERALD HOTEL

OPENING REMARKS OF BALKAN CONSTITUTIONAL COURTS FORUM

Ms. Pavlina Panova

President of the Constitutional Court of the Republic of Bulgaria

Dear Presidents of Constitutional Courts,
Dear Constitutional Judges,
Dear Colleagues,

It is an immense honour for me to address the members, observers, and guests of the Balkan Constitutional Courts Forum once again.

First of all, I would like to express my gratitude and respect for our kind hosts, the Constitutional Court of Kosovo, for having us here in Pristina for the Second Annual meeting of the Forum. It is a true pleasure to be here, among allies and friends, and thank you President Caka-Nimani for making this event happen.

Last year, when we gathered in Sofia, we all declared our most sincere intentions to lay the foundations of a lasting organisation of the constitutional courts of the countries from the Balkan region. I am delighted that one year later, we are still very much dedicated to this purpose, and the Forum is beginning to establish the working rhythm of a functioning vital organisation, as has always been my hope and true belief.

As we come together, we are not just representatives of our respective courts, of individual nations or legal systems. We are guardians of constitutional principles that serve as the bedrock of justice, democracy, and the rule of law – the pillars of modern civilization. Our work ensures that the fundamental rights of the individual are upheld, and the delicate balance between state power and citizens' freedoms is preserved.

In this moment of unprecedented global challenges, marked by rapid technological advancement, evolving societal norms, and increasing demands for accountability and transparency – the role of constitutional courts has probably never been more vital. The decisions we render have far-reaching implications, not only for the legal frameworks of our respective countries but for the future of human rights and democratic governance worldwide.

The topic chosen for this year's Annual Meeting, centered around the Evolutions in Contemporary Constitutional Justice, is an ever-important subject which gives vast field for reflection and exchange of experience. I am certain that during the panels we will hear very interesting contributions and will engage in vivid discussions. As we embark on these discussions, we should do so with the recognition that constitutional justice is not static. It is, rather, a living and breathing entity that adapts to the changing needs and aspirations of society.

Over the past few decades, we have witnessed profound shifts in constitutional interpretation, and these shifts have had a deep and far-reaching impact on the way we understand governance, democracy, and human rights in our modern world. As jurists and supreme guardians of constitutionalism we are all amply aware that constitutions are not merely legal texts, but rather, foundational frameworks that reflect the values, principles, and aspirations of the societies they govern. As the world becomes more interconnected, more diverse, and more complex, the role of constitutional justice in upholding these foundational principles – such as the protection of individual rights, the balance of powers, and the promotion of the rule of law – becomes ever more crucial, hence our task becomes ever more urgent.

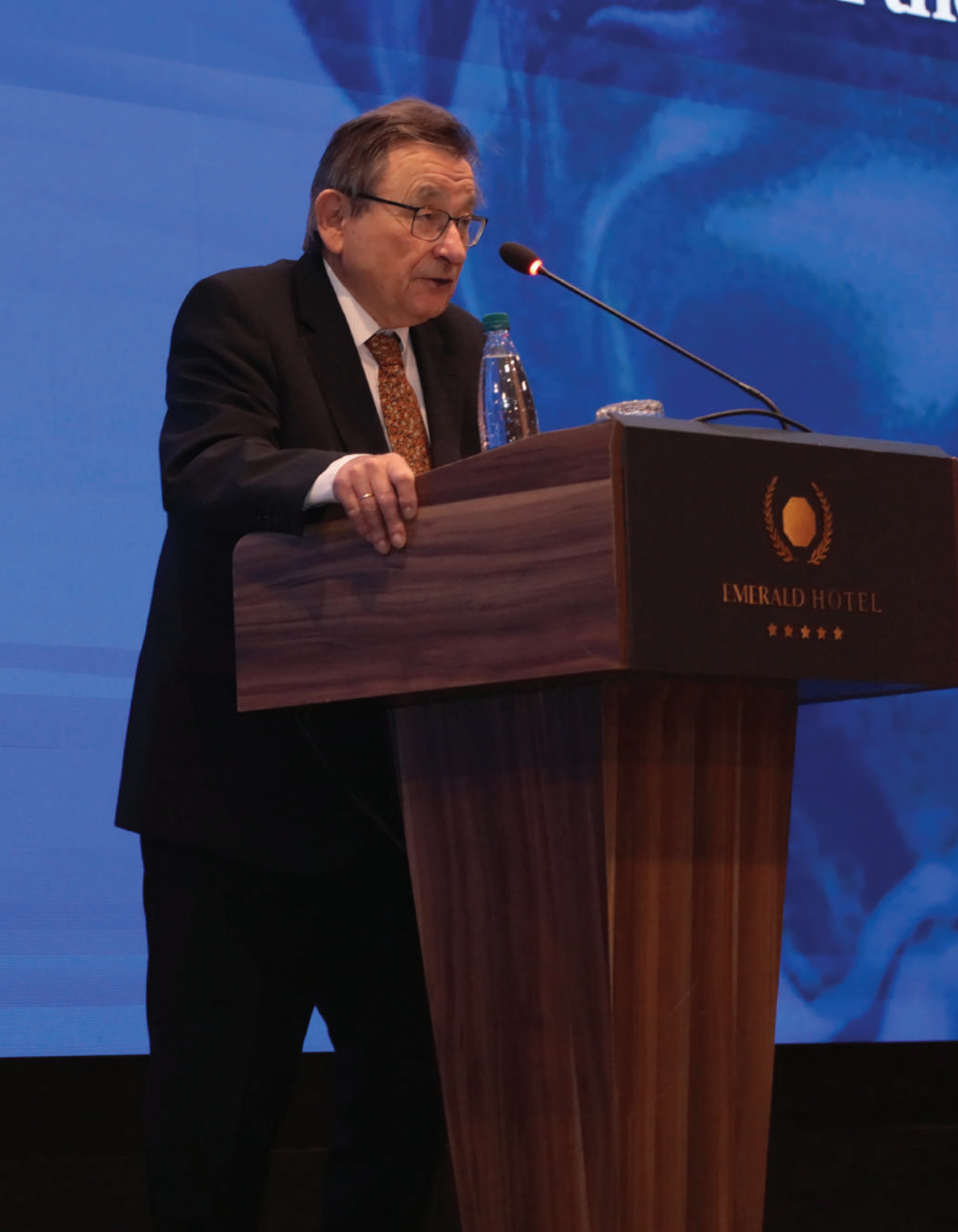
In this regard, the Balkan region, due to our somewhat unique historical fate, geo-political situation, and cultural idiosyncrasies, provides an even greater variety of examples and points for discussion.

Of course, beyond the technical aspects of constitutional law, this conference is also an opportunity to foster greater understanding and collaboration among our institutions. In a world that is becoming increasingly interconnected, the challenges we face often transcend borders. The lessons we share, and the experiences we exchange, are vital in shaping not only our individual legal systems but the broader framework of constitutionalism in the Balkan region, and even on a global scale.
As judges, we are entrusted with the responsibility to interpret and safeguard the social contract between the state and its citizens. We must strive to ensure that justice is not only done but seen to be done – impartially, fairly, and transparently. In doing so, we affirm the trust that society places in us and strengthen the legitimacy of our constitutional orders.

I look forward to all of us engaging fully in the discussions, to sharing our insights and experiences, and to taking full advantage of the opportunity to learn from one another. The challenges before us may be complex, but together, we are more than capable of addressing them.

With that, I would like to express my sincere gratitude to all of you for your dedication to the Balkan Constitutional Courts Forum in particular, and to upholding the values of constitutional justice in general, and I look forward to a productive and inspiring conference.

Thank you.


EMERALD HOTEL

OPENING REMARKS OF BALKAN CONSTITUTIONAL COURTS FORUM

The Role of Constitutional Justice in Contemporary Constitutionalism

Prof. Rainer Arnold, University of Regensburg
Director of the International Congresses on European and Comparative Constitutional Law

Dear Madam President of the Constitutional Court of Kosovo, Excellencies, Ladies and Gentlemen,

The Balkan Constitutional Courts Forum is holding its second meeting today in Prishtina. This is an expression of a lively and open constitutionalism in an important and future-oriented region! Thank you very much for the invitation. It is a great honor and pleasure for me to be able to begin this Conference with some reflections on the role of constitutional justice in today's constitutionalism.

Constitutional jurisdiction is the engine of constitutionalism. When Charles Evans Hughes, the later President of the US Supreme Court, said the much-quoted sentence at the beginning of the 20th century: "The constitution is what the judges say", this documents the special significance of constitutional jurisdiction, which continued in Austria in 1920 with the emergence of an independent constitutional jurisdiction conceived by Hans Kelsen and which has consolidated and spread worldwide in the second half of the 20th century to the present day.

Constitutional justice, whether in the original form practiced by the American SC as early as 1803 in the famous Marbury v. Madison case, or through special constitutional courts, is today an integral part of constitutionalism, indeed, some say, the highest perfection of the rule of law.

Current constitutionalism is characterized by 4 essential tendencies which it is the task of constitutional jurisdiction in particular to clarify and strengthen. These tendencies are:

1. the individualization
2. the constitutionalization
3. the internationalization and
4. the differentiation of the exercise of power (in a horizontal and a vertical sense; between public and private actors).

Individualization ,the first tendency, indicates the emancipation of the individual in law and also in constitutional law; *human dignity* is seen as the highest central value in state and society, regardless of whether this is explicitly written in the constitution (as is increasingly the case in the new constitutions) or not. It is part of the *essence* of a genuine constitution, a constitution which is human-centered, anthropocentric.

As the philosopher Immanuel Kant says: man, the human being, must be recognized as a subject and must never be turned into an object, an instrument for another purpose. Human dignity is the very foundation of the constitutional order.

Human dignity includes *human freedom*. Human freedom *as a principle* is part of the constitutional order. *Restriction* is a necessary part of freedom as it is freedom in the community of the state. However, restriction must be justified by a legitimate community interest, restriction must be necessary and individually tolerable, that is: *proportionate*. Furthermore, the *essence of freedom* must not be touched. It is evident: The human being is not an isolated individual in the state community, but is, as the German Federal Constitutional Court has put it, “community-related and community-bound”.

The third of the anthropocentric fundamental values is equality, as the constitutional values are due to all people by virtue of their humanity. This is also a consequence of human dignity.

All other fundamental rights are derived from these three fundamental values as specifications of the principle of freedom, whether they are written or unwritten in

the text of the constitution. And it should be emphasized that the central institutional value, democracy, is a case of human political freedom and self-determination, closely linked to human dignity. Democracy is not just a matter of numbers, of the numerical majority; it is also and above all an orientation towards values the values which are embodied in the Constitution.
It is the task of the constitutional courts to recognize the reference of the constitution to the human being and to interpret the constitution in accordance with its ideal foundation and thus in the light of the three values mentioned.

The second trend in contemporary constitutionalism is *constitutionalization*. The essential content of this tendency is the ever-increasing importance of the constitution and its values. The primacy of the constitution is progressively recognized and is conceptually linked to the rule of law. Here we can also see a connection between democracy, the rule of law and the constitution. As the French Conseil constitutionnel classically formulated it in its 1985 decision Nouvelle Calédonie: "The general will of the people is expressed by legislation only if it is in harmony with the constitution" ("la loi n'exprime la volonté générale que dans le respect de la Constitution").

In this context it is also important how to interpret the Constitution. The *interpretation* is necessarily *evolutionary* because a Constitution is a "living instrument" that is not static but dynamic. The constitutional courts must adapt, by interpretation, with all due caution, the meanings of the constitutional provisions to the changes that occur over time. They must investigate the *objective will* of the constitutional norm as it is at the time of interpretation and not as it may have been at the time of the creation of the constitution, possibly at a time long ago. Especially the value part of a constitution, the fundamental rights, are subject , at least to a certain degree, of change in meaning, which the court must determine.

However, and this is very important, the core values of the constitution relating to human beings, human dignity, the principle of human freedom and equality must not be changed in their basic functional content. Human dignity is an anthropological axiom that cannot change with its consequences of freedom and equality.

Especially in the emerging age of new technologies, it is important that the courts recognize these developments as a progress and also integrate them into the constitution, for example by accepting fundamental rights in their digital dimension and allowing the use of artificial intelligence, at least to a controllable extent, for the

protection of constitutional values. However, it should be noted that the recognition of technological progress does not jeopardize the core values of the constitution. Despite all technological openness, these core values are and remain barriers against the threat of technological dominance over humans.

Constitutionalization as a tendency also means that ordinary statutory law is permeated by constitutional law; legislation is only compliant with the legal system if it is compliant with the constitution. The interpretation of ordinary law in the light of the constitution is an imperative of today's constitutional state. Legality and constitutionality are linked and belong together. The rule of law means recognizing the law as the sole basis and orientation for the exercise of public power, the law in its hierarchical order and in its assignment to the three powers, which limit and functionally balance each other. Obviously, the rule of law is also necessarily based on constitutional values as its goal is to realize justice.

Despite occasional setbacks, today's tendency of constitutionalization is also, and mainly expressed by a comprehensive *judicial* review of the exercise of power, of politics, namely of the legislature. This genuine task of constitutional jurisdiction is not an inadmissible political activity, it is not so-called negative legislation, but only a *correction of the legislature* in such a way that the order intended by the constitution is restored, this means that political decisions expressed in legislative acts are brought back into harmony with the constitution. The political decision as such lies solely in the hands of politics, but the legal examination of the conformity of politics with the constitution lies in the hands of the courts.

The *third tendency* is that of internationalization. Today we live in a globalized world, even if there have recently been tendencies towards renationalization to a limited extent. The state of today is an *open state*; the constitution is oriented towards international law and its interpretation should be as harmonious as possible with the concepts of the international community. In the area of human rights in particular, international legal developments are the benchmark for interpreting the corresponding national constitutional guarantees.

Within the Council of Europe, for example, the interpretation of the national fundamental rights of the member states on the basis of the European Convention on Human Rights and in the light of the case law of the Strasbourg Court is a particularly striking sign of open statehood. This is explicitly stated in a number of

constitutions or, as in Germany, has been recognized as a principle of interpretation by the case law of the Constitutional Court.

The special feature of the Member States of the European Union is that this supranational legal order takes precedence over national law and, at least in the view of the European Union itself, also over national constitutional law. This has the consequence that national constitutional law is to be interpreted in harmony with the concepts of the European Union as much as possible and that, as far as fundamental rights are concerned, these are even replaced by supranational fundamental rights, by the EU Charter of Fundamental Rights, insofar as EU law is executed by a member state.
This far-reaching internationalization has given rise to a certain counter-tendency, namely a return to the country's own national constitutional identity, the core area of the national constitutional order.

In German constitutional law, this term was defined by the Federal Constitutional Court on the basis of the so-called eternity clause in Article 79 (3) of the Basic Law. This means constitutional identity is equated with those matters which, due to their fundamental importance for the state, may not be changed or removed even by a formal constitutional amendment.

In general, it can be said that the core area of a constitution is to be respected by the supranational legislator. Article 4 of the Treaty on European Union stipulates this. But in defining the country's constitutional identity, the state's current conditionality, resulting from its openness to the international and supranational community, must be duly taken into account.

The interpretation of the national constitution in favor of European law, as elaborated by the German Federal Constitutional Court, is also part of the constitutional identity. Particularly in the area of the protection of fundamental rights, we must regard the protection of fundamental rights, which is also distributed at different levels, as a *reinforcement* and not as a weakening or fragmentation of national protection of fundamental rights.

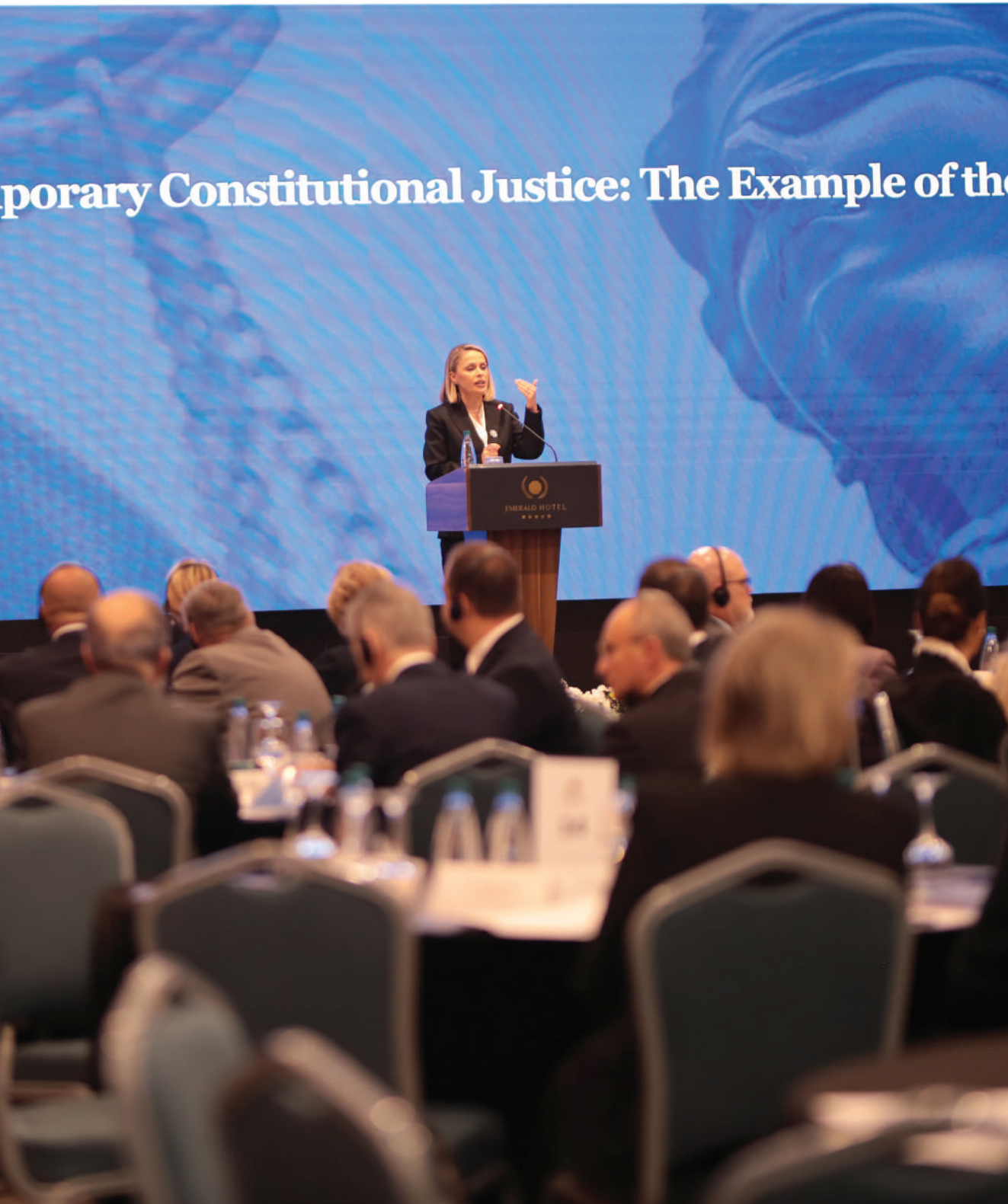
A few brief remarks, however, on the *fourth tendency* of constitutionalism mentioned, the *differentiation of power:*

Differentiation of power is an essential component of the concept of separation of powers, which is indispensable for a rule of law-based state. The *vertical* separation of powers is well-developed in federal and regional states, and the autonomy of the local community also exists in more centralized states. As far as the *horizontal* separation of powers is concerned, two phenomena are particularly recognizable:

(1)The transfer of parliamentary power to the executive, a frequent and often indispensable process in times of crisis such as the pandemic. Insofar as this was and is necessary for reasons of rapid action to combat the pandemic, this must be regarded as constitutional if the other requirements of the rule of law are met.

(2)The second phenomenon is the cumulation of private power, in particular linked to the progress of modern technologies: Power is potentiated in private companies that operate social networks and platforms. In many respects, their influence is comparable in its intensity to that of state power. The principles of the rule of law and, in particular, fundamental rights must also apply to these private actors, as the individual is possibly threatened by them. The extension of constitutional safeguards to powerful private actors is therefore an increasingly recognized need.

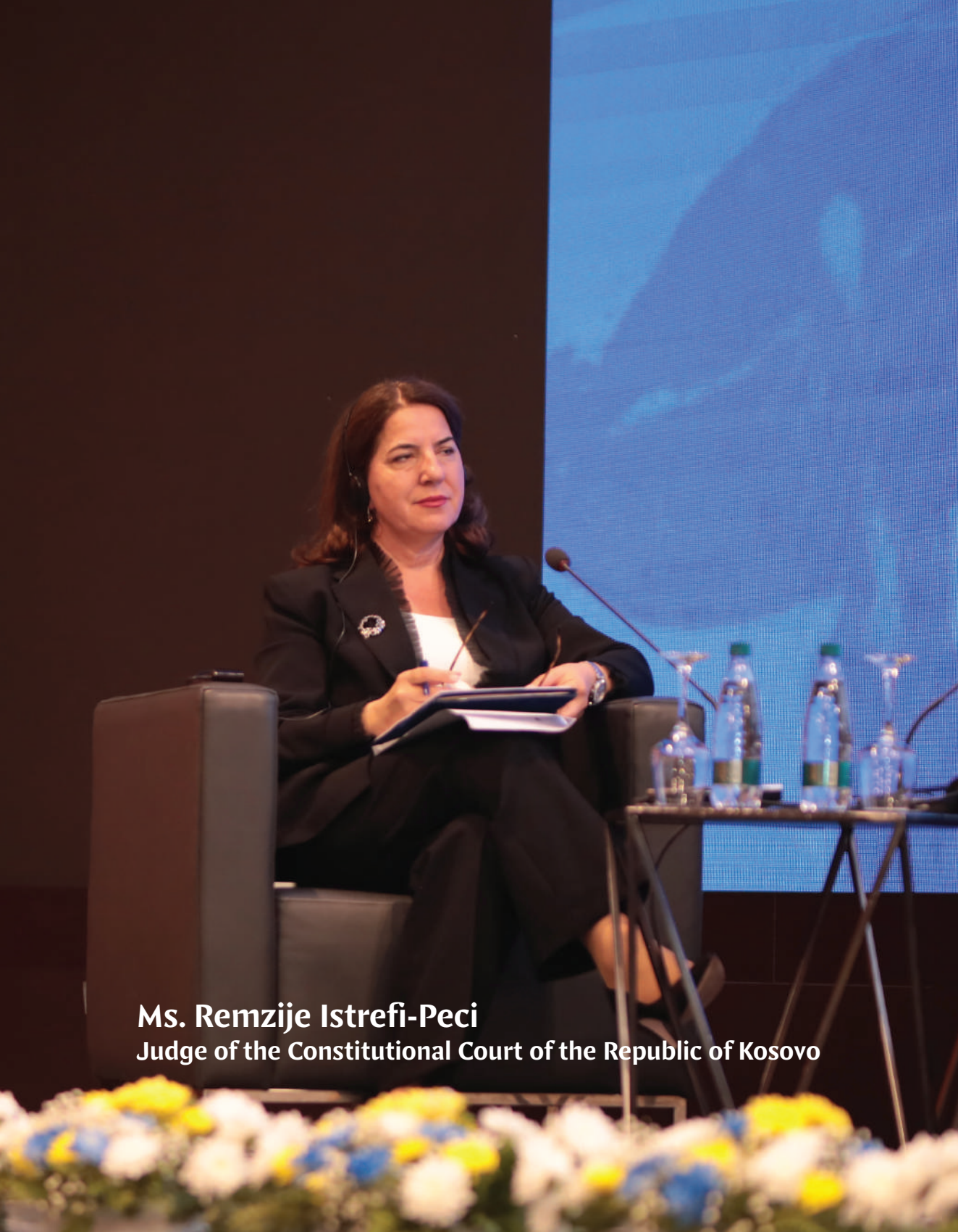
Constitutional courts have the task of recognizing the modern developments of constitutionalism, defending and preserving the core content of the constitution as it relates to the individual, interpreting the constitution as a living instrument, and, in particular, promoting the embedding of the constitution in the international context in a manner that duly preserves the constitution's own tradition and identity.


porary Constitutional Justice: The Example of th
EMERALD HOTEL

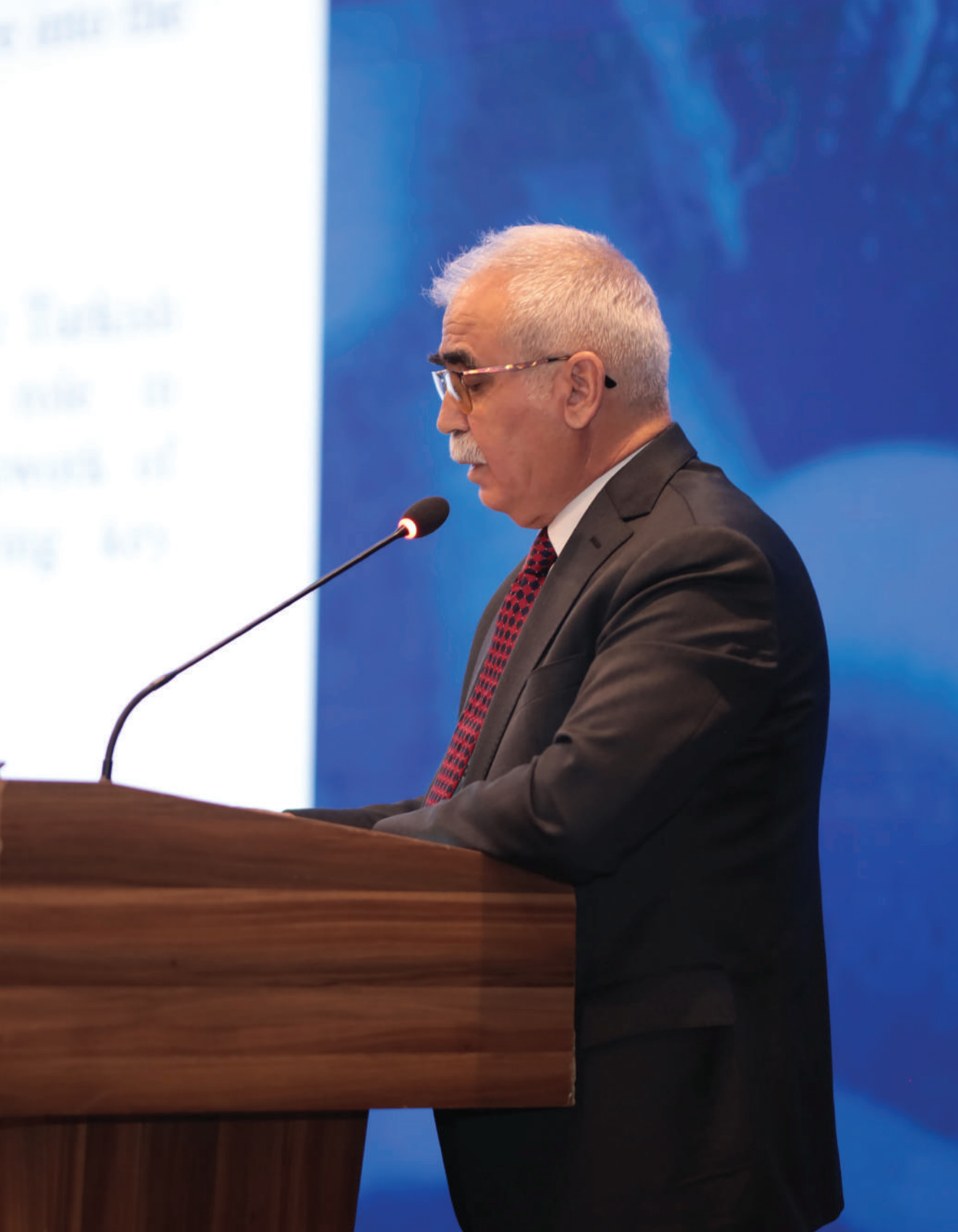
SESSION I

CONSTITUTIONAL COURTS AS GUARDIANS OF DEMOCRATIC VALUES AND PRINCIPLES:

Balancing Executive, Legislative and Judicial Powers in Modern States



Ms. Remzije Istrefi-Peci
Judge of the Constitutional Court of the Republic of Kosovo



The Role of the Turkish Constitutional Court in Protecting Democratic Values under the Principle of Separation of Powers

Mr. Kadir Özkaya

President of the Constitutional Court of the Republic of Türkiye

Distinguished colleagues,
Ladies and gentlemen,

It is a great pleasure to be here today among such distinguished participants and to have the privilege of addressing this esteemed group of colleagues.

I would like to express my gratitude to the Constitutional Court of Kosovo and its esteemed President, Mrs. Gresa Caka-Nimani, for the kind invitation and heartfelt hospitality within the scope of this organisation.

"**The Turkish Constitutional Court's Role in Upholding Democratic Values within the Framework of the Separation of Powers**" is the topic I will strive to cover in the allocated time of fifteen minutes for presentations.

As I commence my remarks, I would like to share a proverb that is deeply rooted in Turkish culture.

Justice that is not predicated on power is incapable, and power in the absence of justice is tyrannical.

Distinguished participants,
As is widely recognised, the separation of powers presupposes that the State organs, namely the legislature, the executive and the judiciary, be constrained by one another in order to effectively administer justice. In other words, it entails the delegation of legislative, executive and judicial responsibilities within a State to organs that are independent of one another, elected through separate processes, and governed by a system of 'checks and balances' amongst them. According to this principle, the bodies that enact the law, implement it, and resolve disputes arising from its implementation should be distinct within the organisation of the State.[1]

My esteemed fellow colleagues, elections represent the primary element in advanced democracies. Election results determine the formation of governments. In elections, having the majority is crucial. However, historical facts have shown that democracy is not solely confined to reflecting the will of citizens through elections, but it also encompasses upholding of the rule of law and the protection of human rights and freedoms. For this reason, in democracies, mechanisms to limit the power of the majority, such as subjecting them to rule of law, are envisaged, for the purpose of protecting rights and freedoms. This is because the universal, shared values grounded in human rights and the rule of law are indispensable components inherent in democracy. Therefore, in democracies, these values must be necessarily afforded protection by way of establishing independent courts and furnishing adequate legal framework and safeguards.

Following the World War II, in contemporary states, the constitutional courts have assumed an important role as the guardian of democratic principles, with a significant responsibility in upholding these values and maintaining the democratic social order.

The *raison d*'être of constitutional courts, which are primarily tasked with reviewing the constitutionality of the legislative and executive acts, is to safeguard and uphold fundamental values, principles, procedures, and provisions enshrined in constitutions. The constitutional courts were instituted for contributing to the overarching goal of ensuring justice, both for individuals and for the State.

In this sense, it can be stated that the main task of constitutional courts is to ensure the functionality of constitutions, which are called social contracts formulated to

[1] Erdoğan Teziç, Anayasa Hukuku (*Constitutional Law*), Beta Yayınları, İstanbul, 2003, p. 393.

determine the exercise of sovereign power within the framework of democratic principles, by securing fundamental rights and freedoms.

On the other hand, despite various constitutional and statutory provisions regarding the protection and upholding of fundamental rights and freedoms, the role of the constitutional courts as the constitutional review body cannot be overlooked in this regard.
Nowadays, the majority of democratic nations have established constitutional courts tasked with reviewing the constitutionality of legal norms. Besides, the constitutional complaint or individual application, a mechanism which enables individual access to the constitutional courts on an alleged violation of any constitutional rights, has become increasingly widespread, thus becoming an integral component of constitutional justice.

The preamble of the Turkish Constitution, underlining the absolute supremacy of the will of the nation, states that sovereignty is vested fully and unconditionally in the Turkish Nation, and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the principles of liberal democracy enshrined in the Constitution and the legal system instituted according to the requirements thereof. It also underscores the principle of the separation of powers. Additionally, Article 2 of the Constitution lays down that the Republic of Türkiye is a democratic, secular and social state governed by rule of law.

Accordingly, the Turkish Constitution manifests itself as a basic law that is underpinned by constitutional democracy, in consideration of the principles and concepts referred to therein, namely 'democratic, secular and social state governed by rule of law', 'the binding nature and supremacy of the Constitution', 'human rights and freedoms', 'separation of powers', and 'judicial review'.

As set forth in the currently-in-force Constitution, the legislative power is vested in the Grand National Assembly of Türkiye, whereas the executive power and function shall be exercised and carried out by the President of the Republic, and the judicial power shall be exercised by independent and impartial courts, all of which shall be exercised on behalf of the Turkish nation.

In this regard, it should be noted that in the constitutionality review of legislation, the 'European Model', which is called 'centralised system of constitutional review'

or 'special court system', is being employed in Türkiye. The Turkish Constitutional Court, established by the 1961 Constitution, commenced its operations in 1962.

The history of constitutional courts demonstrates that the Turkish Constitutional Court is among the oldest tribunals with a vast amount of experience in the world. It ranks as the fourth constitutional court globally to have operated uninterruptedly. In this respect, having been active since 1962, it stands as one of the most experienced constitutional courts worldwide. The Court, which celebrated its 62nd foundation anniversary this year, has assumed an important role in ensuring the rule of law and conducting the constitutionality review of norms. It keeps up the implementation of the universal principles of constitutional jurisdiction by protecting the citizens' rights and freedoms through the individual application mechanism that was introduced in 2010.

Two important amendments, the 2010 and 2017 amendments, to our current Constitution have profoundly reshaped the course of constitutional jurisdiction in Türkiye. Thereby, the scope of the review conducted by the Turkish Constitutional Court was broadened, and the Court has been vested with new powers, thus undergoing a restructuring process.

Following the 2010 amendment on the introduction of the individual application mechanism, there has been a significant shift in constitutionality review decisions towards the democratic state of law and human rights, in parallel to the examination of individual application cases. That is because the constitutional amendment in question both enabled the Turkish Constitutional Court to undertake a pivotal role in the protection of individual rights and freedoms, and reinforced its institutional structure by furthering its democratic legitimacy. These amendments have turned the Court a more independent and effective review body in pursuit of human rights and democratic stated governed by the rule of law.

The 2010 constitutional amendment made a substantial contribution to the constitutional jurisdiction and the legal system by enabling the adoption of the individual application mechanism in Türkiye. The competence to adjudicate individual applications has tasked the Court with the mission to protect and uphold fundamental rights and freedoms in cases of complaints resulting from acts and actions performed by those wielding public power. The Constitutional Court has been successfully fulfilling this mission in recent years. Through its decisions, the Court raises the sense of freedom in the Turkish law to universal standards. This

novel remedy, which enables individuals to bring their alleged violations by directly applying to the Constitutional Court, has facilitated the examination of whether the constitutional rights have been infringed and has thus ensured the realisation of theoretical constitutional safeguards also in practice. Thereby, the interplay between individuals and constitution is manifested concretely, and the Constitutional Court has gained the opportunity to directly address alleged violations through the applications filed by individuals.

Through the judgments delivered by our Court in individual applications, significant contributions have been made towards the protection of fundamental rights and freedoms. Furthermore, it must be noted that the individual application mechanism has facilitated the accelerated implementation of universal human rights standards at the national level, thereby triggering the more effective enforcement of international human rights norms within domestic law. Additionally, following the introduction of the individual application mechanism, the number of cases filed before the European Court of Human Rights (ECHR) against Türkiye has noticeably decreased, and so have the violation judgments rendered by the ECHR against the latter. The individual application system in our country, which has been recognised by the ECHR as an effective remedy, is often cited as an example of good practice.

Distinguished Presidents, esteemed justices, and honourable participants,

The constitutional amendment of 2017 in Türkiye constituted a profound transformation of the government system. Throughout the transition to the presidential system, the Turkish Constitutional Court has handed down a series of landmark judgments that have played an instrumental role in safeguarding the principle of the separation of powers. The relevant constitutional amendment vested the Presidency with the authority to issue presidential decrees. In this regard, Article 148 of the Constitution conferred upon the Constitutional Court the authority to conduct constitutionality review of the presidential decrees both in form and in substance. Since that time, the Turkish Constitutional Court has articulated the guiding principles and essential criteria for the review of presidential decrees. The Court employs a two-tiered process in its constitutionality review of these presidential decrees. The **first stage**, referred to as the 'competence *ratione materiae*', entails an examination of whether the presidential decree was duly issued in accordance with Article 104 of the Constitution. **The second stage** is the '*review as to content*'. The objective of this review is to ascertain whether a presidential decree issued within the limits of jurisdiction is in accordance with the Constitution in terms of its content.

The Constitutional Court's review of presidential decrees holds paramount importance in upholding the principle of separation of powers between the legislature and the executive within the Presidential government system. The Court has consistently underscored that, in exercising his regulatory powers, the President must not infringe upon the legislative competence of the Grand National Assembly of Türkiye and must strictly adhere to the boundaries of executive power. In its decisions concerning the review of Presidential Decrees, the Constitutional Court has established key principles that define the legal framework of the Presidential government system.

In its decisions, the Turkish Constitutional Court also emphasises the importance of judicial independence, underscoring the impartial stance of the judiciary as regards the legislature and the executive. According to the Court, judicial independence must be upheld not only in relation to all institutions and bodies within the state structure but also at the level of individual actors. Accordingly, the notion of judicial independence entails "*the judge's ability to decide freely, without fear or hesitation, or in the absence of an external influence other than the requirements of the law*" (The Court's decision no. E.2021/83, K.2022/168, 29 December 2022, § 11). As reiterated in the decisions of the Turkish Constitutional Court, judicial independence is the primary and most effective safeguard of all other fundamental rights and freedoms, as well as the right to a fair trial (The Court's decision no., E.2022/72, K.2023/3, 05 January 2023, § 24).

In its jurisprudence, the Turkish Constitutional Court endeavours to strike a balance among the legislative, executive, and judicial organs, in line with the principle of separation of powers. In its constitutionality review of laws, the Court acts to prevent the executive from exerting undue influence over the legislative authority, while simultaneously aiming to secure the independence of the judiciary. Notably, in the aftermath of the 2017 constitutional amendments, the review of presidential decrees has become a pivotal safeguard in upholding the separation of powers. Through this review process, the Court seeks to maintain the democratic balance by preventing any undue intervention of the executive into the legislative sphere.

A review of the statistics on the decisions of the Turkish Constitutional Court in the context of its role in safeguarding democratic values within the framework of the separation of powers reveals the following key findings.

DECISIONS RENDERED IN CONSTITUTIONALITY REVIEW PROCESS

Over the past five years, the Constitutional Court has examined 3,913 provisions within the scope of constitutionality review, and 1,572 of these provisions have been annulled. The majority of the annulment decisions were based on the grounds that the annulled provision constituted an unlawful interference with a right or freedom safeguarded under the relevant articles of the Constitution.

DECISIONS RENDERED IN INDIVIDUAL APPLICATION PROCESS

The Court have so far received a total of 635,860 individual applications, and 530,907 of these applications have been adjudicated. As of today, there are 104,953 pending applications before the Court. Out of the 530,907 finalised applications, in 56,443 cases the Court held that the proceedings had not been concluded within a reasonable time and awarded compensation to the applicants accordingly. In 18,838 applications (with a total of 19,993 violations), it was found that at least one right or freedom enshrined in the Constitution had been subject to an unconstitutional restriction by public authorities. In these judgments, the Court ordered a retrial, compensation, or both, as a redress for the established violations.

Right to a fair trial	5,511
Right to property	4,608
Freedom of expression	4,370
Right to respect for private and family life	1,612
Right to hold meetings and demonstration marches	1,436
Prohibition of ill-treatment	817
Right to personal liberty and security	420
Right to an effective remedy	344
Right to life	254
Prohibition of discrimination	140
Right to protect the corporeal and spiritual existence	136

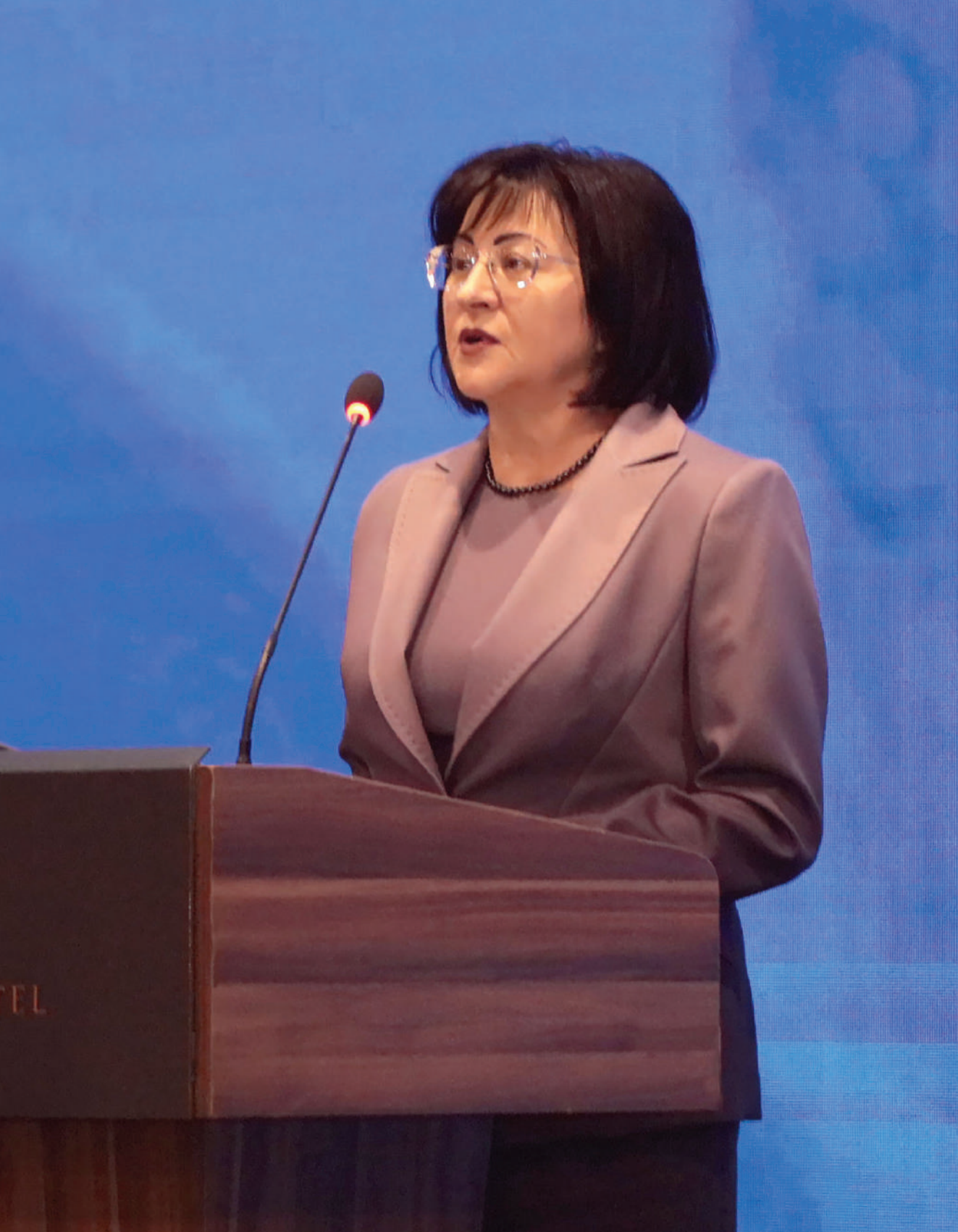
Right to trade-union freedom	131
Freedom of association	88
Nulla poena sine lege principle	49
Right to education	43
Right to vote, to stand for election, to engage in political activities	18
Freedom of religion and conscience	12
Right to individual application	3
Right to seek judicial review of the judgment	1
TOTAL	19,993

Distinguished participants, as I conclude my remarks, I would like to reiterate one final point. As of today, approximately four and a half million refugees are sheltered in Türkiye. This issue presents a number of challenges, particularly in terms of national security. However, in the cases brought before the Court concerning this matter, no distinction is made between citizens and non-citizens. Refugees are afforded the same consideration, and their rights and freedoms are subject to the same evaluation as those of our citizens.

Esteemed colleagues, on behalf of myself and the justices of the Constitution Court of the Republic of Türkiye, I would like to extend my warmest regards to you all and express my sincerest hope for a renewed commitment to moral values and justice, for the benefit of humanity as a whole and for the establishment of a fair and lasting peace that prevails in every corner of the world. I would also like to extend my heartfelt wishes for a healthy and prosperous life, in the company of your loved ones.

Thank you for your attention.

Kadir ÖZKAYA
President
Constitutional Court of the Republic of Türkiye



The Protection of the Separation and the Balance of Powers in the Jurisprudence of the Constitutional Court of the Republic of Bulgaria

Pavlina Panova
President of the Constitutional Court of the Republic of Bulgaria

There are values and principles that stand at the heart of modern constitutionalism. The separation of powers is undoubtedly one of them. Limiting the possibility of state power being concentrated in the hands of a single body is both a prerequisite for the existence of constitutional justice and a principle to be preserved by constitutional courts. The principle of separation of powers is explicitly provided for in the 1991 Bulgarian Constitution. Building on a fundamentally different value base from the previous 1971 Constitution, which established the principle of unity of State power, a Fundamental Law meeting the standards of democratic and liberal constitutionalism was established in 1991.

The separation of the executive, legislative and judicial functions of the State between different organs is fundamental to the protection of the fundamental rights of citizens, for which the Constitutional Court is the guarantor.

The Constitutional Court of the Republic of Bulgaria has been consistent in its jurisprudence in its understanding that the principle of separation of powers is a principle guaranteeing balance between the different organs of the State, without allowing the possibility of establishing a hierarchy between them (1). A fundamental value of any modern democratic and liberal state, this principle that forms the core of modern Bulgarian constitutionalism enjoys a particularly heightened constitutional stability, which the Constitutional Court carefully ensures (2).

1. Principle guaranteeing balance between State organs, without the possibility of hierarchy between them

The Constitutional Court in 2005 has stressed that "the principle of separation of powers in the Bulgarian Constitution does not create an insurmountable barrier between the constituted powers and should not be understood as an absolute separation of each of the three powers, the existence of each of them for itself and its isolation from the other two. On the contrary, it ensures both mutual control and a reasonable relationship between them, so that independence does not exclude control, deterrence and cooperation, and control and deterrence do not exclude either independence or interaction and influence" [1]. The Court adheres to the understanding that "the separation of powers is a method for the optimal functioning of the supreme State power and a means of preventing possible arbitrariness on the part of the State authorities, which has repercussions on the rights of citizens"[2].

The three branches of government are on an equal footing before the norms of the Constitution and statutory laws. The scheme of the separation of powers is such that no primacy is given by means of law to any of the executive, legislative and judicial powers. The legal system does not confer preferential treatment on any power at the expense of another. The Constitution treats equally the executive, legislative and judicial powers, placing them in an equally binding subordinate position to its provisions. The three powers are equal in their duty to faithfully execute the Constitution and the statutory legislation and to promote the legally

[1] Decision No. 8 of 2005 in Constitutional Case No. 7/2005, Decision No. 8 of 2006 in Constitutional Case No. 7/2006, Decision No. 10 of 2021 in Constitutional Case No. 8/2021, Decision No. 15 of 2022 in Constitutional Case No. 10/2022

[2] Decision No. 6 of 1993 in Constitutional Case No. 4/1993, Judgment No. 10 of 2021 in Constitutional Case No. 8/2021

sound governmental organization of society. In this sense, none of them can have primacy and supremacy in constitutional terms[3].

The Constitutional Court considers in two cases from 2020 and 2021 that it is constitutionally intolerable for any of the organs of the legislative, executive and judicial power to go beyond the constitutionally defined limits of competence, to refuse to exercise the powers conferred on it or to delegate its constitutional powers to another, as well as to take away constitutionally provided powers of the state bodies[4]. The Constitutional Court had the occasion to proclaim explicitly that it is constitutionally unacceptable to "alter the constitutionally established balance of powers by taking away powers that the Constitution has vested in the executive. This is in direct contradiction with the principle of the separation of powers (Article 8 of the Constitution), which is enshrined in the Basic Law. [...] The National Assembly's seizure of constitutional functions that belong to the Council of Ministers violates the principle of the separation of powers, the rule of law and the supremacy of the Constitution"[5].

2. Separation of powers - a principle enjoying a high degree of constitutional protection

The Constitutional Court draws attention to the fact that the Constitution establishes a certain balance between the powers of the state bodies that are fundamental to the organization and exercise of public power, including the National Assembly, the Council of Ministers, the President of the Republic and the organs of the judiciary, in such a way that they balance and restrain each other in the exercise of state power. In Bulgaria, only a Grand National Assembly, specifically convened to amend the constitution and to adopt a new one, following an extremely complicated procedure, can change the balance of constituted powers, because it could change the form of government (Article 158 point 3 of the Constitution). Interpretative Decision No. 3/2003 in Case No. 22/2002 sets out the dimensions of the "form of government" that each National Assembly must apply as substantive criteria and limit to its own constitutional amendment competence when adopting constitutional changes. The

[3] Decision No. 10 of 2021 in Constitutional Case No. 8/2021

[4] Decision No. 10 of 2021 in Constitutional Case No. 8/2021, Decision No. 6 of 2020 in Constitutional Case № 10/2019

[5] Decision No. 4 of 2008 in Constitutional Case No. 4/2008

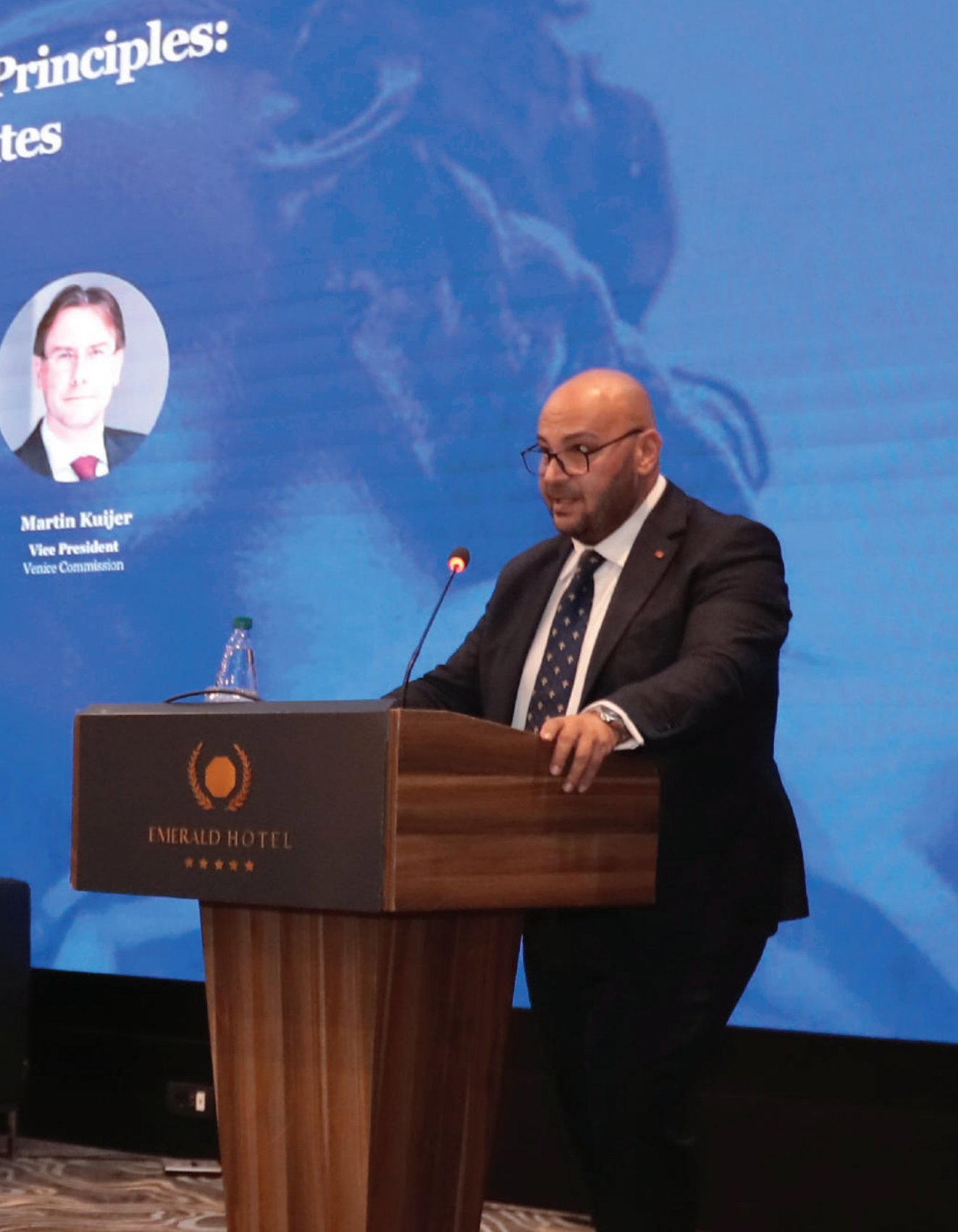
Court states that only the Grand National Assembly is granted the competence to amend the fundamental principles, the main constitutional institutions, their place in the state hierarchy, the order of their constitution and their mandates, the activity specific to each of them, the powers assigned to them and the balance between them, and holds that "it is not permissible for an ordinary National Assembly to make a change in the organization, functions and status of the main constitutional organs that carry out state governance as defined by the Constitution." The essential point in this case is that the "objects" referred to in the Basic Law that falls within the competence of the Grand national assembly are defined in the quoted decision as "that on which the State is built", i.e. as the foundation of the State.
The basic organs of the State established by the Constitution, their place, formation and structure, as well as the basic powers conferred on them and the balance established between them, are within the scope of the essential content of the Constitution defining its identity, and it is not permissible to change them by a transitional parliamentary majority elected in the National assembly. They are substantive limitations established by the constitutional legislator on the constitutional changes to be made by the National Assembly, which it must follow. The provision of Article 158 of the Constitution has this meaning and prescribes that a new Constitution and changes to the existing Basic Law relevant to the foundations of the constitutional order are matters which are within the competence of the Grand National Assembly.

The Constitutional Court, in a recent decision from this year - 2024, had occasion to rule on the constitutionality of the Constitutional Amendment Law, adopted in 2023 by the National Assembly[6]. In its decision, the Court reiterated that the founders of the Constitution distributed the State power among the principal constitutional organs in such a way that state power would be exercised in the most effective manner, defining their status together with the mechanisms of interaction and cooperation and mutual control and restraint in accordance with the nature of the task entrusted to them. The effective functioning of the different state organs would not be possible, however, if such restrictive means of exercising power were established that they were not given the necessary and sufficient discretion to do what was necessary for the well-being of society and the State as a whole. The introduction in the Constitution by constitutional amendments adopted by the National Assembly of limitations on the exercise of the powers of the different bodies, in violation of principles fundamental

[6] Judgment No. 13/2024 in Case No. 1/2024.

to the established constitutional order, such as popular sovereignty, separation of powers and the rule of law, affects the core values of the Constitution as a substantive limits on the inherently limited power of the National Assembly. In this context, the Constitutional Court declared unconstitutional part of the amendments, considering that they changed the established balance between the legislative, executive and judicial powers and thus violated the principle of separation of powers. For example, the Constitutional Court declared unconstitutional provisions that established that the primary task of the caretaker government was to organize fair and free elections and that limitations on the caretaker government's powers could be provided for by a statutory law, as well as a provision that removed the power of the Prosecutor General to supervise the legality of the activities of all prosecutors. With regard to the amendment of the composition of the administrative body of the judiciary competent to appoint, promote, demote and dismiss prosecutors and investigators - the Supreme Prosecutorial Council, the Constitutional Court also considers that it affects the balance of powers. The Court held that the composition of the Supreme Prosecutorial Council provided for by the amendment, by upsetting the balance between the judiciary and the legislature, violated the principle of separation of powers. The declared unconstitutional amendment provided that the number of members of the Supreme Prosecutorial Council elected by the National Assembly (six out of the ten members of the body), taking into account the prohibition on including sitting prosecutors and investigators in its composition, has the effect of depriving prosecutors and investigators of the possibility of counteracting impermissible interference by the legislature in the formation of the body, which is also intended to be a guarantor of the functional independence of prosecutors and investigators. In this case, the Court considers that „the independence of the judiciary is not absolute, but that the overstepping of constitutionally permissible limits of influence by the legislature is in essence a violation of the principle of separation of powers."

For a long time rejected from the values shaping constitutional law in Bulgaria, absent from positive constitutional law as well, the separation and balance of Executive, Legislative and Judicial Powers is an element of the value core of Bulgarian constitutionalism after 1991. One of its main guardians is also one of the bodies that cannot exist without separation of powers - the Constitutional Court. From the idea of the separation of the various functions of the State between different organs, the Court derives the necessity of a balance between the legislature, the executive and the judiciary, which is an indispensable condition for safeguarding the rights and freedoms of every citizen that we have a duty to protect.


Principles:
tes
Martin Kuijer
Vice President
Venice Commission
EMERALD HOTEL

Constitutional Courts as Guardians of Democratic Values and Principles: Balancing Executive, Legislative, and Judicial Powers in Modern States

Mr. Darko Kostadinovski
President of the Constitutional Court of the Republic of North Macedonia

Greetings to everyone, and thank you for the opportunity to express my opinions and conclusions drawn from my seven years of experience as a constitutional judge, on this significant occasion celebrating the anniversary of the Constitutional Court of the Republic of Kosovo, and in such a prestigious gathering. The topics are entirely relevant and in line with what I intend to share with you, anticipating our Macedonian constitutional reality. The relevance of these topics is further confirmed by the fact that most countries in the Balkans have gone through, or are still facing similar or identical challenges.

In my recent academic book, Loyalty to the Constitution – The Theory of Living Constitutionalism, I have already addressed this issue in a chapter discussing the tension between expectations and reality – Unfulfilled expectations. Allow me to briefly restate my point and thereby confirm the relevance of the given topics.

The judicial review of the legislation, the general regulations, and the protection of human rights has globally become an indispensable feature of modern constitutionalism in contemporary democracies. Nowadays, constitutional courts and constitutional judiciary are more powerful than ever before. Although many embrace this trend, others argue that it could represent a covert attempt to limit democratically elected authorities, or what is known as an entrance toward "juristocracy."

The dominant model of liberal democracy defines constitutionalism by the ability of constitutional courts to restrain politics (the authorities), emphasising the protection of human rights and the supremacy of law over politics. It is no coincidence that an anecdote about a fishing net is often retold—a net in which only the small and weak fish are trapped, while the larger ones manage to tear through it. This net symbolizes a handicapped legal system that lacks robust mechanisms to curtail the injustices resulting from the disregard of the principle of the "separation of powers." The concept of "neo constitutionalism" views the Constitution as the "law above all laws," as a "law created by the people to regulate and limit the governments." As a result, this dominant model understandably assigns the privilege of interpreting the Constitution, its values, principles, and norms to constitutional courts, which are the supreme and authoritative interpreters. Meanwhile, all other bodies of state power are obligated to comply with the Constitution and the decisions of the Constitutional Court.

Today, probably more than ever, in circumstances where political authorities are overwhelmingly dominant, often with populist or even nationalist tendencies, constitutional courts are required to be devoted protectors of democracy and human rights and freedoms, and they must ensure the separation of powers as a necessary element for functional democracy, remain independent of political actors, and avoid judicial activism through self-deference or judicial deference. These are the essential goals and values expected of constitutional courts, but securing them remains challenging for every constitutional court, including the Constitutional Court of the Republic of North Macedonia. The challenge lies in the dilemma of whether it is possible to fully maximise all four values simultaneously.

For this reason, we must view constitutional courts as the subject of ongoing constitutional tension, their institutional constitutional design involves inevitable compromises, because to maximize certain values, others must – at least to partially weaken. However, these compromises should not be made with just anyone, especially not with politics. I am referring to compromises between the aforementioned four

essential goals, as a direct consequence of this tension is that it is logically impossible to design a perfect constitutional court. This impossibility, along with potential poor compromises, naturally results in the fact that constitutional courts generate unmet societal and political expectations. That is the case in my country as well. The adoption of the Constitution from 1991 created enormous expectations. Given the historical context, there was enthusiasm and great energy, which naturally generated expectations that the transition to democracy would stabilize and improve the overall socio-political landscape, or simply bring about a better life. The Constitution from 1991 was meant to serve as the foundation upon which the new constitutional legal, and the new social order would be built, ensuring the transition to democracy and the establishment of democratic institutions whose essential goal was to protect human freedoms and rights. Around the new Constitution, its foundational values, principles and norms, the citizens built their expectations for a better near future. Unfortunately, it is an objective assessment that these expectations were disappointed. It is undeniable that we transitioned into democracy, and it is undeniable that we had periods of stability, but we have yet to make the necessary leap toward a mature democracy.

What were the reasons for the unfulfilled expectations, and what is required today and expected from constitutional courts?

Let's begin with the causes. In the context of a 32-year transition, the lack of democratic traditions resulted in a constitutional, legal, and political culture of disregard. If that is an undeniable fact, its consequences multiply in such a way that unavoidably one of the authorities—and it's always the executive—becomes predominant over the others, effectively usurping the legislative and judicial. In a sense, they turn into hostages of the executive. This reality, which we have witnessed for far too long in Macedonia, has its consequences. It leads to the politicisation of the entire system, weakening institutions that are not governed by the spirit of the Constitution and laws but by political centers of power, abandoning the imperative principle of the separation of powers with a serious imbalance and the absence of the principle of "checks and balances." The ultimate result is undeniable: the rule of law was sacrificed. Objective reports over the past ten years have described our system as a "captured state," a "hybrid regime." This has led to a situation where the trust of the citizens in the rule of law, the legal system, and the institutions of the system in Macedonia is at its lowest point in history. And it should have been different!

If we already know where we went wrong, then the answer to what needs to be done is straightforward.

Radical steps are necessary. In my firm belief, faced with such a constitutional reality, the constitutional courts are the most qualified institutions to restore trust and establish the order that will produce legal certainty, to restore the rule of law and trust in the legal system. To reset the separation of powers and place politics back within legal, constitutional boundaries, as the classical doctrine of Montesquieu mandates, the three powers should be separate and operate independently of one another. The separation of powers means that power is not a monopoly or privilege of one body or one person but is divided among several autonomous and independent bodies, thereby eliminating the potential for its abuse or usurpation. The separation of powers is at the heart of constitutionalism because it affects the very structure of the state and its organisation, as well as the interrelations between state bodies, and by limiting discretion in the exercise of power, the principle of the separation of powers enables the realisation and protection of the freedoms and rights of the citizens.

In confronting this anomaly in our constitutional reality, as the Constitutional Court, we are prepared to uncompromisingly protect, against frequent violations, the fundamental value of the separation of powers. Without hesitation, we must limit the predominance and usurpation of the executive over the legislative and judicial authorities through our decisions and judicial activism, and thereby restore the disrupted system of checks and balances. We must, to the greatest extent possible, prevent the domination of politics over law, placing it within constitutional boundaries, because it creates a climate of uncertainty and makes it impossible for citizens to fully exercise their rights and freedoms. If we remain uncompromising in this resolve, without a doubt, the result, over a reasonable period of time, will be the enhancement of constitutional and legal culture, the absence of which has caused the consequences we have witnessed. Constitutional courts must bear this responsibility!

If the constitutional court does not perform its primary function in the manner prescribed by the constitution and does not produce stability in the legal order, legal certainty, compliance and harmony, and does not act as a check on the "unruliness" of the "constitutionally undisciplined" authorities, whether the executive, the legislative, or the local authorities, and fails to curb their arbitrary actions, then it becomes a direct accomplice in the situations we are witnessing. There can be no excuse for this, and there must not be! However, such statements alone will not change things. And change is necessary. Through action! As constitutional judges, we must make a critical contribution to the leap toward mature democracy!

Mature democracy implies a high level of constitutional and political culture, genuine, and not false dedication to the rule of law, stable and independent institutions, institutions that have withstood the test of time and can effectively address challenges such as political crises, economic, health, or any other downturns, deeply integrated democratic norms that respect fundamental freedoms and rights, and uncompromising constitutional courts that act as guarantors of the rule of law. Will it be easy? Certainly not, but even the longest journey begins with the first step. What might that initial step be? In my view, it is a proper understanding of politics and law. For a correct understanding of politics and its actors, it is essential to recall the attributes Max Weber[1] identified as necessary for a politician—passion, responsibility, and moderation. For a real understanding of the rule of law, judicial authorities, especially constitutional judges should possess the following key qualities —conscience, independence, and uncompromising integrity. The absence of loyalty to these qualities is not only a "mortal sin," as Weber claimed for politicians, I would say the same applies to judges, it will also keep us trapped in a cycle of uncertainty, instability, and permanent crises will persist, distorted values will be accepted as a way of life, the erosion of the legal order will continue, and the credibility of institutions will further deteriorate. The success and pace of this process, which will encounter obstacles of various kinds (politicisation, the ethnicization of court proceedings, nationalism, populism, etc.), will depend on that first step, which will begin to shift the mentality and awareness of the citizens, and new standards will gradually be established, under which no future will fall below. No one is saying it will be easy or quick. But it must begin!

I believe that many countries have gone through or are still facing identical or similar challenges, and from that perspective, the topic is exceptionally relevant to me personally, and I would be interested to hear how these challenges have been or are being overcome.

I will not burden this gathering with specific examples of how our Constitutional Court has acted, although our constitutional case law is extensive and rich (a small portion of which is included in this speech and I hope it will be distributed to you), but I must reiterate that it has evidently been insufficient. And that is something I, as President,

[1] Max Weber, Politics as a Vocation. "Politics as a Vocation" is an essay by German economist and sociologist Max Weber. It originated in the second lecture of a series he gave in Munich to the "Free Students Union" of Bavaria on 28 January 1919. https://archive.org/details/weber_max_1864_1920_politics_as_a_vocation/page/n7/mode/2up

have set as a priority above all priorities—things must change dramatically!
Thank you.

The most common cases in which the Constitutional Court determines a violation of the constitutional principle of separation of powers are those where by-laws of the Government or ministries, i.e. the ministers as holders of executive power, exceed the legally established boundaries of their authority to regulate legal relations during the elaboration of laws. The case law of the Constitutional Court of our country has consistently held that the rights of the citizens and the conditions under which they may be exercised, can only be regulated by law, not by by-laws. The by-laws adopted by the Government, ministries, and other administrative bodies, as well as independent regulatory bodies, can only elaborate on legal provisions to facilitate their application, but they cannot establish new rights or obligations, nor prescribe new conditions and criteria for exercising rights that fall outside the legal framework and criteria. This not only leads to a violation of the principle of the rule of law but also the principle of separation of powers.[2]

In recent years, particularly during the COVID crisis, the Constitutional Court annulled several regulations with legal force adopted by the Government to address the emerging pandemic situation, because the Court determined that the Government had overstepped its constitutional authority by regulating matters and imposing restrictions on the rights of the citizens that had no direct connection to the sanitary or health crisis.

There are also instances where the Assembly of the Republic has exceeded its constitutional framework when legislating the competence of bodies established by

[2] For example, with Decision U.no.176/2003 of 3 November 2004, the Constitutional Court repealed several conclusions of the Government regulating the payment of certain employment-related conclusions for employees in state administration bodies, and pointed out the following: 'According to the constitutional position of the Government of the Republic of Macedonia, as the holder of executive power, it cannot, within the scope of its rights and duties established by the Constitution and laws, independently regulate relations and matters that fall within the domain of legislative authority, and even less so, amend or suspend specific legal provisions regarding the subjects, conditions, and scope of rights established by those legal provisions... Through these conclusions, the Government regulated matters in a manner different from that provided by law, thereby exceeding its constitutional and legal powers, while simultaneously violating the constitutional principles of the rule of law and the separation of state powers as established in Article 8, Indents 3 and 4 of the Constitution.

the Constitution, such as the Constitutional Court. These cases are rare in practice because there is no specific law governing the Constitutional Court in our country, and its functioning is regulated by an Act of the Court, as a result, the legislature has limited opportunities to interfere with the status and competence of the Constitutional Court through legislative interventions. However, whenever such actions do occur, the Constitutional Court responds, initiating proceedings on its own accord to review their constitutionality.[3]

As a form of legislative interference in the judiciary was also determined in the provision of the Criminal Procedure Code, which mandated compulsory detention in cases where there is reasonable suspicion that a crime punishable by life imprisonment has been committed (Decision U.no.34/2005 dated May 31, 2006).[4]

[3] For example, in Decision No. U.195/2005 dated 21 December 2005, the Constitutional Court repealed a provision of the Law on Referendum and Other Forms of Direct Expression of Citizens ("Official Gazette of the Republic of Macedonia" No. 81/2005), which allowed the President of the Assembly, upon receiving a proposal to initiate a citizens' initiative, to request the Constitutional Court of the Republic of Macedonia to determine within a specified timeframe whether the initiative was in compliance with the Constitution and the laws. The Constitutional Court, based on the principle of the separation of powers and the constitutional role as a body that safeguards constitutionality and legality, with competence defined by and derived from the Constitution of the Republic of Macedonia, decided that the constitutional provisions: "create a constitutional guarantee against any form of interference or regulation of the constitutional competence by the holders of power. This means that the competence of the Constitutional Court of the Republic of Macedonia, as established by the Constitution, can only be amended by the Constitution... However, through the cited legal provisions, the legislature assumed authority without any constitutional basis, establishing new obligations and powers for this Court, thereby regulating constitutional matters that cannot be subject to legal regulation outside the Constitution itself."

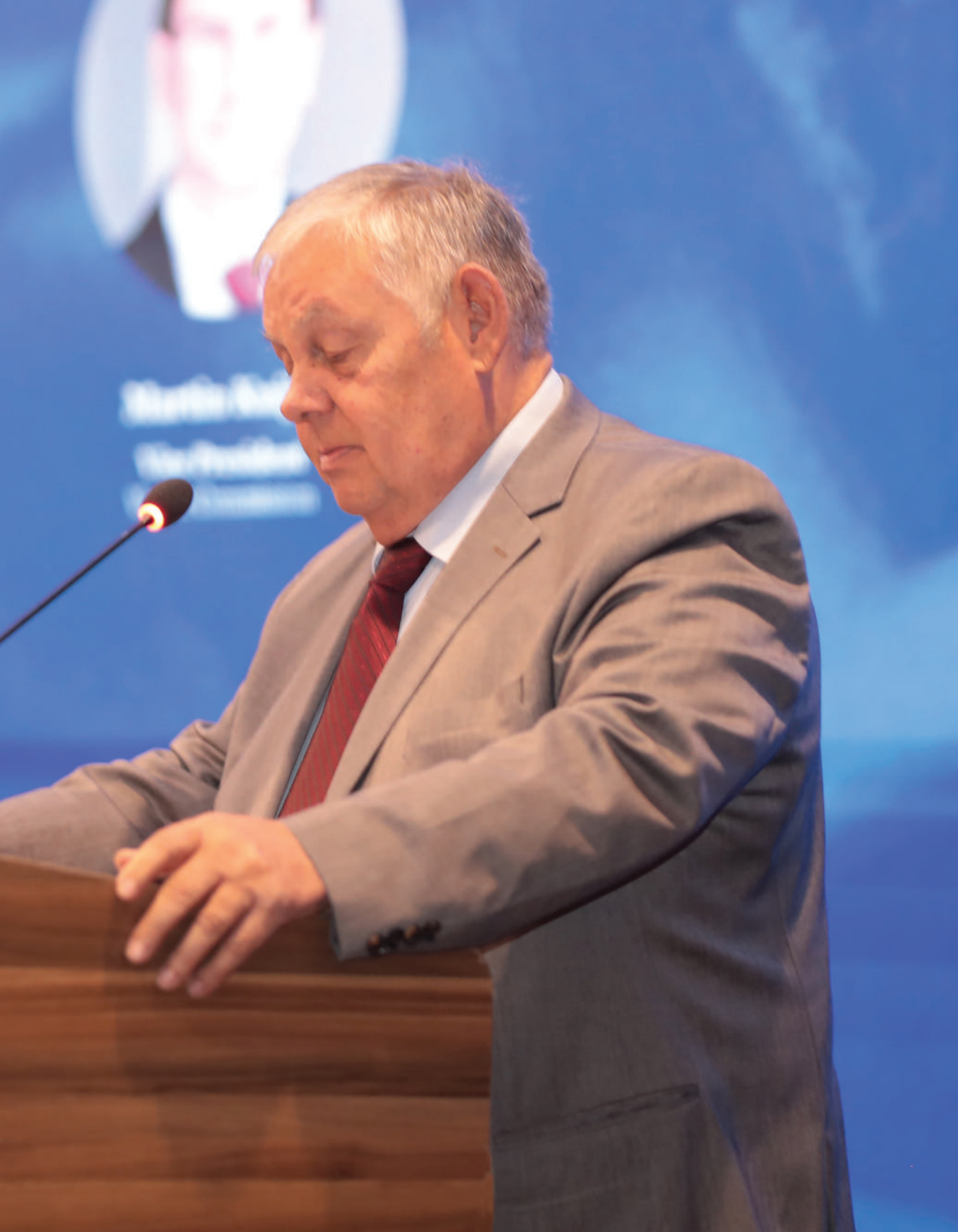
[4] By obliging the Court to impose detention for these crimes solely due to the severity of the punishment of life imprisonment, the judge is prevented from independently exercising judicial discretion and from conducting a thorough and careful assessment of the facts and evidence to determine whether the grounds for ordering detention, as stipulated in the Criminal Procedure Code, are met. In the reasoning of the decision, the Court indicated that the provision for mandatory detention distorts the constitutional position of the Court to decide on the necessity and justification of detention as the strictest measure to ensure the defendant's presence in criminal proceedings, and through this mandatory norm, the legislature compels the Court to issue a detention order merely in a formal sense. By imposing a requirement on the Court to mandatorily apply detention, simply because the law imperatively demands it, meaning that the legislature, and not the Court, effectively decide the measure of detention for specific criminal offences, and consequently, the Court found that this provision violates the constitutional principles of the rule of law, the separation of powers, and the right to the presumption of innocence.

A recent example of legislative interference in the judicial branch can be found in the provision of the Law on the Judicial Council, which stipulated that the President of the Judicial Council and their deputy are to be elected from among the voting members of the Council, who themselves are appointed by the Assembly of the Republic of North Macedonia.[5]

These are just a few examples from the constitutional case law of the Constitutional Court of the Republic of North Macedonia. They demonstrate that constitutional courts contribute to the observance of constitutional values and principles, including the principle of the separation of powers, by ensuring that the actions of other state bodies remain within the boundaries defined by the Constitution, thus contributing to strengthening constitutionalism and the rule of law.

[5] With its Decision U.no.233/2020 dated 7 March 2023, the Constitutional Court repealed this provision as unconstitutional, stating that it prevents the election of members from among the judges, who are representatives of the judiciary, and that this provision allows the legislative authority to limit the judiciary, through its representatives, equally with other members of the Council elected by the Assembly in the governance of this body. However, Amendment XXVIII of the Constitution affirms that these elected members are constitutionally equal. However, even the Judicial Council can exceed its constitutional powers. A notable example of this is the Decision of the Court U.no.237/2009 from 28 April 2010, which repealed provisions from the Law on Salaries on Judges and the Rules on the procedure and criteria for monitoring and evaluating the work of the judges, adopted by the Judicial Council of the Republic of Macedonia. In its Decision, the Court noted that "the criteria are established by law, and any further elaboration be done by a by-law, and that this principle aligns with the rule of law and the separation of powers among the legislative, executive, and judicial powers as fundamental values of the constitutional order of the Republic of Macedonia... and by authorising the Judicial Council to prescribe criteria for monitoring and evaluating the work of judges, the legislature did not approach the elaboration of constitutional competence of the Judicial Council... According to the Court, such an inconsistent approach in regulating an important issue related to the professional careers of the judges cannot be justified by the constitutional status of the Judicial Council and its autonomy and independence, and it could call into question the principles of the rule of law and the separation of powers among the legislative, executive, and judicial powers, which are fundamental values of the constitutional order of the Republic of Macedonia. The Judicial Council has a constitutional obligation to guarantee the independence of the judiciary, and according to the Court, this can be achieved by professionally, responsibly, and impartially implementing the constitutional and legal provisions governing the judiciary in the Republic of Macedonia, particularly regarding its competence, and not by assuming legislative functions, as occurred in the case of determining the criteria for monitoring and evaluating the work of the judges.

Through its constitutional case law, the Court has provided authoritative legal interpretations of all fundamental values and principles, giving them substantive meaning in their various manifestations, and it is up to the other authorities to follow, respect, and implement the practice and decisions. The decisions of the Court, in which both the material and formal constitutionality of laws have been reviewed, as well as its positions on numerous cases, legitimise the rule of law. The Constitutional Court stands at the apex of the rule of law, serving as the primary body responsible for reflecting legal certainty and ensuring compliance with the legal order. That is the role of constitutional courts—nothing more, nothing less.



Constitutional role of the Croatian Constitutional Court in Realizing the Constitutionality and Legality through an Ex-Ante Procedure

Mr. Mato Arlović*

Vice-President of the Constitutional Court of the Republic of Croatia

SUMMARY

The quality and level of exercising constitutionality and legality are of exceptional importance for achieving legal certainty and the rule of law in every state, especially in a state that rests on the values of a democratic society, the protection of human rights and freedoms, and the rule of law and the Constitution.

For the supervision and protection of constitutionality and legality in states following the Kelsenian model of constitutional adjudication, special constitutional courts are usually entrusted. They fulfill this part of their task through *ex post* control of the constitutionality of laws and the constitutionality and legality of other regulations. However, the question often arises as to whether and what can be done to eliminate occurrences of unconstitutionality and unlawfulness from the constitutional and legal order earlier — that is, before the constitutional court does so in the prescribed procedure of *ex post* control of constitutionality and legality. These questions are present and arise naturally, stemming from the realization that no constitutional and legal order is or can be ideal and final.

* Deputy President of the Constitutional Court of the Republic of Croatia, e-mail: mato_arlovic@usud.hr; ORCID: 0000-0001-8937-1753

Especially since, in its static (formal-legal) form, it is not able to keep pace with the present dynamics of social development, which is in constant flux and continually creates new relationships among people that need to be normatively regulated. Due to (these objective reasons and/or those subjective ones present with the legislator) omissions in legislative regulation and/or the creation of new social relations that require legal regulation, legislative omissions and legal gaps appear within the constitutional and legal order in certain regulations. They can and usually do express (along with other forms) occurrences of unconstitutionality and unlawfulness, especially in areas of social relations where the immediate application of the Constitution is not possible, and the Constitution itself requires that they be regulated by law in accordance with it. For the purpose of detecting occurrences of unconstitutionality and unlawfulness, some countries prescribe as the competence of constitutional courts the monitoring of the exercise of constitutionality and legality and reporting to the legislative body on emergence of unconstitutionality and unlawfulness.

The Republic of Croatia is one of those countries that has established this activity as a competence of the Constitutional Court of the Republic of Croatia by the Constitution. This paper precisely addresses that issue.

This paper seeks to provide answers to the questions of what are the arguments for and against the existence of such competence of constitutional courts. What practice the Constitutional Court of the Republic of Croatia has established in exercising this competence, what are its effects on eliminating emergence of unconstitutionality and unlawfulness, and how the Constitutional Court, by *ex ante* exercising this competence, contributes to strengthening constitutionality and legality on the one hand, and through them, the realization of the rule of law and the Constitution on the other.

Key words: constitutionality and legality, rule of law, Constitutional Court, constitutional and legal order, Constitution of the Republic of Croatia, report on the emergence of unconstitutionality and unlawfulness

I. INTRODUCTION

The Constitutional Court of the Republic of Croatia was constitutionalized according to the model of the European continental system of constitutional adjudication, which has been adopted by most European countries.

The position, tasks, and jurisdiction, namely the rights and duties of the Constitutional Court of the Republic of Croatia, as well as the election of its judges, the termination of their duties, the conditions and time limits for initiating proceedings for the review of constitutionality and legality, the protection of human rights and fundamental freedoms guaranteed by the Constitution, the legal effects of its decisions and rulings, and other issues important for the performance of duties and the work of the Constitutional Court are regulated by the Constitution of the Republic of Croatia and a constitutional act adopted according to the procedure prescribed for amending the Constitution.[1]

The internal organization of the Constitutional Court of the Republic of Croatia is regulated by its Rules of Procedure, as explicitly provided by the Constitution of the Republic of Croatia. The Croatian constitutional legislator opted for such an approach to the constitutionalization of the Constitutional Court of the Republic of Croatia primarily because, in Häberle's theoretical sense, it assigned to it the role of "guardian" and "protector"[2] of the Constitution of the Republic of Croatia. The Croatian constitutional legislator confirmed this intention substantively in the provision of Article 2 paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: CACCRC)[3]. Another reason why the status of the Constitutional Court of the Republic of Croatia (hereinafter: CCRC), its jurisdiction, proceedings and decision-making before it, as well as the status, rights, obligations, and responsibilities of its judges, and other issues important for the work and performance of duties of the CCRC, were decided by the Croatian constitutional legislator to be regulated exclusively by norms of constitutional force, lies in its intention and legitimate aim to ensure its independence "from all bodies of state authority."[4] Believing that achieving the independence of the CCRC from all bodies of state authority requires regulation by legal acts of the highest rank and supreme legal force, the Croatian constitutional legislator chose to regulate all issues concerning the position, jurisdiction, proceedings before the CCRC, its rights and duties, as well as the rights, obligations, and responsibilities of its judges, by

[1] Article 132, paragraph 2 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

[2] Häberle, P., "The Role and Influence of Constitutional Courts from a Comparative Perspective," in Bačić, A. and Bačić, P., Constitutional Democracy and Courts, Split, 2009, p. 353.

[3] In this paper, I use the text of the Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

[4] Article 2, paragraph 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

the Constitution itself and a constitutional act of constitutional force. The Croatian constitutional legislator opted for such a solution because: a) the very procedure of adopting, amending, and supplementing these legal acts is complex and demanding, prescribed by the Constitution itself; b) given that all issues important for the work and performance of duties of the CCRC are prescribed by legal acts of constitutional force, by *argumentum a contrario*, it is clear that its position, jurisdiction, rights and duties, as well as the rights, obligations, and responsibilities of its judges cannot and must not be changed by law and/or any other regulation which, by its position in the hierarchical structure of the Croatian constitutional and legal order, is below the Constitution and subordinate to it.

In order to ensure the independence of the CCRC from all other bodies of state authority, the Croatian constitutional legislator has provided a special place[5] for the CCRC within the content structure of the Constitution itself, thereby also wanting to emphasize its independence. This independence is essential for it to fulfill at the necessary and high-quality level its task as protector and guardian of the Constitution—that is, constitutionality and legality as the central requirement for realizing the value of the rule of law, which is one of the highest values of the constitutional order under the Constitution of the Republic of Croatia and, like other values determined by it, serves as a foundation for its interpretation.[6]
Starting from such a constitutional position, tasks, rights, and duties of the CCRC, each of its individual jurisdictions and all of them as a whole must be evaluated, but always starting from the entirety of the constitutional content[7], including the values

[5] The Croatian constitutional legislator, in the structure of the Constitution, assigned the Constitutional Court of the Republic of Croatia a position in a special Chapter V entitled "The Constitutional Court of the Republic of Croatia," which is substantively covered by Articles 126–132; see: Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text. By such an approach, the Constitution clearly separated the Constitutional Court from the legislative, executive, and judicial powers.

[6] The Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text, Article 3, which reads: "Freedom, equal rights, national equality and equality of the sexes, love of peace, social justice, respect for human rights, inviolability of ownership, preservation of nature and the human environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution."

[7] That the Constitution is a whole and that, in conducting abstract control of constitutionality and legality, it must be approached as a whole was also affirmed by the Constitutional Court of the Republic of Croatia; see its ruling No.: U-I-3789/2003 et al. of 8 December 2010, "Official Gazette" No. 142/10.

prescribed by it, which are the highest values of the constitutional order and as such actually constitute the essence on which the constitutional identity rests—that is, the very spirit of the Croatian Constitution.

Following the above, I will strive to realize such an approach in addressing one of the jurisdictions[8] of the CCRC that I deal with in this paper. It concerns the jurisdiction of the CCRC to "monitor the exercise of constitutionality and legality and report to the Croatian Parliament on emergence of unconstitutionality and unlawfulness."[9]

II. On the Reasons Pro and Contra Regarding the Jurisdiction of Constitutional Courts to Monitor the Exercise of Constitutionality and Legality

The jurisdiction granted upon constitutional courts to monitor the exercise of constitutionality and legality and to report to the parliament on emergence of unconstitutionality and unlawfulness is rarely explicitly prescribed in the legal regulations governing constitutional courts. There are several reasons for such an approach. Among them, the most common is that this jurisdiction opens up space for constitutional courts to engage in political activity and, based on their authority, exert political influence. The second reason is much more benign. It starts from the premise that such jurisdiction is superfluous for constitutional courts because it does not culminate in any concrete decision and/or ruling in which, in a specific case, the question of constitutionality and/or constitutionality and legality is examined and decided. Understandably, because this jurisdiction does not relate to a specific (individual) case of violation of constitutionality and legality but pertains to occurrences of unconstitutionality and/or unlawfulness, which constitutional courts may observe in the process of reviewing constitutionality and legality but cannot eliminate because they are not competent to act (e.g., in cases of legislative gaps). The third reason arises from problems associated with the very definition of this jurisdiction. Namely, it cannot be classified as either prior or subsequent control of the constitutionality of laws. At the same time, although there are opinions that it is a form of political influence of the constitutional court on the legislator, it is not in itself political activity of constitutional courts. Simply because, by exercising this jurisdiction, constitutional courts do not make any concrete decision. The fourth

[8] The jurisdiction of the Constitutional Court of the Republic of Croatia is prescribed by Article 129 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

[9] Article 129, paragraph 1, item 5 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

objection, which can be grouped among the objections against such jurisdiction of constitutional courts, is connected with the ideological-political role of the constitutional court. Namely, this jurisdiction can rightly be associated with the jurisdiction that constitutional courts had in the socialist self-management system of the former Socialist Federal Republic of Yugoslavia and its constituent states—the socialist republics and autonomous provinces[10]. This objection could be classified among the most serious reasons why constitutional courts should not have such jurisdiction, but only under conditions when they would, within it, have all the rights and freedoms they had under the Constitution of the SFRY and the constitutions of the socialist republics and autonomous provinces, which were the constitutional basis of their political activity. The fifth reason, which is the basis for rejecting such jurisdiction of constitutional courts, could be the one that considers that, with this jurisdiction, constitutional courts receive additional tasks that are not primary for fulfilling their fundamental tasks related to being the guardian and protector of the Constitution and the protector of constitutionally guaranteed human rights and fundamental freedoms.

However, alongside the aforementioned reasons against, there are those that support the justification of prescribing this jurisdiction to constitutional courts. These reasons, in their substantial sense, arise from the synergistic political-legal orientation and foundation that, if such jurisdiction is established, it is assigned precisely to constitutional courts. Especially in the initial stages of building and realizing the constitutional and legal order in states that radically change the old and establish a new socio-political and overall social order through the Constitution. Particularly when this new, constitutionally prescribed social order needs to be legally regulated and elaborated by laws and other regulations on such a quality basis that it can pass all verification procedures and receive confirmation that they are harmonized with *the acquis communautaire* of the European Union, which their states wish to join.

The task of legally regulating the entire system of social relations after a radical change from one to another completely opposing social system is neither easy nor simple. Especially if the creation of a new constitutional and legal system must

[10] See in more detail Articles 376 and 377 of the Constitution of the Socialist Federal Republic of Yugoslavia from 1974, "Official Gazette of the SFRY" No. 9/1974, or, for example, Articles 414 and 415 of the Constitution of the Socialist Republic of Croatia from 1974, "Official Gazette" No. 8/1974.

simultaneously be subjected to the requirement of what scope and content it must satisfy, then which values, principles, and ideals it must respect and rest upon, and which goals and interests it aims to achieve, on the one hand, and on the other hand, to accomplish all this in the shortest possible time. The legislative body (and all other indirect and direct participants in the legislative process), in performing this task, whether they like it or not, find themselves in a dual role. They must simultaneously harmonize the laws they enact with the Constitution and with the *acquis communautaire* of the European Union. In this work, it is possible (and it actually happens) that various occurrences of unconstitutionality and unlawfulness arise, and that without any, especially deliberate, intent. Most often, these are those that we can classify as legislative omissions and/or gaps in the law (legal gaps) that may result in the occurrence of unconstitutionality and unlawfulness. Who should monitor such circumstances and situations and, through reports, warn the legislator about them, if not constitutional courts? In the Republic of Croatia, after the formal adoption of the decision expressing the desire to become a full member of the European Union and NATO through accession, all necessary, including legal, prerequisites were made to fulfill that task and goal, but in accordance with the rule of law and the Constitution. One of such prerequisites is connected with the issues of monitoring the exercise of constitutionality and legality and pointing out to the legislator possible occurrences of unconstitutionality and unlawfulness. Due to its independent position, expertise, and all other components of competence to perform that task, the CCRC was most suitable. Consequently, in the revision of the Constitution in 2000, this jurisdiction was established for the CCRC. It was confirmed and further elaborated by the revision of the CACCRC in 2002.[11]

Secondly, a contemporary, modern constitutional and democratic state of constitutionally guaranteed human rights and freedoms and the rule of law and the Constitution is inconceivable without limitations and separation of powers. However, "The separation of powers does not mean mere division, but oversight through cooperation and mutual checks among holders of power," emphasizes B. Smerdel.[12] Although the CCRC is a state body and a court, it is nevertheless not and cannot be classified into any body (legislative, executive, or judicial) that exercises

[11] See Articles 104 and 105 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

[12] Smerdel, B., *Constitution of the Republic of Croatia*, with commentary titled "Fundamental Features of the Constitutional Order of the Republic of Croatia on the Twentieth Anniversary of the 'Christmas Constitution'," Novi Informator, Zagreb, 2010, p. 99.

state power under the Constitution. Therefore, it is a special body that will, based on monitoring the exercise of constitutionality and legality, report to the Croatian Parliament on emergence of unconstitutionality and unlawfulness and enable it to discuss and eliminate them through the parliamentary procedure, through mutual cooperation and verification among all components of power, respecting their constitutional authorities and jurisdictions. The action of the CCRo based on this jurisdiction does not, in any way, exclude the use of any constitutional and legal instrument that all three components of state power have at their disposal within their constitutional jurisdiction to achieve, within the Constitution, mutual cooperation and mutual control, including in the area of exercising constitutionality and legality. Moreover, it is their obligation arising from the requirement to respect and realize the rule of law as one of the highest values of the Croatian constitutional order on the one hand, and on the other hand, from the constitutionally prescribed principle of constitutionality and legality.[13]

The third group of reasons supporting that this jurisdiction: (a) be established and prescribed by the Constitution; and (b) be assigned precisely to the Constitutional Court, arises from a requirement inherent to the very nature of the value of the rule of law and its realization through respect and consistent implementation of the principles of constitutionality and legality. Especially when the constitutional and legal system (as is the case with the Croatian one) is founded on a monistic model. Such a model demands that the constitutional and legal system be unified, internally harmonized, logically connected, clear and understandable, and without contradictions. It must achieve all this regardless of the origin of its legal norms. In one word, it must be coherent. All this is necessary and must be possessed by a legal system that is based on the value of the rule of law and the principles of constitutionality and legality. The Croatian constitutional legislator has established and prescribed the rule of law as one of the highest values of its constitutional order. It is realized, above all, through the consistent implementation of the principles of constitutionality and legality. The Croatian constitutional legislator, in the Constitution of the Republic of Croatia, prescribed the principles of constitutionality and legality such that "laws shall conform with the Constitution, and other regulations

[13] The Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text, prescribes the principles of constitutionality and legality in its Article 5, which reads: "In the Republic of Croatia, laws shall conform with the Constitution, and other regulations shall conform with the Constitution and law. Everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia."

shall conform with the Constitution and law." However, this prescribed principle of constitutionality and legality is expanded in paragraph 2 of the same article, with the constitutional provision that "Everyone ... shall abide ... the Constitution and law and respect the legal order of the Republic of Croatia."[14]

By prescribing the strict subordination of lower legal acts to the Constitution and law based on the principles of constitutionality and legality, the Croatian constitutional legislator evidently and deliberately expanded the requirement that everyone must abide by the Constitution and law. The requirement that everyone must abide by law according to the Croatian Constitution is a requirement that, in the Republic of Croatia, everyone must also abide by the law encompassing the law of the Council of Europe, the European Union, and the international community, which, in accordance with the Croatian Constitution, has become an integral part of the Croatian constitutional and legal order, and which, as an international treaty, has legal force above that of laws.[15] Such constitutional status of a part of international law in the implementation of the review (or monitoring) of the exercise of constitutionality and constitutionality and legality of other regulations by the competent authority, i.e., the Constitutional Court, requires it to assess the conformity of laws based on the principle of constitutionality, not only according to the Constitution but also according to such international treaties—for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms[16], on the one hand, and on the other hand, when conducting the review of the legality of another regulation, to check its conformity both with the law and with international treaties, and, of course, with the Constitution. According to some authors, thus, in the Croatian constitutional and legal order, these international treaties (from Article 141 of the Constitution of the Republic of Croatia) have acquired a quasi-constitutional status.[17] But more on

[14] Article 5 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

[15] Article 141 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, "Official Gazette – International Agreements" Nos. 18/1997, 6/1999 – consolidated text, and 8/1999 – correction.

[17] For more on this, see the work: Šarin, D., "The Convention for the Protection of Human Rights and Fundamental Freedoms through the Relationship between the European Court of Human Rights and the Constitutional Court of the Republic of Croatia on the Example of Protecting the Human Right of Access to Court," available at: https://hrcak.srce.hr/134195.

that later; here we are more interested in the obligation of the Constitutional Court that, while monitoring the exercise of constitutionality and legality, it must exercise this jurisdiction also in relation to international treaties that are an integral part of the Croatian constitutional and legal order. Such an expansion of the jurisdiction of the Constitutional Court on the basis of monitoring the exercise of constitutionality and legality and the obligation to report to the Croatian Parliament on emergence of unconstitutionality and unlawfulness indeed justifies assigning this jurisdiction precisely to the Constitutional Court of the Republic of Croatia (CCRC). Primarily due to its competence arising from the expertise and ability of its judges, and from its objectivity, neutrality, and independence guaranteed to it and its judges by the Constitution-prescribed status, rights, obligations, and responsibilities.

III. Constitutional and Legal Framework of the Jurisdiction of the Constitutional Court of the Republic of Croatia to Monitor the Exercise of Constitutionality and Legality

The jurisdiction of the CCRC to monitor the exercise of constitutionality and legality and to report to the Croatian Parliament on emergence of unconstitutionality and unlawfulness is prescribed by Article 129, paragraph 1, item 5 of the Constitution of the Republic of Croatia. The duties and procedure for exercising this jurisdiction by the CCRC are prescribed by Article 130 of the Constitution and Articles 104 and 105 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Act). In their formal text, they read:

a) Constitution of the Republic of Croatia[18]

"Article 130
Insofar as the Constitutional Court finds that a competent body charged with enacting a regulation needed for the application of the Constitution, law or other regulation has failed to do so, it shall notify the Government thereof, and shall notify the Croatian Parliament when the Government has been charged with enacting such regulation and failed to do so. "

b) Constitutional Act on the Constitutional Court of the Republic of Croatia[19]

[18] The Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

[19] The Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

"Article 104

(1) The Constitutional Court shall monitor the execution of constitutionality and legality and report to the Croatian Parliament about any kind of unconstitutionality and unlawfulness it has observed.

(2) The report in paragraph 1 of this Article shall be established by the Session of the Constitutional Court.

(3) The report in paragraph 1 of this Article shall be delivered in written form to the Speaker of the Croatian Parliament, who shall so inform the Croatian Parliament.

Article 105

(1) If the Constitutional Court finds that the competent body has not passed a regulation for executing provisions of the Constitution, laws and other regulations, and was obliged to pass such a regulation, it shall so inform the Government of the Republic of Croatia.

(2) If the Constitutional Court finds that the Government of the Republic of Croatia has not passed a regulation for executing provisions of the Constitution, laws and other regulations, it shall so inform the Croatian Parliament.

(3) The report in paragraph 1 of this Article shall be delivered in written form to the Prime Minister of the Republic of Croatia, and the report in paragraph 2 of this Article to the Speaker of the Croatian Parliament.

(4) The Session of the Constitutional Court shall decide about the publication of the reports in paragraphs 1 and 2 of this Article in the Official Gazette Narodne novine."

From the obligation set out in Article 104 of the Constitutional Act for the Constitutional Court to adopt at a session of the Court the report by which it informs the Croatian Parliament on emergence of unconstitutionality and unlawfulness, it can be discerned how much importance the constitutional legislator attaches to such reports. Namely, by prescribing that the report is adopted at a session of the Constitutional Court, it actually requires that all judges of the Constitutional Court discuss it and decide on its adoption in the prescribed procedure. Thus, in full composition and with the required number of votes (an absolute majority of votes of all judges from their total number), as when the CCRC decides on the constitutionality of laws and/or the constitutionality and legality of another regulation.

A similar situation exists with the reports from paragraphs 1 and 2 of Article 105 of the Constitutional Act. Admittedly, in the mentioned provision, it is not explicitly

prescribed that the reports from paragraphs 1 and 2 of Article 105 are adopted at a session of the Constitutional Court. Its stipulation is different. It prescribes: "When the Constitutional Court establishes (...)"—the initial part of the first sentence of paragraphs 1 and 2 of Article 105 of the Constitutional Act—from which, through linguistic analysis, I conclude that the constitutional legislator, by such wording, meant the Constitutional Court in full composition; that is, these reports are also adopted at a session of all judges of the Constitutional Court, and in written form, by which it informs, in the cases from paragraph 1 of this Article, the Government of the Republic of Croatia, and in the cases from paragraph 2, the President of the Croatian Parliament, and through him, all its members.

The constitutional legislator, in paragraph 4 of Article 105 of the Constitutional Act, prescribes the authority of the session of the Constitutional Court to decide whether or not to publish the reports from paragraphs 1 and 2 in the "Official Gazette," the official journal of the Republic of Croatia. From this authority of the session of the Constitutional Court, one can rightly infer confirmation of the will of the constitutional legislator that the reports from paragraphs 1 and 2 of Article 105 are adopted at a session of all its judges. Understandably so, because if at such a session it decides whether or not to publish these reports in the "Official Gazette," which is of incomparably less significance and interest for the realization of the values of the rule of law and the principles of constitutionality and legality, then it is self-evident that they must also be adopted at a session of all judges of the CCRC. As for the publication of these reports in the "Official Gazette," although paragraph 4 of Article 105 prescribes that the session of the Constitutional Court decides on it, I believe that, as a rule, it is known in advance what that decision will be. These reports will, as a rule, always be published in the "Official Gazette," first because it is in the interest of the entire public, and secondly due to the constitutional obligation prescribed to the Constitutional Court that its work is public.[20] Actually, this authority from paragraph 4 of Article 105 of the Constitutional Act should be read as the possibility for the Constitutional Court to decide that some of the reports from paragraphs 1 and 2 of Article 105 are not published in the "Official Gazette," of course, if there are justified reasons prescribed by the Constitution and law. Consequently, for the reports from paragraphs 1 and 2 of Article 105, everything previously said for the reports from Article 104 of the Constitutional Act applies.

[20] Article 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

However, it would be incorrect to conclude that these reports of the Constitutional Court have the same legal character and legal force as its decisions and rulings made in specific cases of reviewing the constitutionality of laws or the constitutionality and legality of other regulations, as well as upon constitutional complaints submitted by authorized applicants due to violation of human rights and freedoms established and guaranteed by the Constitution and the Convention. Moreover, from the formal-legal and material-substantive aspect, that would be inadmissible. Why? Because in that regard, the Constitutional Act is completely clear and unambiguous. It does not include the reports to the Croatian Parliament and does not prescribe to them the same status and legal force as it has established for the decisions and rulings of the CCRC.[21] For the decisions and rulings of the CCRC, the Constitutional Act has prescribed that they are "binding" and that they "shall be respected by all natural and legal persons." Therefore, they are generally binding and on that basis have legal force equivalent to that of laws, and because of that, every natural and legal person must respect them, and in addition, "all bodies of state authority and bodies of local and regional self-government shall execute them within their constitutional and legal competences."[22]

Unlike the above-mentioned decisions and rulings, these reports in themselves (by their content) do not have and cannot have a generally binding character and legal force of laws. They are, by their content, findings on emergence of unconstitutionality and unlawfulness in accordance with Article 104 of the Constitutional Act in conjunction with Article 129, paragraph 1, item 5 of the Constitution, about which the Constitutional Court reports to the Croatian Parliament. It is similar with the reports from paragraphs 1 and 2 of Article 105 of the Constitutional Act in conjunction with Article 130; only they are the result of findings after conducting supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations. The mentioned reports of the Constitutional Court are obliged to be received by the President of the Croatian Parliament or the Prime Minister of the Republic of Croatia, who shall inform the Croatian Parliament or the Government of the Republic of Croatia thereof. Whether, on their basis, specific legislative activity will occur—that is, the adoption of a completely new law or amendments to the existing one, in order to eliminate the observed unconstitutionality and unlawfulness—will be decided by the legislative body, i.e., the Croatian Parliament. In a similar way, the

[21] See Article 31, paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

[22] Ibidem.

reports of the Constitutional Court that it adopts on the basis of its jurisdiction from Article 105, paragraphs 1 and 2 of the CACCRC, and sends to the competent bodies determined therein, will proceed.

By exercising its jurisdiction of monitoring constitutionality and legality and, on that basis, establishing occurrences of unconstitutionality and unlawfulness about which the Constitutional Court reports to the Croatian Parliament and other state bodies determined by the Constitution, the CCRC generally encounters legislative omissions or legal gaps[23] within laws and other regulations over which it conducts control of their conformity with the Constitution and law.

When it comes to legal gaps or legislative omissions, although they indeed exist in reality, it should be noted that the Croatian constitutional and legal order does not explicitly recognize these concepts nor does it empower the Constitutional Court to examine and assess the constitutionality and legality of legislative omissions and legal gaps. The CCRC itself has taken the stance that it is not competent to decide on the existence of legal gaps and legislative omissions in proceedings for the review of constitutionality of laws, or the constitutionality and legality of other regulations. This does not mean, for the Court or for legal theory, that in its practice it does not encounter them or that they cannot have a significant impact on the issue of constitutionality and legality, or unconstitutionality and unlawfulness in certain areas of social relations. Especially in cases where there is no legal norm necessary for the implementation of the Constitution and laws in social reality. However, legal gaps and legislative omissions do not exist only in cases of the absence of a legal norm or regulation. They also exist in cases of incompleteness and ambiguity of a legal regulation, which is therefore suspect from a constitutional and legal aspect, because such a characteristic indicates the occurrence of unconstitutionality and/or unlawfulness. For example, when due to such deficiencies or ambiguities, a legal regulation leads to inequality and unequal treatment of legal subjects (natural and legal persons) because, due to the legislator's omission in that regulation, rights and freedoms are not prescribed for some of them, but according to the Constitution, they should and must have been. These and other issues, as is evident, have their constitutional and legal dimension, which manifests in the realization of the

[23] For more on legislative omissions and legal gaps, see my work: Arlović, M., "Constitutional Framework of the Activities of the Constitutional Court of the Republic of Croatia for Examining and Assessing the Constitutionality of Legal Gaps," Collection of Papers of the Faculty of Law in Split, Vol. 54, No. 1/2017, pp. 255–281.

principles of constitutionality and legality, both in their formal-legal and material-legal aspects, with a direct impact on the realization of the rule of law, human rights and freedoms, and other values, principles, and ideals of a legally regulated and functional democratic society.

The Constitutional Court is not competent to resolve legal gaps and legislative omissions, simply because this is contrary to its status arising from its role as a negative legislator. However, this does not mean that in situations when it encounters such occurrences, it should not react. Especially when they are of such nature and intensity that they indicate the occurrence of unconstitutionality and unlawfulness in that matter. In such situations and circumstances, the significance and value of the jurisdiction to monitor the exercise of constitutionality and legality are manifested, as well as the possibility for the CCRC to report emergence of unconstitutionality and unlawfulness to the competent bodies, primarily the positive legislator, i.e., the Croatian Parliament.

In the following part of this paper, I will point out several examples of the practice of the CCRC in exercising this jurisdiction.

IV. Practice of the Constitutional Court of the Republic of Croatia in Monitoring the Exercise of Constitutionality and Legality (Sample Cases)

1. Monitoring the exercise of constitutionality and legality and to report on the emergence of unconstitutionality and unlawfulness

The CCRC exercises its jurisdiction to monitor the exercise of constitutionality and legality in concrete situations and during the review of the constitutionality and legality of laws and other regulations in their entirety or individual provisions thereof. Namely, in that procedure, the Constitutional Court may encounter a legislative gap due to which some of the protected constitutional goods, i.e., rights and freedoms, cannot be realized, as a result of which individuals, certain groups of citizens, or legal persons are or may find themselves in an unequal position before the law, thereby violating the constitutionally guaranteed right of equality of all before the law as enshrined in the Constitution of the Republic of Croatia. The Constitutional Court cannot eliminate such an observed occurrence of unconstitutionality by itself. Simply because the specific social relationship affected by the observed unconstitutionality is not regulated by law. In fact, if the Constitutional Court were

to resolve such a question by itself, it would assume the role of a positive legislator, thereby exceeding the scope of its constitutionally established jurisdiction, which is not permitted by the Constitution. On the other hand, the Constitutional Court cannot remain blind to the unconstitutionality it has observed; therefore, based on its prescribed jurisdiction, it establishes, in the prescribed procedure, a report on the observed unconstitutionality and submits it through its President to the Croatian Parliament, with the aim that the Croatian Parliament eliminates the observed unconstitutionality by enacting a new law or amending and supplementing the existing law in the part where the unconstitutionality was observed.

Thus, for example, in the procedure of reviewing the constitutionality of the Pension Insurance Act, in case number: U-I-1152/2000 and others, it decided to inform the Croatian Parliament about the observed occurrence of unconstitutionality. The unconstitutionality manifested in the unequal legal position in exercising the right to a family pension of family members, specifically common-law widows or widowers, in relation to family members who are marital widows or widowers.

Since the Constitutional Court does not annul laws and other regulations or individual provisions thereof when, in the procedure of reviewing their constitutionality or constitutionality and legality, it establishes a certain legislative omission, it then, in its report, warns the Croatian Parliament about the need to supplement certain provisions or eliminate the legislative omission. This is what it did in the case related to the review of the constitutionality of the Pension Insurance Act in its Report number: U-X-1457/2007 of 18 April 2007, in whose reasoning it states:

"In the Republic of Croatia, the family is under the special protection of the state and thus represents a protected constitutional good. On the other hand, marriage and common-law unions are communities recognized by the Constitution. In relation to the family, the Constitution does not make distinctions between marital and common-law unions. Both types of unions are recognized by the Constitution, and both types are regulated by law.

Starting from Article 61 of the Constitution, which recognizes two types of family unions (marital and common-law), and taking into account the legal nature and purpose of the family pension in the pension insurance system (see point 1 of this Report), the Constitutional Court establishes that the Pension Insurance Act (PIA) should regulate the prerequisites for acquiring the right to a family pension not only for marital widows or widowers but also for common-law widows or widowers.

4. When considering the problems related to recognizing the right to a family pension for common-law widows or widowers, the Constitutional Court also took into account the fact that the legal effects of a common-law union between a woman and a man are regulated by the Family Act ('Official Gazette', No. 116/03, 17/04, and 136/04), and that in the area of inheritance relations, the decedent's common-law partner inherits on the basis of law and is equated with the spouse in inheritance rights (Article 8 paragraph 2 of the Inheritance Act, 'Official Gazette', No. 48/03).

Although the mentioned laws are not directly applicable in the pension insurance system regulated by the Pension Insurance Act (PIA), they provide a framework for regulating the right to a family pension for common-law widows or widowers in that system.

5. The Constitutional Court finally points out that the position of a close family member, and thus the right to a family pension for common-law widows or widowers, is explicitly recognized by the Act on the Rights of Croatian Homeland War Veterans and Members of Their Families ('Official Gazette', No. 174/04; hereinafter: the ARHV).

The position of a close family member of a deceased, detained, or missing Croatian veteran is recognized to that common-law partner who lived with him/her in a shared household for at least three years until the death, detention, or disappearance of the veteran, whereby the status of a common-law union, for the purpose of determining the rights recognized by the ARHV, is established in non-contentious court proceedings (Article 6 paragraphs 2 and 3 of the ARHV).

6. Starting from the fact that funds for exercising the rights recognized by the ARHV (including the right to a family pension) are provided from the state budget (Article 106 of the ARHV), and therefore one can speak of a kind of state pension recognized (also) to common-law partners as members of the close family of a deceased, detained, or missing Croatian veteran, the Constitutional Court considers it all the more justified in the pension insurance system regulated by the PIA to recognize the position of a family member to the common-law partner of a deceased insured person, since this system is based on financing through contributions from insured persons.

The Constitutional Court notes that regulating all issues related to acquiring the right to a family pension for a common-law partner of an insured person (for example, which life partnership between a woman and a man will be considered a common-law union in the sense of the PIA, how it will be proven, under which special conditions the right to a family pension will be recognized to the common-law partner of an insured person, to what extent, etc.) is within the jurisdiction of the Croatian Parliament in accordance with Article 2 paragraph 4 item 1 of the Constitution.

7. In accordance with the above, the Constitutional Court informs the Croatian Parliament about the need to amend the Pension Insurance Act (PIA) in order to regulate the legal prerequisites for recognizing the right to a family pension also to the common-law widow or widower of an insured person, as a member of his/her family."

The second case is specific in that it is a consequence of a decision of the Constitutional Court by which a law or certain provisions thereof were annulled, and the legislative omission occurred because the legislator did not enact a new law or did not amend and supplement the annulled provisions, and the annulment decision entered into force. In its entire previous practice, the CCRC had only one such case. Namely, on 31 March 1998, the Constitutional Court issued decision number: U-I-762/1996 by which it annulled the provision of Article 40 paragraph 2 of the Lease of Flats Act ('Official Gazette', No. 91/96). By that decision, it decided that the annulled legal provision would cease to be valid upon the expiration of six months from the day of publication of the decision in the Official Gazette.

The Croatian Parliament did not harmonize the Lease of Flats Act with the decision of the Constitutional Court within the specified period, and upon its entry into force, the provision of Article 40 paragraph 2 ceased to be valid, resulting in the creation of a legal gap. As even after several years the Croatian Parliament did not harmonize that Act with the mentioned decision of the Constitutional Court, the Court sent Report number: U-X-2191/2007 ('Official Gazette', No. 67/2007) to the Croatian Parliament, informing it of the observed unconstitutionality and the existence of a legal gap. In the said Report, the CCRC, among other things, emphasizes:

"In its decision annulling the provision of Article 40 paragraph 2 of the Lease of Flats Act (point III.12), the Constitutional Court expressed the following position:

'The contested provision conditions the landlord's right to terminate the lease agreement of a protected lessee when the landlord wishes to move into that flat himself or intends to settle his descendants, parents, or persons he is obliged to support under special regulations, by securing another habitable flat for the lessee under conditions for housing that are not less favorable for the lessee, in the same way as prescribed in Article 21 paragraph 2 of the Lease Act, for which the Court found that it is not in conformity with the Constitution. Therefore, the reasons stated under III.6 apply here as well, due to which it had to be annulled as insufficiently selective regarding protected lessees, but due to its connection with the provision of paragraph 1 of the same article, the effect of its annulment had to be postponed in the sense of the provision of Article 21 paragraph 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia ('Official Gazette', No. 13/91), which was done in point I.2 of the decision. Within a specified period of six months, the legislator can appropriately regulate the prerequisites for termination in the sense of the provision of Article 40 paragraph 1 item 1 of the Lease of Flats Act.

In addition, the provision of Article 40 paragraph 1 item 2, in which case another suitable flat is obligatorily provided to the lessee by the local self-government unit or the City of Zagreb, cannot influence the assessment of the contested provision of paragraph 2 here.'

Attached to this Report, we submit the decision of the Constitutional Court number: U-I-762/1996 of 31 March 1998.

2. The Government of the Republic of Croatia informed the Constitutional Court that at the 29th session of the Croatian Parliament, held on 29 January 2003, a debate was held in the first reading on the Proposal of the Act on Amendments to the Lease of Flats Act.

The Constitutional Court notes that the Croatian Parliament, in the period from the publication of the mentioned decision of the Constitutional Court (6 April 1998) until the entry into force of its annulment effect (6 October 1998), did not amend or supplement Article 40 of the Lease of Flats Act in accordance with the legal position expressed in the said decision of the Constitutional Court, nor has it done so up to the date of establishing this Report.

3. In the period after the decision of the Constitutional Court, i.e., after the cessation of validity of the annulled legal provision, flat owners (lessors) initiated numerous proceedings before competent courts for the termination of lease agreements, invoking the provisions of Article 40 paragraph 1 item 1 of the Lease of Flats Act.

According to the records of constitutional court cases, constitutional complaints have been submitted to the Constitutional Court against judgments in which courts decided on the claims of flat owners (lessors) for the eviction of lessees, without the prerequisites for such eviction being established in the Lease of Flats Act. Constitutional complaints were submitted, depending on the judgment, by flat owners or lessees because they believe that their constitutional rights were violated by those judgments.

In response to such constitutional complaints, the Constitutional Court, in two cases (U-III-135/2003, U-III-485/2006), postponed the enforcement of judgments of competent courts on the eviction of lessees until a decision is made on the constitutional complaint. The Constitutional Court has not made a decision on the constitutional complaints in the said cases because the annulment decision of the Constitutional Court has not been implemented by the Croatian Parliament, which is a prerequisite for a meritorious decision on those constitutional complaints.

4. According to the provisions of Article 31 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Act), the decisions of the Constitutional Court are binding, and all bodies of state authority are obliged to execute the decisions of the Constitutional Court within their constitutional and legal competences.

The Constitutional Court notes that within its jurisdiction, it has no authority to eliminate inequality in the application of the Lease of Flats Act, arising from the cessation of validity of the annulled legal provision. The decisions of the Constitutional Court (upholding or rejecting the constitutional complaint) would lead to further inequality before the law, which is contrary to the constitutional guarantee contained in Article 14 paragraph 2 of the Constitution. Therefore, the existing normative situation is unacceptable and inadmissible from the constitutional and legal standpoint because it does not resolve the problem in its entirety and in the same way for all regarding the application of the Lease of Flats Act.

It follows that only the legislator is competent to regulate contentious legal relations by adopting appropriate amendments to the Lease of Flats Act in a way that will ensure equality of all before the law.

5. Monitoring the exercise of constitutionality and legality and bearing in mind the binding nature of implementing the decisions of the Constitutional Court (Article 31 of the Constitutional Act), based on Article 129 item 5 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act, this Report is sent to the Croatian Parliament."

Although this concerns an individual case of non-implementation of a decision of the Constitutional Court by the Croatian Parliament, it deserves attention in the context of this paper for at least two reasons. First, it could be a case where "the legislator intentionally does not regulate an issue, leaving it to practice to resolve it."[24]

However, in such a situation, as there is a legal gap because the legislator has not resolved something or does not want to resolve it, the Constitutional Court is not competent to decide in the procedure of reviewing the constitutionality of laws and the constitutionality and legality of other regulations or individual provisions thereof.

The Court is left only with the right and duty to report to the Croatian Parliament if, due to such a legal gap or legislative omission, it observes unconstitutionality and unlawfulness. Second, in the constitutional and legal order of the Republic of Croatia, "there are no mechanisms by which the Croatian Parliament or the Government of the Republic of Croatia can be compelled to implement the decisions of the Constitutional Court by which laws or other regulations, or individual provisions thereof, are annulled due to non-conformity with the Constitution,"[25] or non-conformity with the Constitution and law when it comes to other regulations. If the legislator opts for such an option, even with its (albeit tacit) consent of the Government of the Republic of Croatia when the enactment of a regulation or an individual provision thereof is within its competence, Article 31 of the CACCRC, despite all its good solutions, remains only a dead letter on paper. Of course, we do not enter into other forms, including political, of their responsibility, due to which influence

[24] Vuković, Đ., *Rule of Law*, Zgombić & Partners, Zagreb, 2005, p. 108.

[25] Arlović, M., "The Interrelationship Between the Positive and Negative Legislator in the Republic of Croatia," Legal Gazette of the Faculty of Law in Osijek, Nos. 3-4/2015, p. 257.

could be exerted on them to eliminate unconstitutionality and unlawfulness that are a consequence of legal gaps or legislative omissions arising from the entry into force of annulment decisions of the Constitutional Court.

Starting from its constitutional jurisdiction under Article 129 paragraph 1 item 5 of the Constitution of the Republic of Croatia in connection with Article 104 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, the Constitutional Court of the Republic of Croatia (CCRC), while monitoring the exercise of constitutionality and legality, observed and determined the existence of an (unexpected) occurrence of unconstitutionality and unlawfulness. It compiled its Report No.: U-X-2270/2010 dated 12 May 2010 and submitted it to the Croatian Parliament. In the said report, among other things, it is stated:

"1. The Constitutional Court received three proposals to initiate proceedings for the review of conformity with the Constitution of the Decision on the Amendment of the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', No. 6/04), the Decision on Amendments to the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', No. 54/05), and the Decision on Amendments to the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', No. 30/10), which were decisions made by Presidents of the Republic of Croatia during several constitutional mandates.

In the proposals, it was pointed out that the contested acts are primarily formally unconstitutional since, pursuant to Article 106 of the Constitution of the Republic of Croatia, it is not permissible to regulate the organization and scope of the Office of the President of the Republic of Croatia by decision, nor is the President of the Republic authorized to adopt such a decision.
(...)

By the amendments to the Constitution of the Republic of Croatia ('Official Gazette', No. 113/00), which entered into force on 9 November 2000, Article 106 of the Constitution of the Republic of Croatia was amended. It reads:

'Article 106
The President of the Republic shall be assisted in the performance of his duties by advisory bodies. The members of these bodies shall be appointed and dismissed by the President of the Republic. Appointments that are contrary to the principle of the separation of powers shall not be permitted.

Advisory, professional, and other affairs shall be performed in the Office of the President of the Republic. The organization and scope of the Office shall be regulated by law and regulations.'

3.1. In the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia ('Official Gazette', No. 28/01), which entered into force on the day of its promulgation on 28 March 2001, it was prescribed:

"Article 3
Laws enabling the application of constitutional provisions which cannot be directly applied shall be enacted no later than two years from the day of promulgation of this Constitutional Act.'

a) Failure to Legally Regulate the Organization and Scope of the Office of the President of the Republic of Croatia

4. The Croatian Parliament has not, to date, enacted a law that would, based on the second sentence of Article 106 paragraph 2 of the Constitution of the Republic of Croatia ('Official Gazette', Nos. 113/00, 28/01), regulate the organization and scope of the Office of the President of the Republic of Croatia.

Accordingly, the President of the Republic of Croatia has not, to date, adopted the regulations from the second sentence of Article 106 paragraph 2 of the Constitution of the Republic of Croatia ('Official Gazette', Nos. 113/00, 28/01), whose purpose is to elaborate the provisions of the law on the organization and scope of the Office of the President of the Republic of Croatia.

In summary, the failure to legally regulate the organization and scope of the Office of the President of the Republic of Croatia based on the second sentence of Article 106 paragraph 2 of the Constitution of the Republic of Croatia has continuously lasted for more than seven years, counting from the expiration of the two-year deadline for its enactment prescribed by Article 3 of the Constitutional Act for the Implementation of the Constitution of the Republic of Croatia ('Official Gazette', No. 28/01).

b) Actions of the President of the Republic of Croatia

5. Referring to Article 106 of the Constitution of the Republic of Croatia ('Official Gazette', Nos. 113/00, 28/01), the President of the Republic of Croatia adopted on 12 January 2004 the Decision on the Amendment of the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', No. 80/00). The decision was published in the 'Official Gazette', No. 6 of 16 January 2004.

5.1. Referring to Article 106 of the Constitution of the Republic of Croatia ('Official Gazette', Nos. 113/00, 28/01), the President of the Republic of Croatia adopted on 19 April 2005 the Decision on Amendments to the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', Nos. 80/00 and 6/04). The decision was published in the 'Official Gazette', No. 54 of 27 April 2005.

5.2. Referring to Article 106 of the Constitution of the Republic of Croatia ('Official Gazette', Nos. 113/00, 28/01), the President of the Republic of Croatia adopted on 2 March 2010 the Decision on Amendments to the Decision on the Office of the President of the Republic of Croatia ('Official Gazette', Nos. 80/00, 6/04, and 54/05). The decision was published in the 'Official Gazette', No. 30 of 5 March 2010, and entered into force on the day of publication.

II. DETERMINATION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

6. Within the structure of state authority determined by the Constitution of the Republic of Croatia and the constitutional position of the President of the Republic of Croatia, the need to organize the Office of the President of the Republic of Croatia for performing advisory and general affairs within his scope of work is indisputable—that is, performing advisory, administrative, professional, and other tasks in preparing and ensuring the preparation and implementation of decisions and acts he adopts, and in performing other powers and obligations determined by the Constitution and laws.

The second sentence of Article 106 paragraph 2 of the Constitution ('Official Gazette', Nos. 113/00, 28/01) prescribes the obligation of the Croatian Parliament to enact a law that will regulate the organization and scope of the Office of the President of the Republic of Croatia.

In the legislative practice of the Republic of Croatia to date, however, that law has never been enacted, and such a state has lasted for years.

7. The Constitutional Court does not find it necessary in this report to specifically consider the significance of the legislative body's failure to act in accordance with the constitutional obligation. In light of the particular constitutional situation arising from the long-term non-enactment of a legislative act, it is sufficient to point out the requirement that every action of state bodies must be regulated by a legal norm, a requirement that arises from the principle of the rule of law as one of the highest values of the constitutional order of the Republic of Croatia established in Article 3 of the Constitution.

(...)
Remaining within the scope of its jurisdiction and guided by the fundamental features of the constitutional organization of the highest state bodies in the Republic of Croatia and their constitutional positions, the Constitutional Court confines itself to the determination that the internal organization of the highest state body is, as a rule, a constitutional reserve of that body itself.

8. Regardless of the solution that the Croatian Parliament will choose (possible amendment of Article 106 of the Constitution or acting according to it), which choice is within its exclusive jurisdiction, the Constitutional Court, by this report, based on Article 128 item 5 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, emphasizes the need for an immediate resolution of the observed problem.

9. The publication of this report in the 'Official Gazette' is based on Article 29 paragraph 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia."

By the Amendments to the Constitution of the Republic of Croatia in 2010, paragraph 2 of the previous Article 106 was amended in such a way that the new paragraph 2 of Article 107 prescribes that the President of the Republic of Croatia regulates these issues by his decision. In this way, regarding this issue, the unconstitutionality pointed out by the Constitutional Court in the above-mentioned Report was eliminated.

2. Monitoring the Exercise of Constitutionality and Legality through Supervision over the Enactment of Regulations on the Implementation of the Constitution, Laws, and Other Regulations

Supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations is one of the jurisdictions of the Constitutional Court of the Republic of Croatia, which Article 129 of the Constitution includes under the item "performs other tasks specified by the Constitution." Precisely for this reason, this jurisdiction as a so-called other task is also regulated by the Constitution, specifically by Article 130, which in terms of content entirely relates to the regulation of this activity. The manner of proceeding of the Constitutional Court in these cases of supervision is regulated by the provisions of Article 105 of the CACCRC. It prescribes the procedure in two cases of conducting supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations. First, according to Article 105 paragraph 1,[26] it refers to the situation "when the Constitutional Court establishes that a competent body has failed to enact a regulation necessary for the implementation of the provisions of the Constitution, laws, and other regulations, and was obliged to enact such regulation, it shall inform the Government of the Republic of Croatia thereof." Second, according to paragraph 2 of the same article, "when the Constitutional Court establishes that the Government of the Republic of Croatia has failed to enact a regulation necessary for the implementation of the provisions of the Constitution, laws, and other regulations, it shall inform the Croatian Parliament thereof." Naturally, by the nature of things and based on the obligation established in paragraph 3 of this article, the report on the conducted supervision in the case from paragraph 1 of this article is delivered in written form to the Prime Minister of the Republic of Croatia, and the report from paragraph 2 of this article to the President of the Croatian Parliament.

The specific constitutional situation that arises when, in the conducted procedure of supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations, the Constitutional Court establishes that the competent body has not enacted such a regulation, it has, willy-nilly, established the existence of a legal gap, and if it concerns a regulation for the implementation of the Constitution, then it generally concerns a legislative omission. The mentioned legal gaps and legislative omissions, by their nature, have a negative impact on

[26] The Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.

the realization of the rule of law, especially its substantive elements expressed in the principles of constitutionality and legality and legal certainty. Particularly severe consequences for these principles are caused by a legislative omission when a regulation (constitutional act or law) necessary for the implementation of the Constitution is not enacted. The very obligation to enact regulations for the implementation of the Constitution, or its individual provisions, leads to the conclusion that it concerns such provisions of the Constitution that are not suitable for direct application. The non-enactment of regulations for the implementation of the Constitution de facto and de jure prevents its application and respect, resulting in the violation of all the highest values of the constitutional order, especially among them the rule of law, constitutionality and legality, and legal certainty.

By informing the Government of the Republic of Croatia or the Croatian Parliament about the conducted supervision by which it established that the competent bodies have not enacted appropriate regulations for the implementation of the Constitution, laws, and other regulations, the Constitutional Court simultaneously warns these bodies: a) that the existence of legal gaps and legislative omissions leads to the porousness of the constitutional order, undermining its consistency, unity, applicability, and effectiveness; b) that such legal gaps and legislative omissions are constant causes of violation of the principles of constitutionality and legality, legal certainty, and the rule of law both as principles and as one of the highest values of the constitutional order, with continuous and destructive effects on them and on the overall effectiveness and stability of the constitutional legal order. Naturally, for each unenacted regulation, proportionate to its position in the hierarchy of the legal system and the role and significance for the implementation of a higher regulation for which it should have been enacted; c) the Constitutional Court is not competent to originally decide on the existence of legal gaps and legislative omissions nor to assess their constitutionality and legality, but it is competent to act upon them and, when it establishes such a situation, to inform the competent bodies through its reports, thereby enabling them, as creators of legislative policy and its implementation, to undertake appropriate activities to fulfill their constitutional or legal obligation and enact the regulation necessary for the implementation of the Constitution, laws, and other regulations. In this way, the Constitutional Court fulfills its role as a negative legislator through a specific form of constitutional judicial activism towards the positive legislator.

The constitutional court practice of the Constitutional Court of the Republic of Croatia to date includes such situations when it, referring to Article 130 of the Constitution in connection with Article 105 of the Constitutional Act, submits a Report due to the non-enactment of regulations necessary for the implementation of higher legal acts or their enactment after the expiration of the prescribed deadline. For illustration, I recall the Report to the Croatian Parliament No.: U-X-835/2005 of 24 February 2005. In that Report, the Constitutional Court, among other things, pointed out that "bylaws are often enacted after the expiration of the legally prescribed deadline for their enactment, which is not in accordance with the principle of constitutionality and legality."

Despite the fact that the Constitutional Court warned the competent bodies back in 2005 about the occurrence of unconstitutionality and unlawfulness arising from the non-enactment of bylaws after the expiration of the legally prescribed deadline for their enactment, such occurrences of unconstitutionality and unlawfulness (albeit more rarely) still exist today. Thus, the Constitutional Court, based on the authority of supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations, conducted supervision in case No.: U-XA-4901/2022, and at the session held on 23 May 2023, issued a Report on the established omission by the Ministry of Health to enact a regulation for the implementation of the law, which was delivered to the Government of the Republic of Croatia. In that report, it is stated:

"1. Article 105 of the Constitutional Act on the Constitutional Court of the Republic of Croatia ('Official Gazette', Nos. 99/99, 29/02, and 49/02 - consolidated text; hereinafter: the Constitutional Act) prescribes the jurisdiction of the Constitutional Court to conduct supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations.

2. The law firm Owens, Houška & Partners d.o.o. from Zagreb, represented by Director Nataša Owens, approached the Constitutional Court with a proposal 'to conduct supervision over the enactment of regulations for the implementation of the Constitution, laws, and other regulations'. The proposers state that the competent minister has not adopted a number of regulations pursuant to Article 256 paragraph 1 of the Health Care Act ('Official Gazette', Nos. 100/18, 125/19, 133/20, 147/20, 136/21, and 119/22; hereinafter: the HCA) necessary for the implementation of that Act. Among other things, the minister has not adopted the regulation based

on Article 100 paragraph 4 of the HCA, by which the minister is obliged to regulate norms and standards for the organization of institutes and departments in clinical hospital centers and clinical hospitals.

2.1. Article 256 paragraph 1 of the HCA reads:

'Article 256
(1) The minister competent for health shall adopt the regulations from Article 23 paragraph 2, Article 24 paragraphs 2 and 3, Article 28 paragraph 3, Article 31 paragraph 4, Article 38 paragraphs 10, 11, and 12, Article 39 paragraph 2, Article 42 paragraph 3, Article 50 paragraph 6, Article 59 paragraph 5, Article 62 paragraph 2, Article 76 paragraph 6, Article 77, Article 100 paragraph 4, Article 101 paragraph 2, Article 105, Article 107 paragraphs 3 and 4, Article 108 paragraph 5, Article 118 paragraph 1, Article 122 paragraphs 3 and 6, Article 123 paragraph 4, Article 125 paragraph 5, Article 130 paragraph 3, Article 131 paragraph 4, Article 138 paragraph 5, Article 139 paragraphs 1, 2, and 3, Article 143 paragraph 11, Article 152 paragraph 5, Article 157 paragraph 5, Article 173 paragraph 1, Article 174 paragraphs 2 and 3, Article 177 paragraph 13, Article 180 paragraph 3, Article 181 paragraph 4, Article 183 paragraph 3, Article 184 paragraph 7, Article 192 paragraph 3, Article 194 paragraph 1, Article 196 paragraph 4, Article 207 paragraph 2, Article 208 paragraphs 9 and 10, Article 209 paragraph 4, Article 218, Article 223 paragraph 2, Article 229 paragraph 3, Article 232 paragraph 8, Article 234 paragraph 2, Article 237, and Article 238 paragraph 3 of this Act within six months from the day of entry into force of this Act.
(...)'

3. Based on the above, it follows that the minister competent for health affairs should have adopted specific regulations within six (6) months from the day of entry into force of the HCA, i.e., no later than 1 July 2019.

3.1. The Constitutional Court established that the minister competent for health affairs adopted, in accordance with Article 256 paragraph 1 of the HCA, eleven regulations, but after 1 July 2019. It also established that the minister has not adopted all the regulations he was obliged to adopt based on that article, including the norms and standards for the organization of institutes and departments in clinical hospital centers and clinical hospitals pursuant to Article 100 paragraph 4 of the HCA, as stated in the proposal.

4. Although the HCA has been amended and supplemented five times since its enactment and entry into force, the legislator did not extend the deadline for the adoption of the said regulations through these amendments and supplements.

5. The relevant part of Article 125a of the Constitution[27] reads:

'Article 125.a

If the Constitutional Court establishes that a competent body has failed to enact a regulation necessary for the implementation of the provisions of the Constitution, laws, and other regulations, and was obliged to enact such regulation, it shall inform the Government (...)'

The relevant part of Article 105 of the Constitutional Act reads:

'XII. SUPERVISION OVER THE ENACTMENT OF REGULATIONS FOR THE IMPLEMENTATION OF THE CONSTITUTION, LAWS, AND OTHER REGULATIONS

Article 105
(1) When the Constitutional Court establishes that a competent body has failed to enact a regulation necessary for the implementation of the provisions of the Constitution, laws, and other regulations, and was obliged to enact such regulation, it shall inform the Government of the Republic of Croatia thereof.
(...)

(3) The report referred to in paragraph 1 of this Article shall be delivered in written form to the Prime Minister of the Republic of Croatia (...)'
In view of the above, based on Article 125a of the Constitution and Article 105 paragraphs 1 and 3 of the Constitutional Act, the Constitutional Court informs the Government of the Republic of Croatia about the established omission by the Minister of Health."

[27] The Article 125a of the Constitution mentioned here corresponds to Article 130 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.

V. INSTEAD OF A CONCLUSION

The need to prescribe, as a special jurisdiction of the Constitutional Court, the monitoring of the exercise of constitutionality and legality and the reporting to the Croatian Parliament on emergence of unconstitutionality and unlawfulness was accepted by the Croatian constitutional legislator, starting from the understanding that the constitutional and legal order is not and can never be perfect. That is, it is sometimes deficient, unfinished, or imperfect. The reasons for such a state of the constitutional and legal order, observed in its formal-legal expression, are multifaceted. Among all of them, I will point out only two in this paper. The first is of an objective nature, arising from the continuous development and improvement of society and the creation of new needs and relations in society, which require, in states governed by the rule of law, to be legally regulated and arranged. The basis of development and social progress, for this reason, is the creation and adoption of new technical and technological means that necessitate not only a new division of labor and, based on it, the establishment of new, more complex, and subtle relationships among people in production and distribution but also the establishment of new interests, needs, and forms of behavior founded on them in the entirety of sociological and cultural relations among people. The best examples illustrating this reason are the creation and use of new information technology means and technologies that have led to automation, robotics, and artificial intelligence. The second reason is of a subjective nature. At its core, it always involves the human factor or the omission by people due to ignorance, insufficient information, inability to reach an agreement due to different interests, needs, and even ideals about whether a particular issue should be legally regulated at all, and then especially, if they reach an agreement, how it should be regulated.

The synergy effects of these reasons on the constitutional and legal order very often manifest as legislative omissions, then legal gaps and/or inconsistency with the Constitution of laws, or inconsistency with the Constitution and law of other regulations, either as a whole or in certain segments of their content. The latter issue of inconsistency of laws with the Constitution, or of other regulations with the Constitution and law, is resolved by constitutional courts by exercising their jurisdiction to decide on the conformity of laws with the Constitution, or the conformity of other regulations with the Constitution and law. But what to do with the existence of legislative omissions and legal gaps that not only negatively affect the quality of the normative-legal expression of the constitutional and legal order but,

as a rule, simultaneously indicate the existence of occurrences of unconstitutionality and unlawfulness? Constitutional courts are called upon to provide answers to these questions by exercising their jurisdiction to monitor the exercise of constitutionality and legality and to report emergence of unconstitutionality and unlawfulness to the competent legislative bodies so that they, through their actions in accordance with the Constitution, or the Constitution and law, eliminate them.

Legislative omissions and legal gaps, without any doubt, are accompanying phenomena of every constitutional and legal order—to a greater and/or lesser extent. They negatively affect both the consistency and coherence of the constitutional and legal order and the implementation of the rule of law and legal certainty prescribed by it through the realization of constitutionality and legality. Legislative omissions and legal gaps accompany and exist in every constitutional and legal order, regardless of whether they are mentioned *expressis verbis* or not. Although they are not explicitly mentioned in the Croatian constitutional and legal order, this does not mean that the Croatian constitutional legislator is not aware of their existence. One of his responses on how to react to their existence is to prescribe the jurisdiction of the Constitutional Court of the Republic of Croatia (CCRC) to monitor the exercise of constitutionality and legality and to report to the Croatian Parliament on emergence of unconstitutionality and unlawfulness.

By exercising this jurisdiction, the CCRC uncovers the existence of legislative omissions and legal gaps. It examines, considers, and determines their impact on the rule of law and legal certainty through the realization of constitutionality and legality. If and when it determines that a legislative omission and/or legal gap has such an impact on the constitutional and legal order that it can and must be qualified as an occurrence of unconstitutionality and unlawfulness, it will inform the Croatian Parliament through its report. By explaining its report, the CCRC will present its positions and the arguments for them on which it bases its determination of the observed occurrence of unconstitutionality and unlawfulness.

The positions of the CCRC are valuable for the legislative action of the legislator. Simply because they in themselves (per se), in a substantial sense, constitute (or can constitute) the basis for the reasoning of why a certain law or other regulation should be enacted or, in the case of an existing one, why it should be amended and/or supplemented. On the other hand, they can be the decisive basis on which the legitimate aim that the legislator wants to achieve by enacting that law or other

regulation and/or by amending and supplementing the existing regulation in force will be founded.

Considering the report and the positions of the CCRC expressed therein from the aspect of its impact on the positive legislator, we can, without the pretension of providing all answers in this paper, draw several conclusions. First, by fulfilling this jurisdiction in the specific case, the CCRC, in synergy with the legislator, contributed to the realization of the constitutional principle of mutual cooperation. Second, *volens nolens*, the Constitutional Court, by determining the specific occurrence of unconstitutionality and unlawfulness in the positions contained in the reasoning, expressed its activist action. It must be founded, first of all, on its interpretation of the constitutional values on which the constitutional order of the Republic of Croatia rests and which are the basis for interpreting the Constitution, but also for interpreting the Constitution as a whole. In this sense, such constitutional court activism is justified, necessary, and needed because it is a valid basis for the positive legislator to eliminate the emergence of unconstitutionality and unlawfulness themselves. At the same time, despite the expressed constitutional court activist action, the CCRC did not step out of the framework prescribed to it by the Croatian constitutional legislator as a negative legislator. It could be said that in exercising its jurisdiction of monitoring constitutionality and legality and reporting to the legislator on emergence of unconstitutionality and unlawfulness, the CCRC is given the space to act *ex ante* through its activism on the holders of legislative power to eliminate from the constitutional and legal order the occurrences of unconstitutionality and unlawfulness, specifically those that exist as such, but for the elimination of which that very authority is competent, and not any other state body established by the Constitution.

LITERATURE

I. Books, Scientific, and Professional Works

1. Arlović, M. Constitutional Court Activism and European Legal Standards, Collection of Papers of the Faculty of Law in Split, No. 1/2014.
2. Arlović, M. The Interrelationship Between the Positive and Negative Legislator in the Republic of Croatia, Legal Gazette of the Faculty of Law in Osijek, Nos. 3-4/2015.
3. Arlović, M. Constitutional Framework of the Activities of the Constitutional Court of the Republic of Croatia for Examining and Assessing the Constitutionality of Legal Gaps, Collection of Papers of the Faculty of Law in Split, Vol. 54, No. 1/2017.

4. Bačić, A. Croatia and the Challenges of Constitutionalism, Split, 2011.
5. Bačić, A., and Bačić, P. Constitutional Democracy and Courts, Split, 2009.
6. Borković, I. Administrative Law, 2nd Edition, Zagreb, 2002.
7. Häberle, P. Constitutional State, Zagreb, 2002.
8. Häberle, P. The Role and Influence of Constitutional Courts and Comparative Perspectives, in Bačić A. and Bačić P., Constitutional Democracy and Courts, Split, 2009.
9. Kelsen, H. General Theory of Law and State, Archive for Legal and Social Sciences, Belgrade, 1951.
10. Krbek, I. Constitutional Adjudication, Yugoslav Academy of Sciences and Arts, Zagreb, 1960.
11. Muhić, F. Theory of State and Law, Sarajevo, 1998.
12. Perić, B. State and Legal System, Informator, Zagreb, 1994.
13. Smerdel, B. Constitutional Arrangement of European Croatia, Zagreb, 2013.
14. Smerdel, B. Constitution of the Republic of Croatia, with commentary titled: Fundamental Features of the Constitutional Order of the Republic of Croatia on the Twentieth Anniversary of the "Christmas Constitution", Novi Informator, Zagreb, 2010.
15. Sokol, S. The Constitutional Court of the Republic of Croatia in the Protection and Promotion of the Rule of Law, Collection of Papers of the Faculty of Law in Zagreb, No. 6/2001.
16. Šarin, D. The Convention for the Protection of Human Rights and Fundamental Freedoms through the Relationship between the European Court of Human Rights and the Constitutional Court of the Republic of Croatia on the Example of the Protection of the Human Right to Access to Court, available at https://hrcak.srce.hr/134195
17. Vuković, Đ. Rule of Law, Zgombić & Partners, Zagreb, 2005.

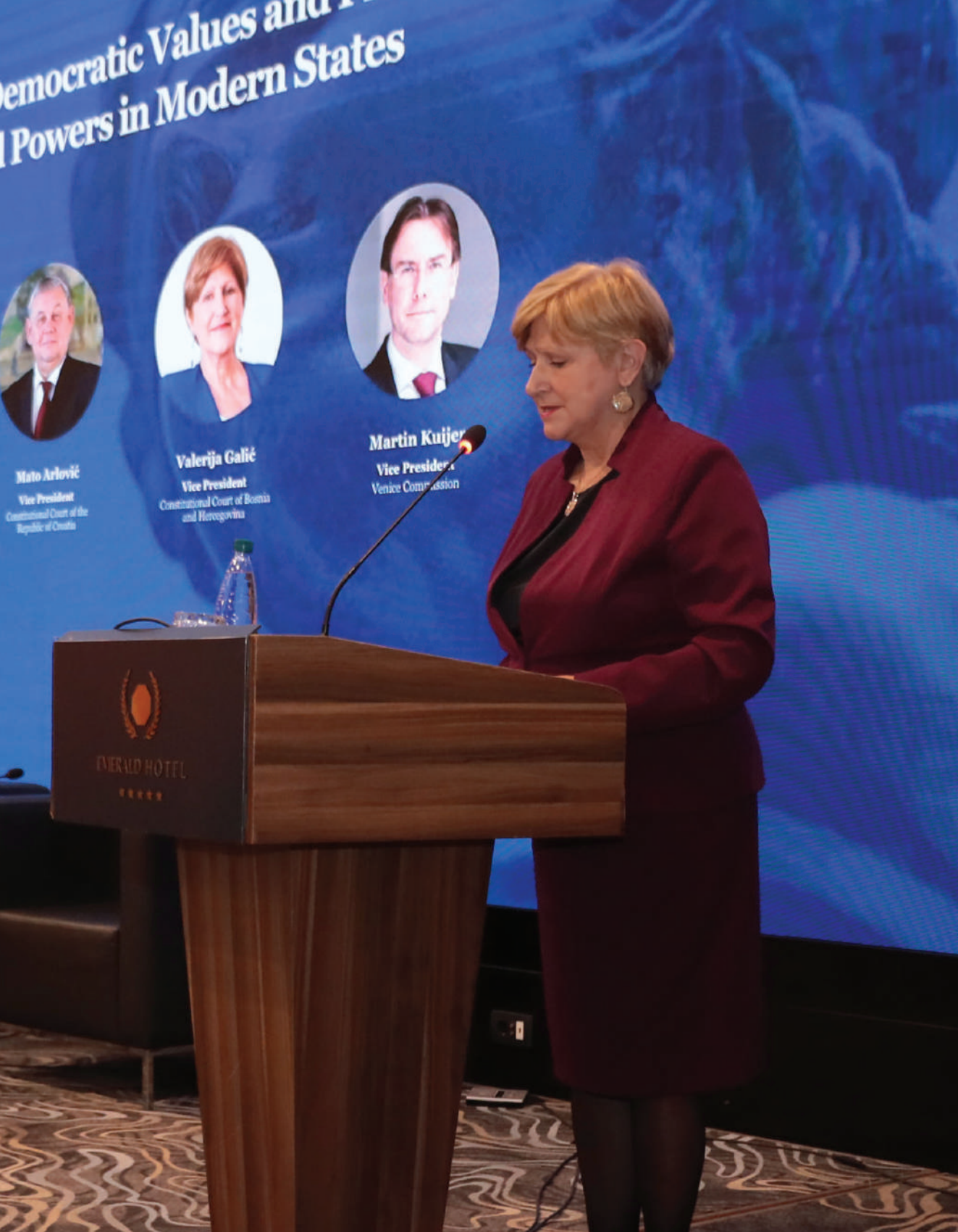
II. Legal Acts, Decisions and Rulings, and Reports of the CCRC

A. Legal Regulations

1. Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 – consolidated text.
2. Constitutional Act on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 – consolidated text.
3. Convention for the Protection of Human Rights and Fundamental Freedoms according to the amendments of Protocol No. 11, "Official Gazette – International Treaties" Nos. 18/1997, 6/1999 – consolidated text, and 8/1999 – correction.

B. Decisions and Rulings and Reports of the Constitutional Court of the Republic of Croatia

1. Ruling No.: U-I-3789/2003 and others of 8 December 2010, "Official Gazette" No. 142/10.
2. Report No.: U-X-1457/2007 of 18 April 2007, "Official Gazette" No. 43/07.
3. Report No.: U-X-2191/2007 of 20 June 2007, "Official Gazette" No. 67/07.
4. Report No.: U-X-2270/2010 of 12 May 2010, "Official Gazette" No. 60/10.
5. Report No.: U-XA-4901/2022 of 23 May 2023, www.usud.hr


emocratic Values and
l Powers in Modern States
Mato Arlović
Vice President
Constitutional Court of the
Republic of Croatia
Valerija Galić
Vice President
Constitutional Court of Bosnia
and Herzegovina
Martin Kuijer
Vice Presider
Venice Commission
EMERALD HOTEL

The Constitutional Court of Bosnia and Herzegovina as a Guardian of Democratic Values and Principles

Ms. Valerija Galić

Vice-President of Constitutional Court of Bosnia and Hercegovina

Role of Constitutional Courts

In modern democratic states, the balance between executive, legislative and judicial power is not only a legal ideal, but also a practical necessity that ensures the stability and functionality of the political system. In this context, constitutional courts play a key role as guardians of democratic values and principles, providing a foundation for the preservation of constitutional order and protection of human rights.

Constitutional courts represent the supreme legal authorities in the interpretation and application of the constitution. Their fundamental function is to oversee and ensure that all laws and acts of state institutions are in compliance with the constitutional norms. This function is of significant importance for the preservation of democratic principles and the protection of civil liberties, as it provides legal protection against potential abuse of power.

Constitutional courts often act as the last line of defense against unconstitutional laws and policies. When the legislative or executive branch renders a decision that is contrary to the constitution, the constitutional courts have the power to review it and, if necessary, annul it. This power of constitutional courts ensures that no government can act outside the framework established by the constitution, thus preventing the concentration of power and preserving the principle of the rule of law.

Challenges and future

Although constitutional courts play a key role in preserving democratic values, they often face numerous challenges. Politicization of courts, pressures exerted by executive or legislative authorities, as well as lack of resources, may jeopardize their ability to perform their function effectively. The situation in which the Constitutional Court of BiH currently finds itself is proof of the above. The failure of the competent legislative authorities to select judges who have been absent in the Constitutional Court for the last two years directly causes a problem in resolving cases from the appellate jurisdiction. As a result, the number of pending cases is constantly increasing. The exercise of constitutional competencies of the Constitutional Court of BiH without violating the right to a fair trial within a reasonable time, while maintaining the quality of work at the highest level, is becoming increasingly challenging. The Constitutional Court undertakes everything in its power to perform its functions as efficiently as possible and, protecting the Constitution of Bosnia and Herzegovina, to ensure the rule of law and to protect human rights and freedoms of all citizens of Bosnia and Herzegovina. However, ensuring the rule of law and the protection of human rights is not only the task of the Constitutional Court, it is the task of all levels of government in Bosnia and Herzegovina and therefore it has never been more important than now in Bosnia and Herzegovina that all levels of government are constantly vigilant in achieving the common goal of protection and fulfillment of constitutional obligations.

Enforcement of decisions as an essential element of democratic value

It is very important for the maintenance of trust in the judicial system and the functioning of democracy that other branches of government respect the decisions of the Constitutional Court of BiH. Any decision holding the unconstitutionality or violation of human rights and freedoms represents a promise for future changes or the prevention of unconstitutional changes. These decisions are the starting point of the process that should enable the rights and freedoms provided for in the Constitution of BiH and the European Convention to become effective.

The Constitution of Bosnia and Herzegovina stipulates that the decisions of the Constitutional Court are final and binding. The issue of enforcement is further elaborated by the Rules of the Constitutional Court in accordance with which all authorities are obliged, within their competencies established by the Constitution and law, to

enforce the decisions of the Constitutional Court. In its decision, the Constitutional Court may specify the manner and deadline for the enforcement of the decision of the Constitutional Court. Within the set deadline, the body under the obligation to enforce the decision of the Constitutional Court is obliged to submit a notification about the measures taken to enforce the decision of the Constitutional Court, as indicated in the decision. In the event of failure to act or delay in enforcing or notifying the Constitutional Court about the measures taken, the Constitutional Court will render a decision establishing that the decision of the Constitutional Court has not been enforced, namely it may specify the manner of the enforcement of the decision. This decision will be submitted to the competent prosecutor or other body competent for enforcement designated by the Constitutional Court. Article 239 of the Criminal Code of Bosnia and Herzegovina provides for criminal liability for officials in institutions of Bosnia and Herzegovina, institutions of the entities or institutions of the Brcko District of BiH who refuse to enforce the final and enforceable decision of the Constitutional Court or prevent such a decision from being enforced or who otherwise prevent its enforcement. Although the commendable intention of the legislator in BiH to ensure the enforcement of decisions of the Constitutional Court through criminal legislation, thus recognizing their indisputable importance in the protection of individual and social goods and values, it is noted that this mechanism has remained without significant effect in the field of the enforcement of decisions of the Constitutional Court of BiH and the sanctioning of persons.

Failure to comply with the constitutional provisions according to which the decisions of the Constitutional Court are final and binding renders the protection of human rights and the rule of law illusory.

In the context of the implementation of the decision of the Constitutional Court of BiH, it is also important to note that compliance with the reasoning of the decisions of the Constitutional Court ensures quality enforcement, is crucial for the protection of human rights, and contributes to good governance and the improvement of the principle of the rule of law. That is why it is important to establish a model of accountability through the cooperation of all levels of government for the full implementation of the decisions of the Constitutional Court.

I would like to end this part with a reference to the enforcement of final court decisions in general and in the context of certain views of the Constitutional Court and the European Court of Human Rights. Namely, in one of its decisions, the Con-

stitutional Court emphasized that preventing the enforcement of final court decisions, but also stipulating that the opinions of executive authorities are "binding on courts" is contrary to the right to an "independent court" under Article 6, paragraph 1 of the European Convention. The Constitutional Court emphasized that this right also includes in itself the principle that no one outside the judicial power may alter or suspend from the enforcement of a binding court decision to the detriment of an individual. The Constitutional Court also pointed to the case law of the European Court of Human Rights according to which the power to render binding decisions is an important characteristic of the "court" within the meaning of Article 6 paragraph 1 of the European Convention, and forms an integral part of the term "independent" Also, "court", within the meaning of Article 6, paragraph 1 of the European Convention, is not considered "independent" if it seeks and accepts binding opinions of the executive, since in this way the judicial function is "subordinated to the executive"[1]

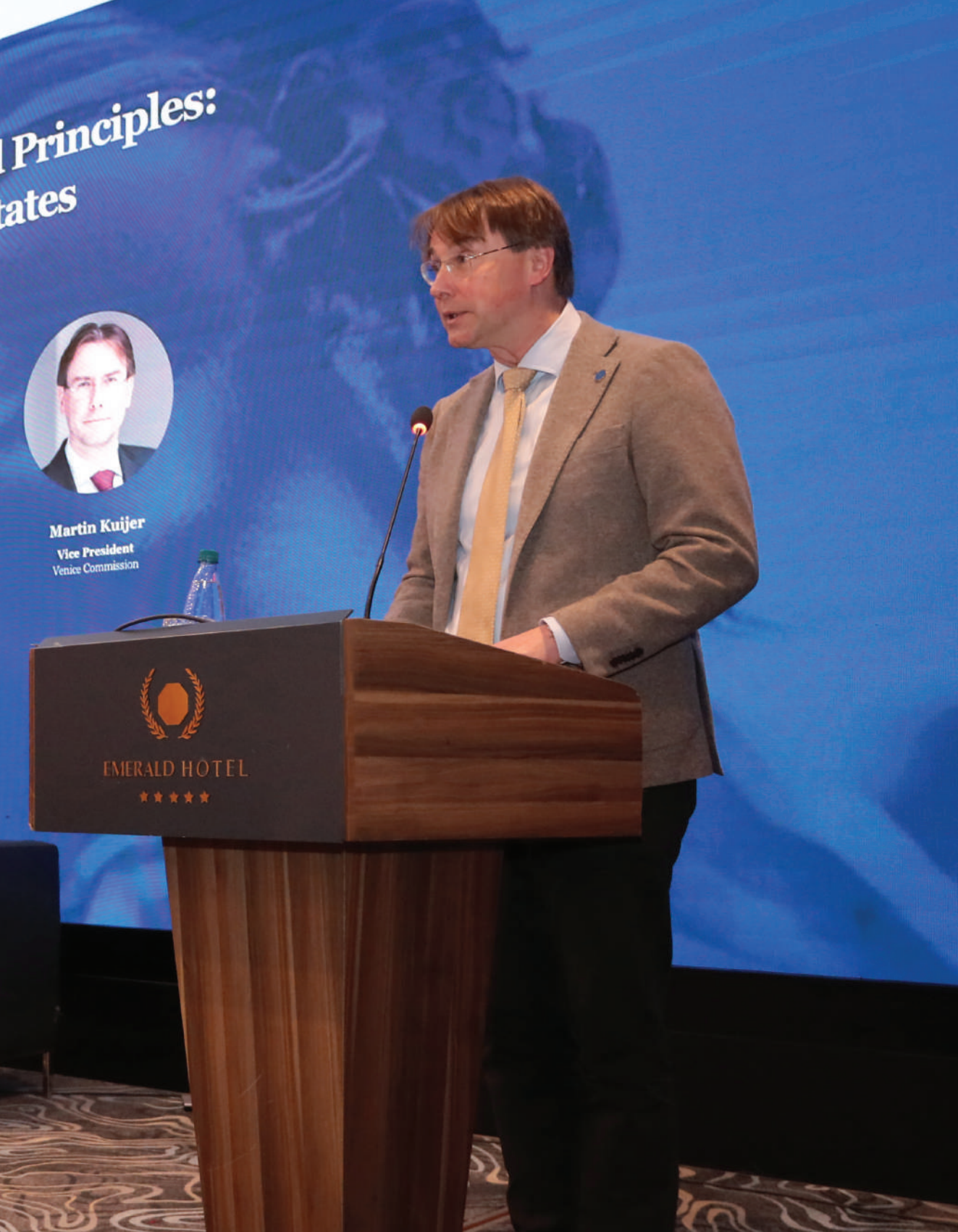
Conclusion

Constitutional courts are an indispensable part of modern democracies. Through their role as guardians of constitutional values and a balance between the different branches of government, they ensure that democracy remains vital and that justice is available to all citizens. Their work is crucial to the preservation of the rule of law and the protection of fundamental human rights and, therefore, deserves constant attention and support from all segments of society.

In order for the Constitutional Court of Bosnia and Herzegovina to be able to effectively protect the fundamental goals, including the rule of law, and thus contribute to the harmonization of overall social relations and the development of democracy, it is important that the organizational and functional independence of the Constitutional Court of BiH is ensured in its relations with the bodies of the legislative, executive and regular judicial power, and that all bodies of state power apply or implement the decisions of the Constitutional Court of Bosnia and Herzegovina, regardless of the views of these bodies on individual decisions. Only in this way will the Constitutional Court of Bosnia and Herzegovina be able to exercise its constitutional role. Due to the specificity and complexity of the constitutional and legal system in Bosnia and Herzegovina, it will probably take time to understand the special constitutional and legal position of the Constitutional Court of Bosnia and Herzegovina as the highest institutional protector of all values which should receive constitutional protection.

[1] See Constitutional Court, decision number AP-2653/05 of 12.9.2006, point 38 with further references


05
10


l Principles:
tates
Martin Kuijer
Vice President
Venice Commission
EMERALD HOTEL

Constitutional Courts as Guardians of Democratic Values and Principles: A Perspective from Venice

Mr. Martin Kuijer

Vice-President of Constitutional Court of Bosnia and Hercegovina

Dear Madame President, dear distinguished ladies and gentlemen,

It is a true honour to join you today for the Balkan Constitutional Courts Forum and it is a pleasure to finally visit Prishtina for the first time!

Allow me – also on behalf of the Venice Commission – to convey my congratulations to the Constitutional Court of the Republic of Kosovo; not only for the excellent organisation of this conference but of course also for its 15th anniversary.

I would also like to thank the Constitutional Court of the Republic of Kosovo for the fact that it so frequently cites the work of the Venice Commission.

The judgments not only refer to opinions of the Commission in respect of Kosovo itself, but also to opinions in respect of third countries if the subject-matter is of relevance to the decision, to reports and compilations, and to the Rule of Law Checklist when discharging the task of reviewing the constitutionality of legislation (in particular when assessing principles such as legal certainty, clarity, and foreseeability).

In Case no. KO55/23, for example, the Court was asked to assess the proposed constitutional amendments no. 27 and no. 28.

These amendments dealt inter alia with the expansion of the grounds for dismissal of judges.

In paragraph 265 of the judgment, the Constitutional Court stated that it would assess the proposal using as a basis – and from here on I quote –

"(i) the Rule of Law Checklist; (ii) the case law of the ECHR; (iii) applicable legislation in the Republic of Kosovo; (iv) opinions of the Venice Commission; and (v) the comparative analysis of the Constitutions of the member states of the Council of Europe."

Needless to say that it is a privilege if independent constitutional courts when exercising their mandates take the work of the Venice Commission as a source of inspiration so seriously (even though I realise not all of you will *always* completely agree with the viewpoints of the Commission).

The Rule of Law Checklist[1] is undoubtedly one of the more well-known documents produced by the Venice Commission, 'simply' because it identifies core elements covered by the terms 'rule of law', 'Rechtsstaat' and 'État de droit'.

It provides an uniform benchmark for measuring compliance with one of the founding principles of the Council of Europe.

For example, the Parliamentary Assembly of the Council of Europe has decided to

"use it systematically in its work, particularly in the preparation of reports of the Committee on Legal Affairs and Human Rights and the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), in order to accurately identify any structural and systemic problems in the Council of Europe's member States".[2]

[1] CDL-AD(2016)007.

[2] Resolution 2187 (2017).

The Checklist was and is a highly relevant tool in times in which we are faced with 'Rule of Law backsliding' fuelled by a trend in various countries, which can best be described as a 'winner takes it all' mentality (I am sure that many of you are familiar with ABBA's song).

Political parties that have legitimately won elections in their countries – sometimes giving them 'supermajorities' in their political system – believe that this 'democratic mandate' allows them to silence 'dissenting voices'.

They introduce measures that erode 'the critical voice' or the institutional checks and balances in a democracy based on the Rule of Law.

The exact way in which this takes shape differs from country to country. But the common thread is often the same: critical voices, or better, alleged critical voices, must be neutralized.

In the *discours* there has been a focus so far on 'Rule of Law' backsliding.

However, more recently, the issue of democratic backsliding has been put on the political agenda as well.

And while (soft and hard) standards in respect of Rule of Law standards have been fairly well developed, the same cannot necessarily be said about the core democratic principles.

Of course, some aspects have been thoroughly regulated.

For example, electoral matters. Many of you will know the Code of Good Practice in Electoral Matters[3], which deals with the common principles of the European electoral heritage.

Suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically. And the Code contains various important notions about stability of electoral law, procedural safeguards that need to be in place in order to organise proper elections, etc, etc.
But other aspects of democratic values and principles are less developed.
For that reason, I was particularly pleased with the fact that the 4th Summit of Heads

[3] CDL-AD (2002) 23.

of State and Government of the Council of Europe, held in May 2023 in Reykjavik, decided to elaborate the Principles for Democracy.

In its Preamble, the member states of the Council of Europe reiterate their commitment to secure and strengthen democracy and good governance at all levels throughout Europe because they "consider democracy as the only means to ensure that everyone can live in a peaceful, prosperous and free society".

They commit to resist "democratic backsliding on our continent, including in situations of emergency, crisis and armed conflicts".

In other words: a fairly direct link is made between democracy and internal societal stability and international peace.

The declaration then lists 10 Principles.

One immediately notices the close relationship with – one might even say: overlap with – core notions of the Rule of Law: the need to ensure an independent judiciary, the need to uphold the separation of powers with appropriate checks and balances between different State institutions, et cetera.

Of course, the principles also refer to the need to hold elections and referenda in accordance with international standards and the need to take all appropriate measures against any interference in electoral systems and processes. The latter issue has become even more important in recent times.

But the first principle refers to 'PARTICIPATION' which is for me a core democratic value.

How do we ensure that all citizens of our societies continue to participate and feel – and remain to feel – represented by the state institutions?

In an increasing number of societies, one can discern an increasingly polarised electorate and/or a divide between people participating in democratic processes and people who do not feel represented by what they call 'the elite'.

These concerns are of course primarily issues that affect political office holders: it is primarily up to them to 'bridge the divide'.
However, to a certain extent I think these issues also affect us as constitutional lawyers.

Some interpretations of the constitution may contribute to a feeling of participation, while other interpretations will make it harder to achieve that goal.
Let me briefly refer to one more example from the case-law of the host court. In Case No. KO 01/09 the Constitutional Court of the Republic of Kosovo referred explicitly to "the responsibility of the State to promote a spirit of tolerance and dialogue, and to support reconciliation among communities".

Ensuring participation also calls for investing in educating people on democratic values and principles in the constitutional order.

What can we – constitutional jurisdictions and international stakeholders such as the Venice Commission – do to explain ourselves better to an audience of non-constitutional lawyers?

Is the language we use accessible?

Should we use more systematically press releases to explain in a more simple language what the core message is we want to convey?
What do we do to educate young people about our work? Etc. Etc.

The Venice Commission has done some work in respect of 'participation'.

It adopted for example a checklist in 2019 about the parameters on the relationship between the parliamentary majority and the opposition in a democracy.[4]

But personally speaking I think more can be done in this field.

Recently, the Commission started working on an update of the Rule of Law Checklist and I would welcome a slightly broader approach to the issues dealt with in the current Checklist in order to reflect the very close interrelationship between the Rule of Law and democracy and to elaborate on the core democratic values and principles.

If we do so, I hope we will be able to benefit from your invaluable insights in these matters.

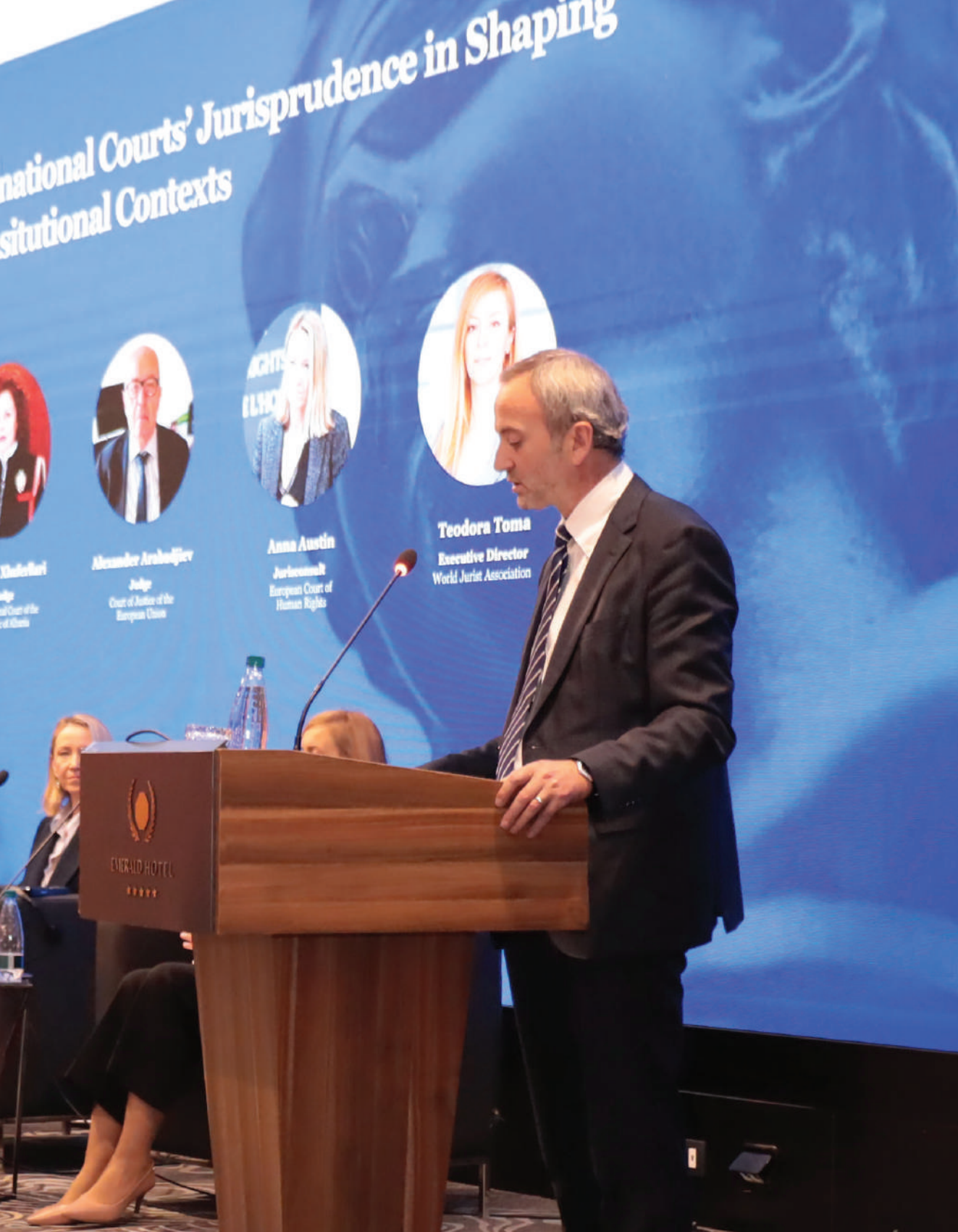
I thank you for your attention.

[4] CDL-AD(2019)015.

SESSION II

THE IMPACT OF SUPRANATIONAL COURTS' JURISPRUDENCE IN SHAPING LOCAL CONSTITUTIONAL CONTEXTS

Mr. Sokol Sadushi
President of the Supreme Court of the Republic of Albania


national Courts' Jurisprudence in Shaping
situational Contexts
Alexander Arabadjiev
Judge
Court of Justice of the European Union
Anna Austin
Jurisconsult
European Court of Human Rights
Teodora Toma
Executive Director
World Jurist Association
EMERALD HOTEL

The influence of the European Court of Human Rights in the process of reviewing the constitutionality of legislation

Mr. Nexhmi Rexhepi
Judge of the Constitutional Court of the Republic of Kosovo

Esteemed colleagues, dear friends,

It is a great pleasure to share with you some perspectives from our Court regarding the influence of the European Court of Human Rights (ECtHR) in the process of reviewing the constitutionality of legislation enacted by the Assembly.

Two hundred and twenty years ago, in 1803, Chief Justice John Marshall of the U.S. Supreme Court, in Marbury v. Madison[1], stated: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?... The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on the level of an ordinary legislative act, alterable whenever the legislature pleases to alter it."

[1] William H. Rehnquist, The Supreme Court (revised and updated), Vintage Books- A Division of Random House, INC., New York, 2001, pp.21-35

In this landmark case, the Marshall Court declared a law passed by Congress unconstitutional. Alexis de Tocqueville observed that this tendency to legalize political questions was a characteristic of the United States. The theory of legal development envisioned by Watson[2] suggests that the legal change is rarely homegrown and often depends on external influence.

Today, this phenomenon is common in modern democracies.

Almost all democracies established after World War II, and particularly after the fall of communism, have embedded provisions for judicial review of the constitutionality of laws in their constitutions.

The necessity of enacting democratic constitutions—and ensuring their implementation by judges tasked with protecting democracy—helped promote the practice of judicial review, placing human rights at the heart of constitutional review.

It is now standard for constitutional review bodies to reference the decisions and arguments of other courts and the work of supranational bodies like the ECtHR and the Court of Justice of the European Union (CJEU).

While every state has its own collective identity, history, and social aspirations, the birth of our state emerged from a long and painful struggle for human dignity, freedom, and democracy. Our Constitution[3] marked a "new beginning" for our society. To borrow the words of Bruce Ackerman, our constitution emerged as a symbolic marker of a great transition in our political life as a new nation.
The framers of our Constitution, inspired by the commonly shared values of modern democracies, in establishing the Constitutional Court, chose constitutional review as the mechanism to permeate every aspect of society with the values inherent in the constitutional framework our society has adopted.

The primary task of constitutional courts—through constitutional review—is to ensure that the values enshrined in the Constitution are upheld throughout the state and society.

---

[2] Alan Watson - *Legal Transplants An Approach To Comparative Law*, The University of Georgia Press, Athens and London, 1993

[3] Constitution of the Republic of Kosovo at https://www.gjk-ks.org/src/assets/aboutDocs/gjkk_kushtetuta_e_republikes_se_kosoves_ang.pdf

In this regard, one of the main functions of the Constitutional Court of Kosovo is its jurisdiction to review the conformity of legislation with the Constitution. Therefore, legislation is subject to constitutional review through three main mechanisms.[4]

First, there is the mechanism of ex post control. Under this mechanism, ¼ or 30 members of the Assembly, the President, Prime Minister, Ombudsperson, and municipalities are authorized to contest the constitutionality of legislation based on criteria defined by the Constitution and the Law on the Constitutional Court.[5]

Second, the mechanism of preventive control allows ten members of the Assembly to challenge the constitutionality of legislation and Assembly acts before they come into effect.

Lastly, incidental control enables regular courts to contest the constitutionality of specific provisions of a law before the Constitutional Court.

The European Convention on Human Rights is one of the nine international human rights instruments that, under Article 22 of the Constitution, are directly applicable within the Republic of Kosovo, and in case of conflict, have superiority over the national laws (Art. 19.2).

In exercising its jurisdiction to review the conformity of legislation with the Constitution, particularly in matters related to the human rights and freedoms enshrined in Chapter II of the Constitution and the directly applicable international instruments, including the European Convention on Human Rights, the Kosovo Constitutional Court applies principles derived from the case law of the European Court of Human Rights, as also required by Article 53 of the Constitution.

Over its fifteen years of existence, the Court, in fulfilling its mandate of constitutional review, has issued numerous decisions in which it has applied and affirmed these principles.

These include, but are not limited to, the principles of legal certainty (relating to the clarity and foreseeability of laws), the right to non-discrimination and equality

[4] See Article 113 paragraphs 2(1), 4, 5, and 8

[5] Law on the Constitutional Court of the Republic of Kosovo at https://www.gjk-ks.org/src/assets/aboutDocs/Law_03-L-121_CCK.pdf

before the law, freedom of movement, and various aspects of the constitutional right to a fair and impartial trial--encompassing, among others, the principle of a tribunal established by law, the burden of proof, judicial independence, and the right to legal remedies. Additionally, the Court has upheld rights such as the right to private and family life, the ne bis in idem principle, and the right to property.

With respect to the legal certainty of contested legislation, the Constitutional Court has consistently applied the standards established by Strasbourg case law, including those outlined in the Rule of Law checklist from the Venice Commission. The Court has emphasized the necessity for "clarity" and "foreseeability" in legal provisions that may affect fundamental rights and freedoms.

In several cases, the Court assessed that the contested legal provisions failed to meet the essential criteria for clarity and foreseeability, as derived from the principle of the rule of law, which is embodied in Articles 3 [Equality Before the Law] and 7 [Values] of the Constitution. This ultimately led to the declaration of these provisions as unconstitutional.

In its review of the Law on Salaries[6], referred by the Ombudsperson, the Court applied the standards and principles established by the European Court of Human Rights concerning the prohibition of discrimination. It determined that the contested law violated the principle of "equality before the law" in two key areas: (a) the foreign diplomatic service, as a result of the exclusion of this category from the benefit of the transitional allowance, without any justification; and (b) in relation to public officials and functionaries who would be employed or change positions, after the entry into force of the contested Law, who would receive a lower salary, compared to their colleagues who performed the same work.

Additionally, in its judgment on the request from the Supreme Court to assess the constitutionality of provisions in the Law on Pension Schemes Financed by the State[7], the Court examined the principles of equality and non-discrimination. It identified a "difference in treatment" between two groups in similar or analogous situations regarding contribution-based pensions. The Court ruled that this difference was neither reasonable nor proportionate.

[6] See the Judgement in case KO 79/23 at https://api.webgjk-ks.org/Custom/ko_79_23_agj_ang.pdf

[7] See the Judgement in case KO 190/19 at https://api.webgjk-ks.org/Custom/ko_190_19_agj_ang.pdf

In a case, concerning the assessment of constitutional amendments[8] related to vetting in the justice system, the Court approved the vetting process for heads of the judiciary. The amendments, among other provisions, established a transitional process for integrity checks of the heads of the justice system and candidates for these positions by a provisional Integrity Control Authority.The Court emphasized two key points: (a) the independence of the judiciary is the cornerstone of the rule of law, and (b) the vetting procedure must ensure the protection of fundamental constitutional values and incorporate safeguards for human rights and freedoms enshrined in the Constitution.

In its assessment, the Court relied on standards and guarantees derived from European Court of Human Rights case-law, particularly examining whether the Integrity Control Authority met the criteria of a tribunal established by law, whether the right to legal remedies was ensured for individuals subject to the integrity checks, and whether the proposed amendments upheld the necessary guarantees for a fair and impartial trial and the right to privacy. These standards were evaluated in light of recent Strasbourg case law on integrity control procedures within the judiciary.

In its decision concerning the Law on Public Officials[9], referred by members of the Assembly, the Court found that the law violated the right to property of civil servants, including their legitimate expectations. While the interference with their rights was "prescribed by law" and pursued a "legitimate aim", it was not deemed proportionate to that aim. The salary reduction, which selectively targeted certain public sector employees—particularly judges and prosecutors—drastically affected their acquired rights. As a result, the Court held that the law failed to maintain a "fair balance" between the general interest and the obligation to protect fundamental human rights and freedoms.

In another case, the Court reviewed the constitutionality of the Law on the State Bureau for Verification and Confiscation of Unjustified Assets.[10] This law introduces the concept of civil confiscation in rem of unjustified assets of public officials. The Court declared certain provisions unconstitutional, in particular regarding

[8] See the Judgement in case KO 55/23 at https://api.webgjk-ks.org/Custom/ko_55_23_agj_ang.pdf

[9] See the Judgement in cases KO 216/22 and 220/22 at https://api.webgjkks.org/Custom/ko_216_220_22_agj_ang_.pdf

[10] See the Judgement in case KO 55/23 at https://api.webgjk-ks.org/Custom/ko_46_23_agj_ang.pdf

retroactive application of the law, due to the lack of necessary procedural guarantees, specifically in relation to the burden of proof.

The Court referred to standards from European Court of Human Rights case-law, the Venice Commission's Opinions on civil confiscation, and other constitutional courts. It clarified that while retroactive application of civil and administrative law is possible in exceptional cases where the public interest is involved, it must be proportional to the aim pursued. In this case, the retroactive period exceeded reasonable limits set by relevant laws concerning data retention.

Additionally, the law placed the burden of proof on the individual, without offering sufficient procedural safeguards to allow the individual to argue the "objective impossibility" of providing evidence to justify their assets.

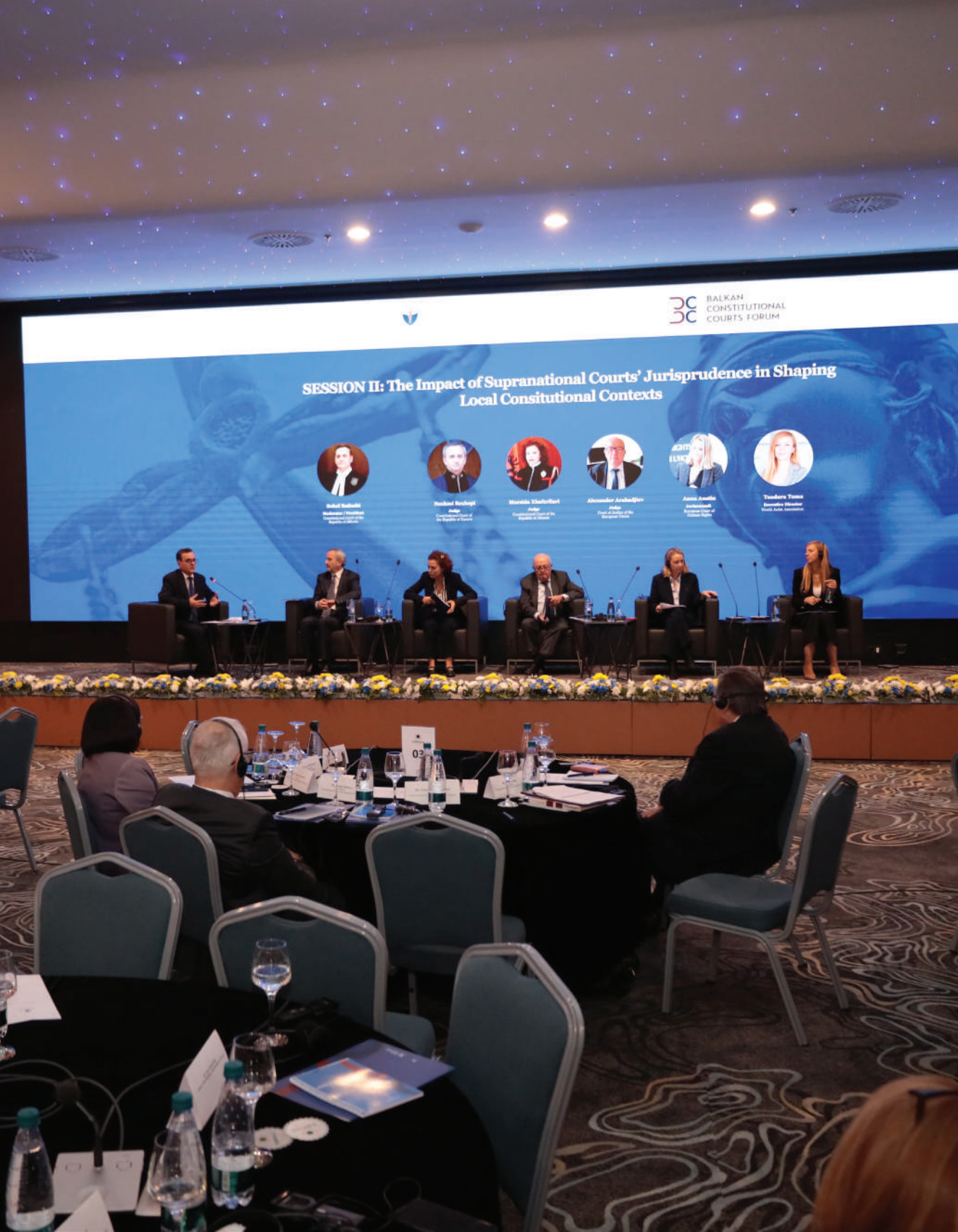
Through judicial review, we remain faithful to the fundamental values we established in the past, which reflect our core identity in the present, and will guide us in the future as our society continues to develop.

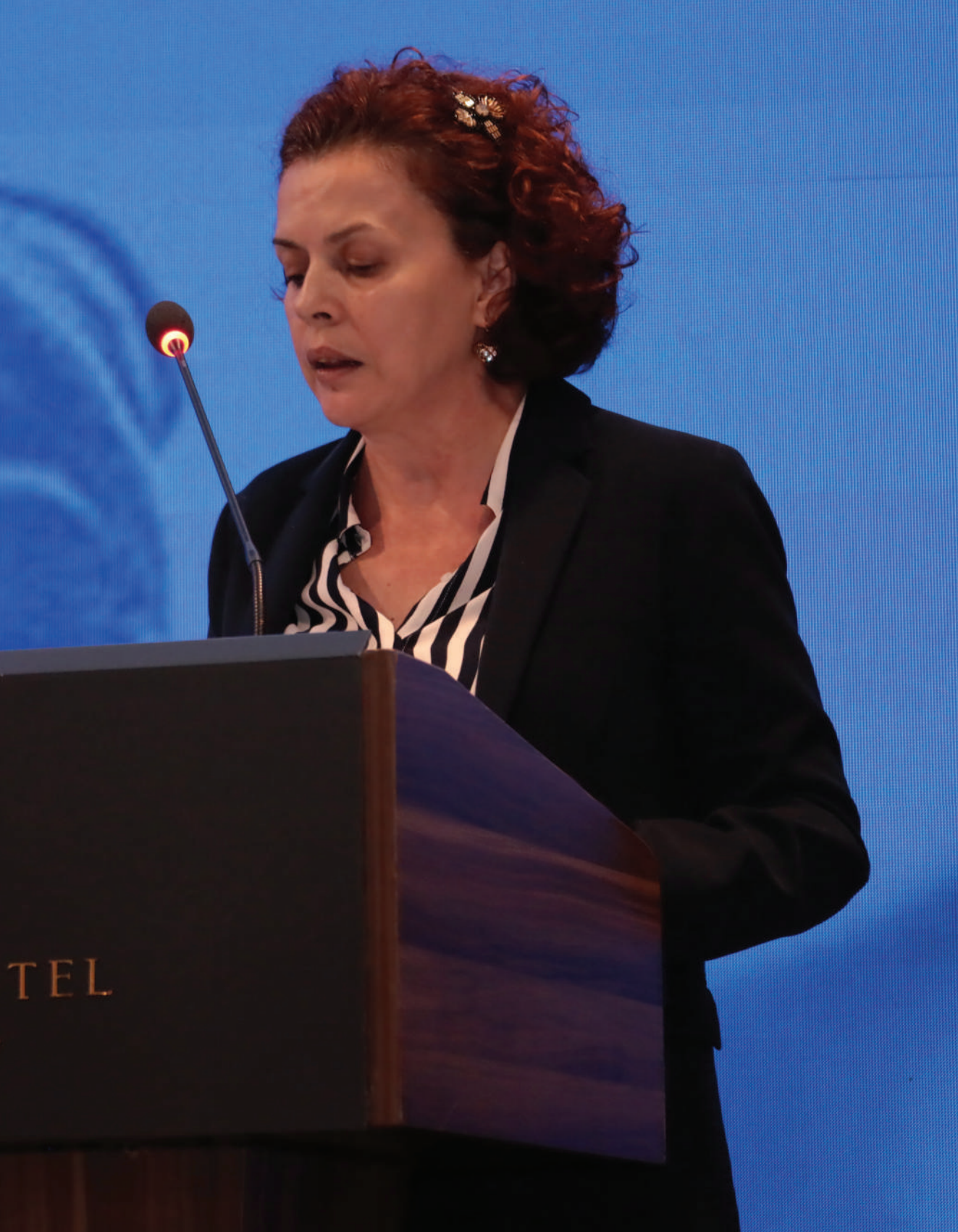
We all share the fundamental belief that in a constitutional democracy, neither the legislature nor the judiciary is supreme—only the Constitution is supreme. Once a constitution is adopted, the legislature is bound to uphold its provisions. The role of the Court is to safeguard the Constitution and ensure that the legislature fulfils its constitutional obligations.

Let me conclude by citing one of our distinguished guests of this conference, the keynote speaker of this morning opening session, and esteemed friend of our Court, Professor Arnold, who wrote that:

"While the 19th century rule of law considered the access to the courts for challenging illegal executive action- a requirement of the rule of law, constitutional review of legislation- is today 'the perfection of rule of law', which transforms it into the rule of the Constitution."

Thank you so much for your attention!


BALKAN
CONSTITUTIONAL
COURTS FORUM
SESSION II: The Impact of Supranational Courts' Jurisprudence in Shaping
Local Consitutional Contexts


TEL

The Albanian Constitutional Court as a "Compliance Partner" of European Court of Human Rights

Ms. Marsida Xhaferllari
Judge of Constitutional Court of the Republic of Albania

Honorable participants,

The processes of integration into international organizations have developed the concept of multilevel constitutionalism, which recognizes that autonomous legal orders are separate yet simultaneously interact with one another. Multilevel constitutionalism seeks to avoid hierarchical conflicts between domestic constitutions, the European Convention on Human Rights, and European Law in the case of a Member State of the European Union.

Within this concept, constructive dialogue between courts of the various legal orders becomes of fundamental importance. The European Court of Human Rights itself refers to judicial dialogue when, in resolving cases before it, looks for the "European consensus" or the "common approach to dealing with a particular issue by the majority of High Contracting Parties".[1]

We are all aware of the difficult times international organizations are going through, mainly due to the populist political agendas that have emerged in various countries.

[1] See the report of the Committee on Legal Affairs and Human Rights submitted to the Parliamentary Assembly of the Council of Europe on the European Convention on Human Rights and national constitutions, 11 April 2023, https://pace.coe.int/en/files/31695/html

Some states are debating whether to withdraw from international systems or to refuse to implement judgments of international courts. In this situation, critical or reserved attitudes toward international courts are no exception. The more recent instances now suggest that domestic courts are not just 'impartial enforcers' of international law but, rather, also see their role – and increasingly so – as 'gatekeepers', controlling the effects of international law at the domestic level and ready to cushion its impact if deemed necessary.[2]

I must say that this is not the case of Albania. In Albania, public trust in international organizations such as the Council of Europe and the European Union is very high. Recently, amid tiring efforts to open negotiations with the European Union, alongside the strong desire of Albanian citizens to be part of the European family, attention has been drawn again to a saying by one of the most famous Albanian authors of our National Renaissance of the early 1900s – "*The sun of Albanians rises in the West*".[3] In seeking to explain the positive approach of Albania toward integration processes into international organizations, several reasons come to mind, such as our painful history as the most isolated country in Europe during communism, the still-fragile state of representative democracy, or the provisions of the Albanian Constitution. The Albanian Constitution was adopted in 1998, after Albania joined the Council of Europe and ratified the European Convention on Human Rights[4]. It provides for the implementation of international law as a fundamental principle[5] (Article 5); its catalogue of fundamental rights and freedoms is very similar to that of the ECHR; it expressly stipulates that restrictions on fundamental rights cannot exceed those provided for in the ECHR (Article 17).

When I received the invitation for this conference, I chose to discuss the role that the Constitutional Court of Albania has held in the execution of the judgments of the European Court of Human Rights.

[2] See Raffaela Kunz, Judging International Judgments Anew? The Human Rights Courts before Domestic Courts, *European Journal of International Law*, Volume 30, Issue 4, November 2019, Pages 1129–1163, https://doi.org/10.1093/ejil/chz063

[3] Naim Frashëri (25.051846 – 20.10.1900), writer and a key activist of the Albanian National Renaissance.

[4] Albania became a member state of the Council of Europe on 13 July 1995 and immediately thereafter ratified the Convention, which entered into force on 2 October 1996..

[5] Article 5 of the Constitution stipulates that "*The Republic of Albania applies international law that is binding upon it.*".

By way of introduction, it should be noted that Article 46 of the ECHR, when it addresses the binding force and the execution of the ECtHR's judgments, is addressed to the High Contracting Parties, meaning the States Parties. It is generally accepted that the drafters of the Convention intended that the way judgments would be given effect be a matter resolved internally by the member states, as a sign of respect for their sovereignty.[6]

The Constitutional Court of Albania has continuously contributed in an active way to the execution of the ECtHR's judgments, sometimes even going beyond domestic legislation and often by taking as reference decision delivered in cases that did not concern Albania. Hence, one can say that it has become a "compatible partner" to the Strasbourg Court. Its contribution to the execution of the ECtHR's decision includes a wide range of cases, from borrowing concepts to annulling laws that violate fundamental rights.

Specifically, regarding the *borrowing of concepts*, the Court has developed constitutional concepts related to human rights, enriching them with references from the jurisprudence of the Strasbourg Court, even beyond cases delivered in relation to Albania. By way of illustration, one can mention the constitutional concepts of property, private life, or the principle of proportionality.

Thus, the Constitutional Court of Albania has affirmed that the concept of the right to property is quite broad and extends both to immovable and movable property, and covers a broad range of economic interests, including material and immaterial interests such as patents, shares, the right to a pension, the right to lease property, the right to exercise a profession, etc. According to it, constitutional control of an infringement of the right to property is based on three main rules: the first rule relates to the peaceful enjoyment of property; the second rule relates to restrictions on the right of ownership under certain conditions; and the third rule recognizes the states' right to control the use of property in line with the general interest by implementing laws they deem necessary for that purpose.[7]

Regarding the right to private life, the Court has acknowledged that, in essence, it must secure an individual space within which a person can develop and fulfill his

[6] See the report of the Committee on Legal Affairs and Human Rights submitted to the Parliamentary Assembly of the Council of Europe on the European Convention on Human Rights and national constitutions, 11 April 2023, https://pace.coe.int/en/files/31695/html

[7] See Decision No. 10, dated 19.03.2008 of the Constitutional Court.

personality independently, emphasizing not only the negative obligation of public authorities not to interfere in private and family life but also the positive obligation of the state to protect these rights as concretely as possible through the bodies of all three powers: legislative, executive, and judicial.[8]

As for the principle of proportionality, at its core lies "a fair balancing of interests", their important and objective assessment, as well as avoiding conflict through the selection of the appropriate means to implement them. A restriction would be considered consistent with the standards of the principle of proportionality if: (i) the legislator's objective is sufficiently important to justify restricting the right; (ii) the measures taken are reasonably related to the objective – they cannot be arbitrary, unfair, or based on illogical assessments; (iii) the means used are not harsher than necessary to achieve the required objective – the greater the harmful effects of the chosen measure, the more significant the objective must be in order for the measure to be justified as necessary.[9]

Regarding the *abrogation of laws*, in 2021, the Constitutional Court of Albania abrogated the Property Law, referring to the ECtHR judgment in the case of *Beshiri v. Albania*[10].It declared that, for the treatment of fundamental human rights, the ECtHR has, in our legal system, an exclusive competence, which is acknowledged by our domestic legal system for the purpose of implementing Article 122 of the Constitution, as well as Article 17, paragraph 2, thereof, which stipulate that the ECtHR's decision are directly applicable. Article 17 of the Constitution grants the catalogue of rights set out in the ECHR the status of a minimum standard regarding limitations of rights and freedoms set forth in the Constitution. Each branch of government has different obligations for the enforcement of the final judgments of the ECtHR. As far as the legislative branch is concerned, there may arise a need for it to take measures to align domestic legislation with the ECHR provisions.[11]

[8] See Decisions No. 52, dated 01.12.2011; No. 16, dated 11.11.2004 of the Constitutional Court.

[9] See Decisions No. 16, 25.07.2008; No. 52, dated 5 December 2012 of the Constitutional Court.

[10] In this case, the European Court of Human Rights held that the minimum threshold of 10% for the value of compensation for property expropriated during the communist regime could be considered reasonable in Albania's specific context due to the overall level of sacrifice that the new compensation scheme imposes on expropriated subjects compared to their expectation of receiving compensation at the current market value under the previous legislation (*paragraph 196 of the judgment*).

[11] See Decision No. 4, dated 15.02.2021 of the Constitutional Court.

Another contribution of the Constitutional Court relates to reopening proceedings. In 2011, even though the criminal procedure law did not explicitly provide for such a possibility, the Court ordered the reopening of criminal proceedings against an individual to execute the ECtHR decision which found a violation of the right to a fair trial and required the restoration of the infringed right. The Court reasoned that pursuant to Article 5 of the Constitution, the Republic of Albania applies international law that is binding upon it and that, under this principle, ECtHR decisions are binding for execution, in accordance with the commitment undertaken by the Republic of Albania as a member state of the Council of Europe pursuant to Article 46, paragraph 1, of the ECHR, which stipulates that the High Contracting Parties undertake to abide by the final decisions of the European Court in any case to which they are parties. The Constitutional Court, in addition to the necessity for the Parliament to fill the legislative gap in criminal procedural law, also underlined that the Supreme Court must seek to find the right solution to restore the applicant's violated right[12]. The Constitutional Court adopted the same stance in 2013[13].

Following these decisions, the Albanian legislator also acted swiftly by adopting the necessary legal amendments to the criminal[14] and civil[15] procedure laws, which now provide that judicial proceedings may be reopened as a result of violations found by an ECtHR judgment. Meanwhile, in 2016, the organic law of the Constitutional Court was amended to allow the reopening of constitutional proceedings if an international court has found that the fundamental rights and freedoms of an individual were infringed as a result of a decision by the Constitutional Court[16] itself.

[12] See Decision No. 20, dated 01.06.2011 of the Constitutional Court, which related to the enforcement of the ECtHR's judgment "Xheraj v. Albania," dated 14 December 1998.

[13] See Decision No. 45, dated 01.11.2013 of the Constitutional Court, which related to the enforcement of the ECtHR's decision "Shkalla v. Albania," dated 10 August 2011

[14] Law No. 35/2017, dated 30.3.2017 "On some additions and amendments to Law No. 7905, dated 21.3.1995 'Criminal Procedure Code of the Republic of Albania', as amended", which, inter alia, amended Article 450, paragraph 1, letter "d" of the Criminal Procedure Code by explicitly providing that this situation constitutes a ground for reviewing a final criminal decision.

[15] See Law No. 10 052, dated 29.12.2008 "On some additions and amendments to Law No. 8116, dated 29.03.1996 "Civil Procedure Code of the Republic of Albania", as amended," which, inter alia, amended Article 494, letter "ë" of the Civil Procedure Code, applicable for the review of final decisions in civil and administrative proceedings.

[16] See Article 71/c of Law No. 8577, dated 10.02.2000 "on the Organization and Functioning of the Constitutional Court of the Republic of Albania, as amended – supplemented by Law No. 99/2016, dated 06.10.2016.

The purpose of reopening proceedings is to restore the individual to the position he was in prior to the established violation; hence, such a request does not constitute a new constitutional appeal through which the individual can bring new or different grounds from those presented in the original appeal. After these amendments came into force, the Court has examined four such cases.[17]

It should be noted that enforcing the ECtHR's decision is not always simple in every case, and a recent matter serves as an illustration. A commercial company addressed the ECtHR[18], claiming that its right of access to the Constitutional Court of Albania had been infringed because its constitutional appeal was rejected as a result of the lack of a decision-making quorum, and that the proceedings before Albanian regular courts infringed the right to a fair trial. The ECtHR found a violation of Article 6 § 1 of the ECHR concerning the right of access to the Constitutional Court. According to the ECtHR, the finding of a violation and the possibility of reopening proceedings in themselves constituted sufficient just satisfaction for non-pecuniary damage, and the Albanian state had the obligation to compensate the applicant for costs and expenses. In the reasoning of its judgment, the ECtHR also addressed the applicant's other claims relating to the regular court proceedings, considering that for one claim the applicant had failed to exhaust the available remedies, therefore it should be dismissed, and for the other that it was manifestly ill-founded.[19]

On the basis of this judgment, in 2024 the applicant again addressed the Constitutional Court for the reopening of proceedings, due to the violation found by the

[17] These cases concerned the ECtHR judgments: "Caka v. Albania," dated 8 December 2009 (see Decision No. 18, dated 06.03.2017 of the Constitutional Court); "Shoqëria 'Supergrav Albania' sh.p.k. v. Albania," dated 9 May 2023 (see Decision No. 205, dated 09.10.2023, of the Panel of the Constitutional Court); "Çela v. Albania," dated 29 November 2022 (see Decision No. 67, dated 06.12.2023 of the Constitutional Court); "Prodhim Veshje nr. 2 v. Albania," dated 17 October 2023 (see Decision No. 67, dated 03.10.2024 of the Constitutional Court). Furthermore, the Constitutional Court examined two other cases for which it did not explicitly order reopening of proceedings, because one case involved the non-enforcement of a final judgment of the Supreme Court for which the ECtHR in "Molla v. Albania," dated 8 December 2016, found a violation of Article 6, paragraph 1, of the ECHR and of Article 1 of Protocol No. 1 thereto (see Decision No. 14, dated 11.03.2011 of the Constitutional Court); whereas in the other case, the ECtHR in "Nuraj v. Albania," dated 10 October 2023, found a violation of the right of access to the Supreme Court.

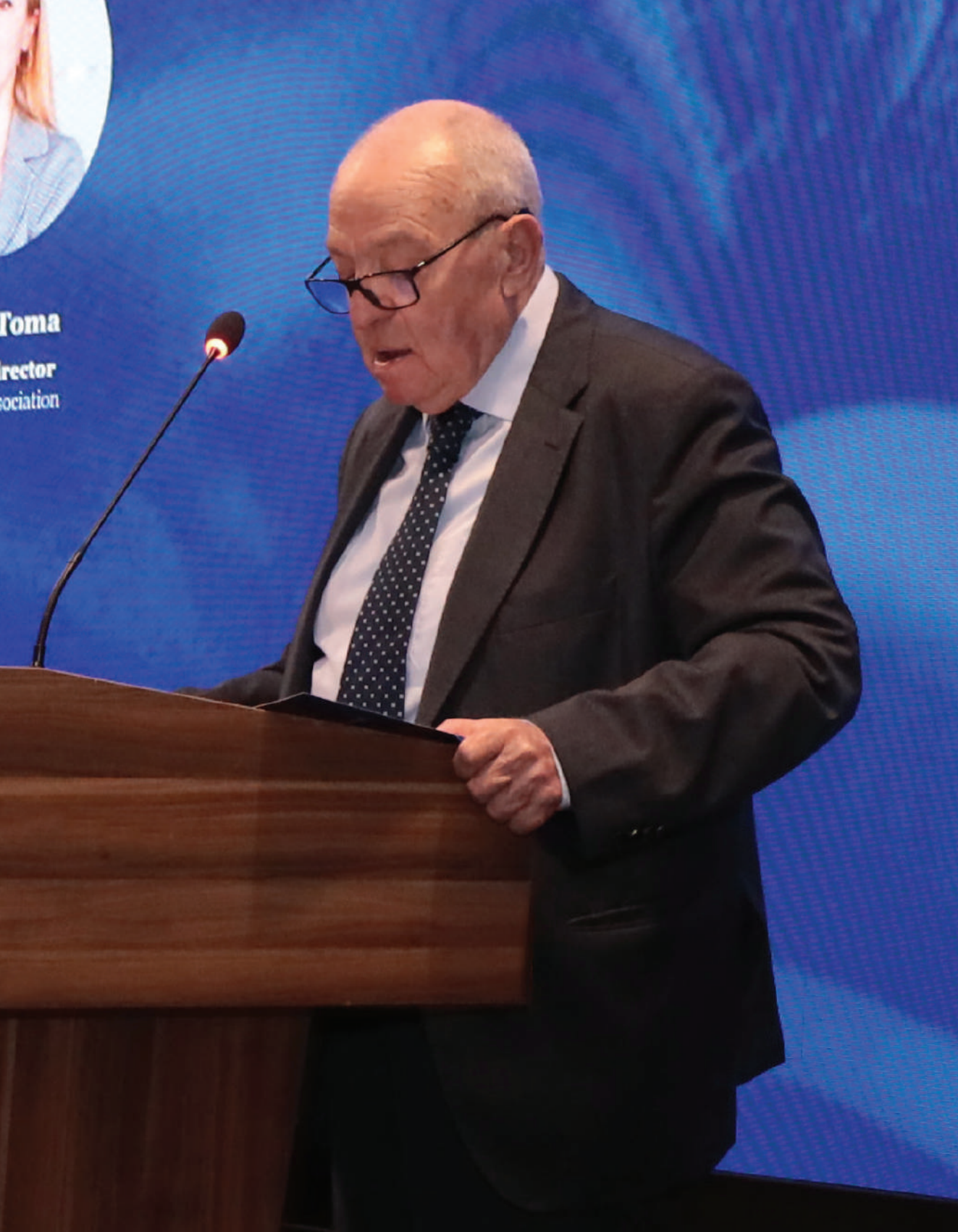
[18] ECtHR judgment "Prodhim Veshje Nr. 2 sh.a. v. Albania," dated 17 October 2023.

[19] Ibidem

ECtHR. In this instance, the Constitutional Court was faced with the dilemma of whether reopening the proceedings—which would guarantee the applicant's right of access to the court—essentially amounted to an illusory restoration of the violated right given that the ECtHR had already expressed its view and taken a position on the merits of the applicant's claims related to the proceedings before the ordinary courts, dismissing them

In conclusion, I wish to close my remarks by once again emphasizing the willingness expressed by the Constitutional Court of Albania, in every situation, to contribute to the implementation of the ECtHR's decision, whether it is judicial, legislative, or executive acts that are at stake. It interprets human rights and freedoms in conformity with the ECtHR's jurisprudence, reopens domestic judicial proceedings in enforcement of the ECtHR's decisions, or orders the legislature and the executive to take active measures to comply with the ECtHR's orders, and even abrogates laws that the ECtHR has found to violate the ECHR.

Thank you!


Toma
irector
sociation

The European Constitutional Order and the Case-Law of the Court of Justice of the EU: Interrelation, Cooperation and Dialogue as Distinctive Traits

Mr. Alexander Arabadjiev
Judge of the Court of Justice of the European Union

Dear Ms. Gresa Caka – Nimani, President of the Constitutional Court of Kosovo,
Annual Conference of the Balkan Constitutional Courts Forum,
Dear colleagues and friends,

As a current judge at the Court of Justice and a former judge of both the Bulgarian Supreme Court and the Bulgarian Constitutional Court, at a time when Bulgaria was not yet a member of the European Union, I believe I might have some experiences in common with most, if not all, the present judges, whether you are from a Member State of the Union or from a Balkan country aspiring to accede to the Union. I feel deeply honoured to have been invited to address you at this unique forum that is bringing us together today and congratulate the organisers for focussing this session on the relationship between the case law of the European Courts of Justice and of Human Rights, on the one hand, and national constitutional context, on the other hand. Let me start by pointing out how closely interrelated these two domains are.

Interrelation

The European Union constitutes a common legal order[1] and has, as such, its own constitutional system though one that does not entail statehood. The Court of Justice's interaction with the Member States' courts has always been an extremely important element in the successful development of this common legal order.
"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

These are the terms of Article 2 TEU. This provision clearly states that the Union is founded on these fundamental values and that they are common to the Member States.

In the so called conditionality judgments, the Court recalled that "respect for those values is a prerequisite for the accession to the European Union"[2] and that its "legal structure [...] is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded"[3]. "That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected"[4].

The Court expressly pointed out that the "values contained in Article 2 TEU have been identified and are shared by the Member States"[5] and that they "have their source in common values which are also recognised and applied by the Member States in their own legal systems"[6]. Indeed, these are values "common to their own

[1] See, to that effect, judgment of 16 February 2022, Hungary v Parliament and Council, C156/21, EU:C:2022:97, paragraph 127.

[2] Judgment of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, paragraph 124.

[3] Ibid., paragraph 125.

[4] Ibid., paragraph 125.

[5] Ibid., paragraph 127.

[6] Ibid., paragraph 237.

constitutional traditions, and which they have undertaken to respect at all times"[7]. They imply "commitments undertaken by the Member States vis-à-vis each other and with regard to the European Union"[8]. It is thus that they come to "define the very identity of the European Union as a common legal order"[9]. It follows that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are given concrete expression in principles containing legally binding obligations for the Member States"[10].

It is obvious from these statements that the constitutional orders of the Union and of the Member states are tightly intertwined: the common constitutional traditions of the Members states are the source of the Union's fundamental values and these reflect back from the Union level towards the Member States. They also play out directly between Member states, primarily through the principle of mutual trust, which derives its legitimacy directly from the facts that the Member States share these values and that, through their accession to the Union, every Member State has undertaken reciprocal commitments to respect them.

The importance of the respect of these values has been exposed most vividly in the case law of the Court on judicial independence and on the European Arrest Warrant.

Before I get into the details, it should be kept in mind – and this is, I think, broadly accepted – that the Court' case law has often had powerful and transformative effects; Judgments such as *Van Gen den Loos*[11] and *Costa/ENEL*[12], have widely been perceived as expressions of transformative constitutionalism, since the Court established, in these and other judgments, seminal principles of the Union's legal order, such as those of direct effect, of its primacy and of its autonomy. The 2018 judgment in the Association of Portuguese judges case, marks another such constitutional leap, as it is widely considered to have started a process of conferring operational effect to the values enshrined in Article 2 TEU. It has indeed added this article and these values to the forefront of the judicial agenda.

[7] Ibid., paragraph 234.

[8] Ibid., paragraph 231.

[9] Ibid., paragraph 127.

[10] Ibid., paragraph 232.

[11] Judgment of 5 February 1963, Van Gend & Loos, 26/62, EU:C:1963:1.

[12] Judgment of 15 July 1964, Costa, 6/64, EU : C:1964:66.

In this case, the Court pointed out that "Article 19 TEU, [...] gives concrete expression to the value of the rule of law stated in Article 2 TEU". As many have pointed out, article 19 TEU thus renders the value of the rule of law stated in Article 2 TEU operational. Article 19 TEU also "entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals"[13]. "Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed"[14]. "The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU"[15].

In the Minister for Justice and Equality judgement , the Court pointed out that "the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of [the Member] States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law"[16]. "Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union"[17].

However, the "high level of trust between Member States on which the European arrest warrant mechanism is based is [...] founded on the premise that the criminal courts of the other Member States [...] meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts."[18] Indeed, the "requirement of judicial independence forms part

[13] Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 32.

[14] Ibid., paragraph 33

[15] Ibid., paragraph 43.

[16] Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 36.

[17] Ibid., paragraph 37.

[18] Ibid., paragraph 58.

of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded."[19]

It follows that the "existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal [...] is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant"[20].

This judgment is but one example of the effect that a departure in one Member State from the common constitutional values and principles may have. Of course, a failure to guarantee the independence and impartiality of national courts is likely to affect almost every aspect of relations between that Member State and all other Member States as well as the Union, as mutual trust would risk breaking down more generally and notably affect civil and commercial matters, too. Even the preliminary reference procedure, "which is the keystone of the judicial system established by the Treaties"[21], may be at risk in such a scenario.

It is, therefore, a common task of all constitutional courts of the European Union, whether they are explicitly designated as such or whether they fulfil the tasks of a constitutional court without carrying the name, to safeguard those common values and principles within the realm of their competences. To that end, we may look towards each other for information and inspiration.

As is apparent from its case law, the Court of Justice certainly strives towards preserving those common values. In this context, some authors have called for a court-driven transformative constitutionalism based on the values of article 2 TEU, notably in order to safeguard democracy where certain Member States may show a tendency to backslide[22].

[19] Ibid., paragraph 48.

20 Ibid., paragraph 59.

[21] Judgment of 6 October 2021, Consorzio Italian Management and Catania Multiservizi, C-561/19, EU:C:2021:799, paragraph 27.

[22] A. v. Bogdandy and L. D. Spieker, Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions, in The Columbia Journal of European Law Vol. 29, No. 2, p. 65.

It remains to be seen whether the Court is willing to expand its case law to some of the values of article 2 TEU other than the rule of law, where less detailed case law exists. The case of Commission v Hungary[23], which is currently pending before the plenary assembly of the Court, may give an indication in that respect.

When trying to assess the scope and requirements of those common values, the Court will obviously rely on the expertise that its Members from all 27 Member States, bring to the fore, it will rely on the information and context furnished by the referring court, by the governments of Member States participating in the procedure, by the observations of the Institutions of the Union who will often play the role of amici curiae, and on the opinions of its learned advocate generals. In addition, the Court will also rely on its Research and Documentation unit which is composed of skilled jurists from all Member States and which both provides continuous information on important developments in national case law and prepares, on request of the Court, research notes on specific topics relevant in a particular case. The Court does indeed strive to dispose of a complete picture when assessing such fundamental issues of common interest and concern.

Just as the Court of Justice does not operate in a vacuum, European national constitutional courts operate in the wider Union context. They can and do look to each other and to the Court of Justice. An interesting study on the use of the case law of the Court by the Czech constitutional court[24] shows that citations have risen continuously since 2005. The highest number of citations occurred in the area of taxation, closely followed by case law from the area of freedom, security and justice, then on provisions governing the institutions. That is not surprising, as these areas often raise constitutional issues, as the case law on the European Arrest Warrant and the Taricco saga[25] exemplify. Interestingly, "Czech constitutional judges refer to the Court's precedents disproportionately more frequently in cases where they declare the act under review unconstitutional". As it happens, the most frequently cited case of the Court is CILFIT[26], which takes us to the cooperation between the Court and European constitutional courts.

[23] C-769/22, Commission v Hungary (Values of the Union).

[24] Marek Pivoda, Štěpán Paulík and Sebastian Křepela, National constitutional courts' use of the ECJ's precedents: The case study of Czechia, in: Maastricht Journal of European and Comparative Law, (2024).

[25] Judgments of 8 September 2015, Taricco and Others, C-105/14, EU:C:2015:555, and of 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936.

[26] Judgment of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335.

COOPERATION

In his concluding remarks at the conference co-organised three years ago by the Constitutional Court of Latvia and the Court of Justice on common constitutional traditions and national identities[27], president Lenaerts stated the following:

"It is important that all matters such as [...] the constitutional traditions common to the Member States and concerns for national identity [...] should be brought before the Court of Justice by the constitutional and supreme courts of the Member States, so that they can be discussed at the pan-European level. [...] In any such reference it should be explained why the case affects the essential core of the national identity of the Member State concerned, why the national tradition at issue should be accommodated in spite of the need for uniform application and enforcement of EU law. Currently, there are a number of constitutional courts in Central and Eastern Europe that are dealing with crucial matters relating to the relationship between national law and EU law. They must refer. A unilateral departure from equality of the Member States before EU law is not an option."

"Moreover, declining to refer such matters is futile, as this type of case will always find its way to the Court of Justice in any event. [...] Scarcely three weeks after the delivery of the judgment of the Romanian Constitutional Court on 8 June 2021, questioning the authority of the judgment of the Court of Justice in Asociaţia "Forumul Judecătorilor din România" and Others of 18 May 2021[28], a Court of Appeal judge, who had been called upon to apply that latter judgment, explained his dilemma in [...] an expedited reference for a preliminary ruling by saying 'I must and want to follow the judgment of the Court of Justice, but I risk disciplinary proceedings being opened against me if I do so.'[29] Is it really preferable to have an internal judicial conflict of that sort, within a single Member State, play out publicly before the Court of Justice? Would it not have been better if the Constitutional Court of Romania had itself made a reference? [...]"

[27] "EUnited in diversity: between common constitutional traditions and national identities". International conference, Riga, Latvia, 2-3 September 2021 : conference proceedings.

[28] Judgment of 18 May 2021, Asociaţia "Forumul Judecătorilor din România" and Others v Inspecţia Judiciară and Others, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393.

[29] Judgment of 22 February 2022, RS (Effect of the decisions of a constitutional court), C-430/21, EU:C:2022:99.

I have cited President Lenearts extensively because I could not have said it any better: direct active cooperation through references from constitutional courts and supreme courts is by far the best way to address constitutional concerns, not least because it gives the referring court the opportunity to set out these concerns in detail and to provide the Court of Justice with the relevant facts and the national law, i.e. the precise framework that the Court of Justice will need to provide a useful reply addressing these concerns. It may also lessen the need for lower Courts to make a choice between referring an issue either to the Court of Justice or to the national constitutional court.

In the Romanian RS case referred to by President Lenaerts, the Court of Justice recalled that it "may, under Article 4(2) TEU, be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State"[30], but that this "provision has neither the object nor the effect of authorising a constitutional court of a Member State [...] to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court"[31]. "If a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU"[32].

Common objections to preliminary references from constitutional courts are that EU law is not a yardstick for constitutional review. The fact that this is not necessarily true has been convincingly shown both by the rising number of references from constitutional courts and by an academic analysis which notably exposes the evolution of the case law of some constitutional courts – not least the Italian, French, Austrian and Spanish constitutional courts towards recognizing EU law as forming part of their purview of constitutional review[33].

[30] Ibid., paragraph 69.

[31] Ibid., paragraph 70.

[32] Ibid., paragraph 71.

[33] Davide Paris, Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review, in Maastricht Journal of European and Comparative Law 2017, Vol. 24(6) 792–821.

In its recent cases Consorzio[34] and Kubera[35], the Court of Justice recalled that, where there is no judicial remedy against the decisions of a national court, that court is in principle obliged to make a reference to the Court of Justice where a question concerning the interpretation of EU law is raised before it, unless one of three exceptions apply[36]. Indeed, a national court of last instance may refrain from referring such a question to the Court where, first, the question is irrelevant because the answer to that question, regardless of what it may be, can in no way affect the outcome of the case[37]. Second, the EU law provision in question has already been interpreted, which is to say that the question raised is materially identical to a question that has already been the subject of a preliminary ruling or where established case-law of the Court already resolves the point of law in question[38]. Third, a national court of last instance may take upon itself the responsibility for resolving such a question where there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of an EU law provision; however, such an assessment must be based on the Court of Justice's interpretation criteria and must be carried out with the objective pursued by the preliminary ruling procedure in mind, which is to secure uniform interpretation of EU law[39]. The Court has added that the statement of reasons of such a decision by a national court against whose decisions there is no judicial remedy under national law must show that one of these three exceptions is fulfilled[40]. These requirements for the statement of reasons are part and parcel indeed of what it takes to have a dialogue among the Courts.

[34] Judgment of 6 October 2021, Consorzio Italian Management and Catania Multiservizi, C-561/19, EU:C:2021:799.

[35] Judgment of 15 October 2024, KUBERA, C-144/23, EU:C:2024:881.

[36] Judgment of 6 October 2021, Consorzio Italian Management and Catania Multiservizi, C-561/19, EU:C:2021:799, paragraphs 32 et 33.

[37] Ibid., paragraph 34.

[38] Ibid., paragraph 36.

[39] Ibid., paragraphs 47 and 49.

[40] Judgment of 15 October 2024, KUBERA, C-144/23, EU:C:2024:881, paragraphs 62 à 64.

DIALOGUE

So far as the notion of dialogue is concerned, I prefer to lay aside any comment on the different types of dialogue and especially on the distinction between direct and indirect dialogue. I would rather limit myself to referring to a succinct formula according to which the legal dialogue between judges is indispensable for the Union.

Regarding the conduct of such a dialogue between judges, first, the Court of Justice seeks to provide clear rationales for its case law in its own statements of reasons. These do allow the referring courts, governments and all interested parties to assess these rationales and to come back to the Court, where deemed necessary, with requests to review or adjust its case law. A prime example of this process is the case law of the Court on data protection. While taking initially, in the Tele2 Sverige case[41], a strict stance on data protection, which precluded "national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication"[42], the Court later established, in response to concerns raised by the referring courts, various exceptions, in order to find a balance between the overarching objectives of personal data protection on the one hand and the fight against crime on the other hand. The French Quadrature du Net cases,[43] in particular, illustrate this point.

So dialogue between the European constitutional courts can and should happen through the respective case law of these Courts and through the preliminary reference procedure. It is infinitely preferable to the Romanian scenario President Lenaerts evoked and it is also preferable to approaches such as those of the Hungarian Constitutional Court in the Central European University case[44], which can

[41] Judgment of 21 December 2016, Tele2 Sverige and Watson and Others, C-203/15 and C-698/15, EU:C:2016:970.

[42] Ibid., operative part 1.

[43] Judgments of 6 October 2020, La Quadrature du Net and Others, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, and of 30 April 2024, La Quadrature du Net and Others (Personal data and action to combat counterfeiting), C-470/21, EU:C:2024:370.

[44] See judgment of 6 October 2020, Commission v Hungary (Higher education), C-66/18, EU:C:2020:792 and the cases II/1036/2017, filed 21 April 2017 with the Hungarian Constitutional Court, and IV/01810/2017, filed 19 September 2017 with the Hungarian Constitutional Court, as well as Constitutional Court Orders 3199/2018 and 3318/2021.

be called, at best, a passive cooperation, but which was also described, by some authors, as an attempt at "sabotaging the full effect of Union law"[45]. The same must, of course, be said of judgments such as those of July 14 and of October 7, 2021, of the Polish Constitutional Tribunal, which declared several provisions of the TEU, including article 19, paragraph 1, TEU, and of the TFEU incompatible with the Polish constitution[46]. The Commission has brought infringement proceeding against Poland with regard to these decisions, which are currently pending before the grand chamber[47].

In this regard, the Court has already recalled, in its judgment on the Independence and private life of judges, that "although the organisation of justice in the Member States, in particular, the establishment, composition, powers and functioning of the national courts [...] falls within the competence of those States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from Articles 2 and 19 TEU"[48].

As to the national identity of the Member States, the Court has pointed out that Article 4(2) TEU "must be read taking into account the provisions of the same rank, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU" and that it "cannot exempt Member States from the obligation to comply with the requirements arising from those provisions"[49]. The Court stressed that "there is no ground for maintaining that the requirements arising as conditions for both accession to and participation in the EU, from the respect for values and principles such as the rule of law, effective judicial protection and judicial independence [...], are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU."[50]

[45] See Nora Chronowski and Attila Vincze, The Hungarian Constitutional Court and the Central European University case: justice delayed is justice denied, in E.C.L. Review 2021, 17(4), 688-706.

[46] Cases P 7/20 and K 3/21.

[47] Case C-448/23, Commission v Poland.

[48] Judgment of 5 June 2023, Commission v Poland (Independence and private life of judges), C204/21, EU:C:2023:442, paragraph 63.

[49] Ibid., paragraph 72.

[50] Ibid..

Though it has sometimes been identified as a "homogeneity clause", Article 2 TEU should not be regarded – as some authors suggest – as a tool of constitutional harmonization. Neither this article, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State[51]. Besides, the Union values enshrined in Article 2 TEU are values common to the constitutional traditions of the Member States[52] and must thus be interpreted in line with the Member States' common constitutional traditions.

Second, dialogue also can and does happen through direct contacts. The Court of Justice does indeed conduct visits to national constitutional courts on a regular basis and, vice versa, hosts judges from these courts. Such meetings allow fruitful exchanges and foster a better understanding of the respective contexts in which the courts operate, thus fuelling cooperation that helps taking account of the interrelated nature of our work.

Finally, conferences such as this one, which allow the same actors to meet and exchange have a similar effect and cannot be underestimated. I know for a fact that such contacts have in many instances raised awareness among the members of the Court of Justice regarding the importance of certain cases, which allows to ensure an appropriate treatment of such cases.

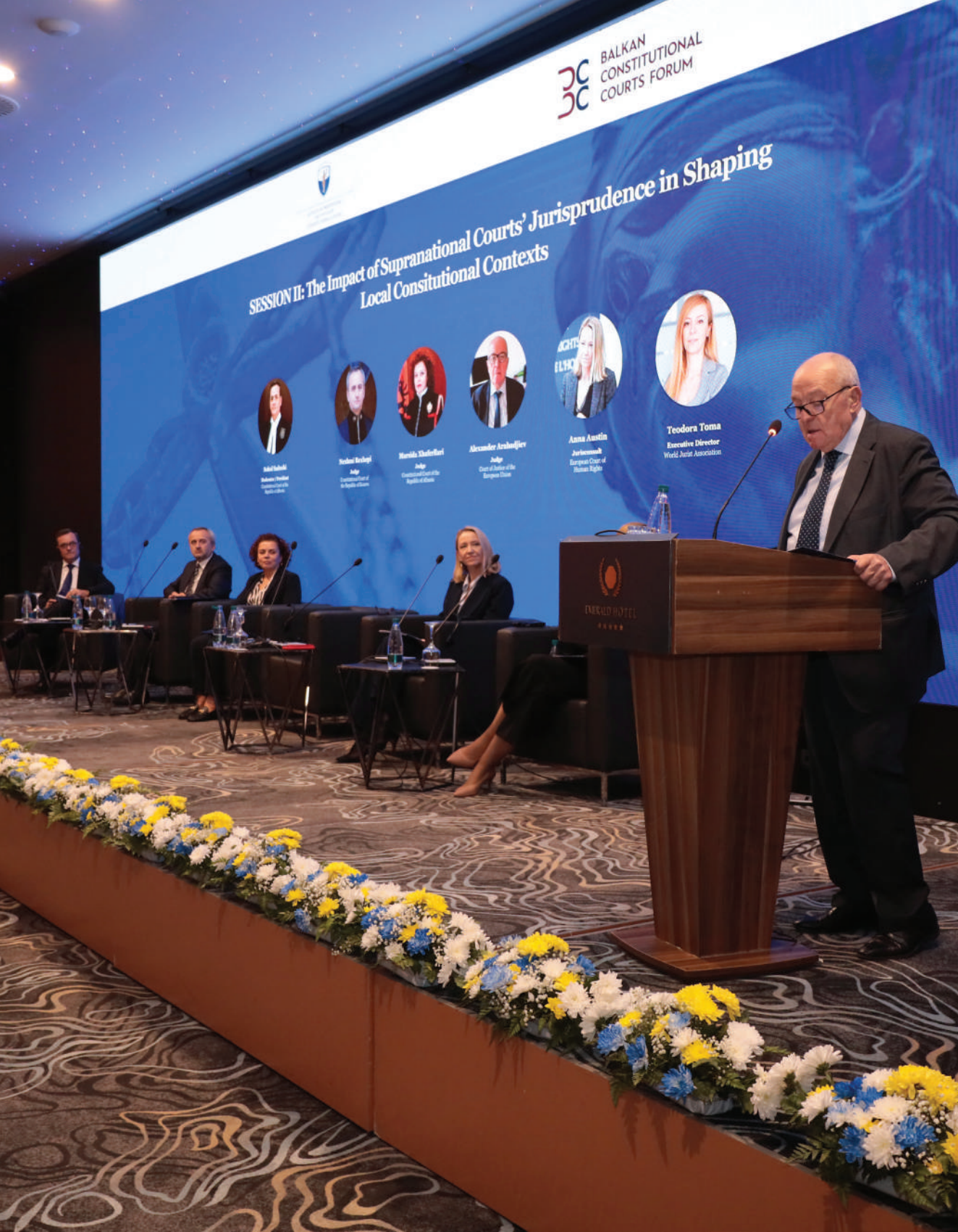
CONCLUSION

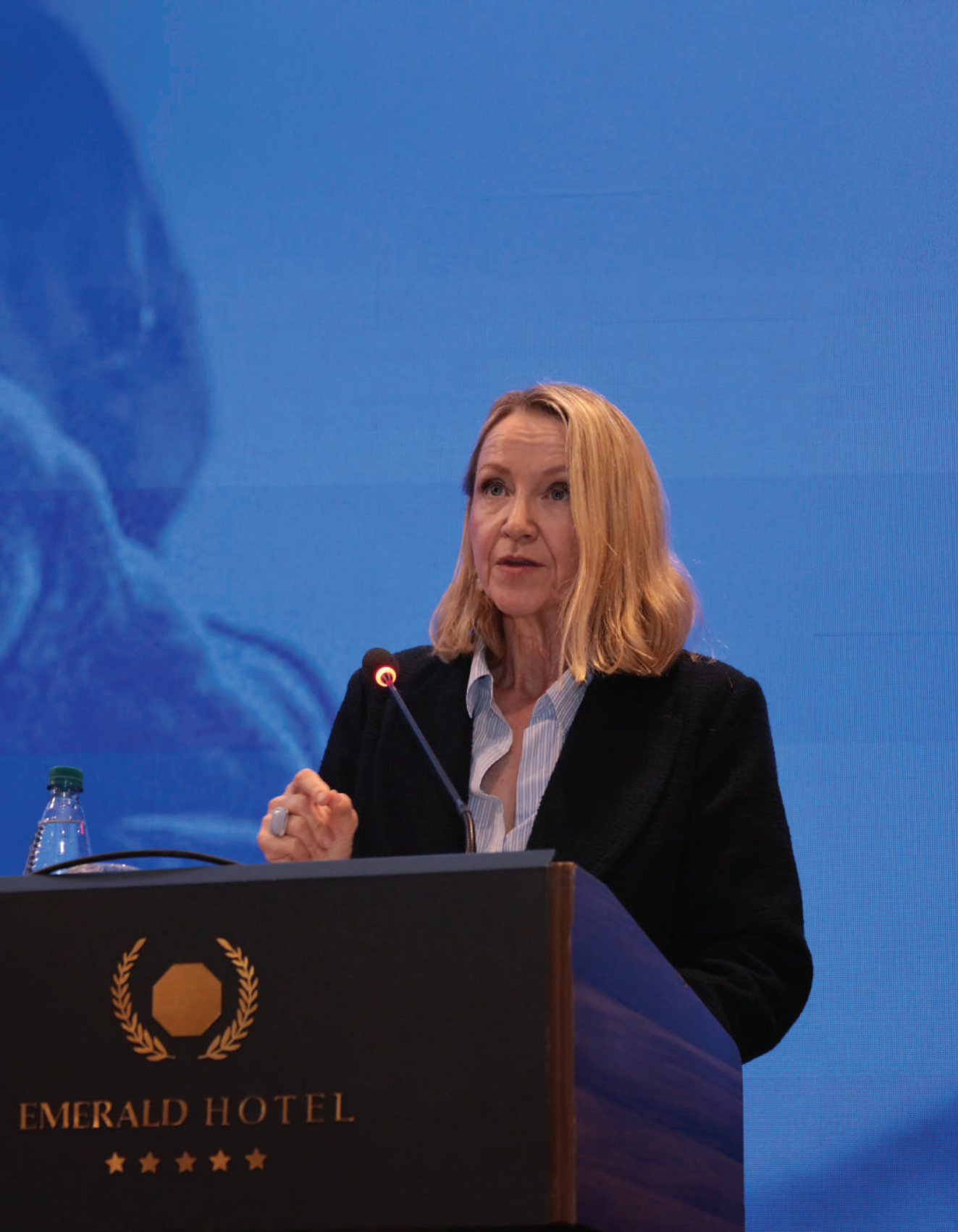
In conclusion, in this particular forum, with the presence of constitutional courts judges from countries both within the European Union and wishing to accede to this Union, I would like to recall that the Union is founded on the fundamental values of article 2 TEU, that these values are common to all Member States, that they are a prerequisite to acceding to the Union, that we must all strive to preserve them and that this objective is best achieved through cooperation and dialogue amongst ourselves.

I thank you for your attention!

[51] See, to that effect, ibid., para. 73.

[52] See, to that effect, judgment of 16 February 2022, Hungary v Parliament and Council, C156/21, EU:C:2022:97, paragraph 234.


BALKAN
CONSTITUTIONAL
COURTS FORUM
SESSION II: The Impact of Supranational Courts' Jurisprudence in Shaping
Local Consitutional Contexts
Teodora Toma
Executive Director
World Jurist Association


EMERALD HOTEL

Impact of the ECtHR on National Constitutional Contexts

Ms. Anna Austin
Jurisconsult of the European Court on Human Rights

Honourable President and judges of the Constitutional Court of Kosovo,

Honourable colleagues,

If certain European constitutions provide that ratified international treaties are directly applicable in the national legal order[1], few contain specific references to the European Convention on Human Rights. Kosovo is amongst their number: the Kosovo Constitution proclaims that the ECHR is directly applicable and "has priority over provisions of laws and other acts of public institutions". Thus, in Kosovo the Convention has a sub-constitutional and supra-legislative status *de jure*.

Even in those legal orders, where the Constitution does not refer thereto, the Convention and the Court's case-law have nevertheless permeated into the fabric of constitutional law and structures. Today we will consider some elements only, in the time available, of this percolation process. Any such reflection must be prefaced by setting the unique context in which the national and Strasbourg courts operate within the Convention system.

If the relationship of the European Court with national courts may previously have been perceived as a hierarchical one, the reality is entirely different: the impact of Convention law on national constitutional contexts is not a top-down exercise but rather a *collaborative* one. Understanding this relationship illuminates precisely how the Strasbourg Court and constitutional systems courts interact in the subsidiary Convention system[2].

1. Implementation through collaboration

What are the tools regulating this collaborative network?

In the first place, the procedural tools, the core ones being the well-known requirement on applicants to exhaust effective domestic remedies prior to coming to the Court and the corresponding obligation on States to provide such remedies[3]. The national courts, notably the constitutional courts, thereby have the opportunity to determine Convention compatibility and the Strasbourg Court has the benefit of their views. This is the core of the subsidiary system of protection[4] and, of course, an individual is *especially* required to test the protection afforded by the constitutional courts in developing Convention rights[5].

Subsidiarity has also found further procedural expression in recent years through a "process-based review": namely, the Strasbourg Court places emphasis, in certain areas of the case-law, on the quality of the national decision-making process whether by the courts in their judgments[6] or through the human rights review by legislative bodies prior to legislating[7]. The Grand Chamber, also in recent years, facilitates these national Convention analyses by providing analytical frameworks for implementation[8] through the articulation of tests, with relevant criteria and presumptions[9].

Secondly, the substantive manifestations of subsidiarity are equally critical. The most crucial is the acknowledgement that States enjoy a margin of appreciation in how they implement the Convention, depending on and tailored to, the circumstances of the case and the rights and freedoms at issue. In this sense, the margin of appreciation has a normative function allowing the Court to manage the delicate task of accommodating diversity, pluralism and flexibility within the Convention framework: the idea is not to impose a uniform Europe-wide interpretation, but rather to take into account, in so far as possible, local contexts, history, values and

needs (which should be expressed, for example, in constitutional court judgments, and to measure those elements against, notably, the prevailing European consensus[10].

Substantive subsidiarity also finds everyday expression in the Court's fourth-instance doctrine: the Strasbourg Court does not take the place of national courts, reassessing facts and interpreting national law, but rather ensures that those decisions are not flawed for arbitrariness or otherwise manifestly unreasonable[11]. Even if the Convention provision itself requires that the State act "in accordance with the law", it is considered to be firstly for the national authorities (notably the courts) to interpret and apply domestic law. The Court's role is therefore confined to ascertaining whether the effects of such an interpretation are compatible with the Convention[12].

Thirdly, while our subsidiary system is primarily concerned with the judicial conversations through the text and reasoning of the respective judgments[13], the Court also systematically sets out to dialogue with national Courts to assist with and, in some sense, curate their interpretation of the Convention within national legal orders. As well as events attended such as today or hosted by the Court, the *Superior Courts Network* (SCN) has become a favoured means of structured dialogue, mutual support, knowledge sharing and problem-solving with now over 110 member superior, including constitutional, courts from 45 States. The Court has invested heavily in its Knowledge Sharing platform: it provides up-to-date case-law analysis on all principal Convention subjects and it has been transformative of access to the extensive ECHR case-law and, of itself, it goes a long way to supporting the application of the Convention by the superior courts in fulfilment of our shared responsibility for the implementation of the Convention[14]. More formally, the Court provides interpretive assistance in pending cases to the decision-making of the highest courts through Protocol No. 16 to the Convention.

Accordingly, on the one hand, States must embed the Convention guarantees and create remedies by which those guarantees can be tested nationally and, on the other, the Court must accord that domestic assessment importance in its own deliberations. It is this interaction - between diligence at national level and a corresponding appreciation thereof at the level of the ECtHR - that makes up the heart of the subsidiarity principle and of the interaction between the Strasbourg and constitutional courts.

The subsidiary principle does not therefore lower the standard of human rights protection and it is not a question of deference by the supranational court. Rather, the message is that a thorough quality control of Convention compatibility has to take place at some point, either at national or supranational level. The principle of subsidiarity operates to calibrate the interrelated roles and responsibilities of the national superior (constitutional) and the supranational courts and, in turn, the very content of the substantive judgments of those courts.

2. Interaction with matters of constitutional importance

That being the broader operating context, how does the Court interact with matters of constitutional importance. Three situations are worth distinguishing.

1. A direct conflict with a constitutional norm

The first is relatively rare: it is indeed rare for the Court to find that a particular constitutional norm directly contradicts a provision of the Convention and, if it does, the execution of such judgments may require amending the Constitution, which is cumbersome and politically challenging and, in any event, can escape the will of the government.

There have been a few cases of direct conflict between the Convention and a national Constitution and execution has indeed proven difficult. Thus, in the case of *Anchugov and Gladkov v. Russia*, 2013, the Court found a violation of the Convention Right to free elections on account of a blanket prohibition on detainees voting. This prohibition was established directly in the Russian Constitution, which limited the legislature's margin of manoeuvre in this field. This judgment remains unexecuted and, following the cessation of Russia from membership of the Council of Europe in 2022, execution remains unlikely. In the well-known case of *Sejdić and Finci v. Bosnia and Herzegovina*, 2009 the Court considered complaints about provisions of the Constitution of Bosnia and Herzegovina[15] – an annex to the 1995 Dayton Peace Agreement and thus imposed in a negotiated peace settlement - to be discriminatory and to breach Article 14 (as regards the elections to the House of People) and Protocol no. 12 (as regards elections to the State Presidency). That that judgment remains unexecuted is well-known. The Grand Chamber is currently examining another case which touches upon related matters (*Kovačević v. Bosnia and Herzegovina*, 2023).

2. Secondly, a far more frequent scenario is where the Constitution itself defines a broad principle, not of itself in conflict with the Convention, and the Court finds a Convention breach because the national legislator/courts have failed to interpret the constitutional norm in a Convention compliant manner. The Strasbourg Court's judgment being directed therefore at sub-constitutional norms legislation and national case-law, the Court's judgment can be implemented without requiring a constitutional amendment.

Thus, for example, the Greek Constitution stipulates that "proselytism is prohibited": this provision neither defines the notion of "proselytism" nor establishes a criminal liability for it. The Court in *Kokkinakis v. Greece*, 1993, found the applicant's conviction for "proselytism" to be contrary to Article 9 of the Convention: only "improper proselytism" – including offering material or social advantages, using violence or brainwashing, abusing vulnerability, etc. – could be criminally punishable whereas non-intrusive methods of evangelisation, at issue in the case, were considered protected by Article 9 of the Convention. The constitutional provision was not, as such, at odds with the Convention but the national court's implementation of it was[16].

It belongs to the national constitutional court of course to decide whether the Constitution can accommodate the findings of the Strasbourg Court or whether a constitutional amendment is required. The 2022 an Advisory opinion, on the rule providing for the ineligibility to certain public offices following the impeachment, shows how an uncompromising position of a constitutional court could make a constitutional amendment inevitable.

Y and Others v. Bulgaria provides an interesting example of how diverging interpretations of constitutional provisions can be managed. The case concerned the failure by the authorities to protect the life of a woman murdered by her husband, despite her complaints about domestic violence over a nine-month period. The duty to take precautionary measures in that regard may be derived from Article 2[17] but also from the Istanbul Convention which Bulgaria did not ratify, because of Articles of the Istanbul Convention which used the terms "gender" and "gender identity" which Articles the Constitutional Court considered would have introduced the notions of "gender" and "gender identity" into the Bulgarian legal system which would have been contrary to the Constitution, which was expressly based on the idea that individuals could only be male or female.

Having found a violation of Article 2 (right to life), the Court turned to Article 14 and the allegations about institutional discrimination within the police and as regards the deceased woman. The Court did not enter into a discussion about the true meaning of the Istanbul Convention and expressly detached the question discussed by the Bulgarian Constitutional Court (the concept of the "gender") from the question under Article 14 (the existence of an "anti-female" bias in the police), finding that there had been no demonstrated anti-female bias, in general or as regards the deceased, in violation of Article 14 in conjunction with Article 2[18] The Strasbourg Court thereby avoided a direct conflict with the position of the Constitutional Court so that the Court's judgment could be implemented without a conflict with the Bulgarian Constitutional Court.

3. Structural problems

Thirdly, and finally, I would mention a very special category of case in which the Court's conclusions have concerned, not one isolated question, but a whole *segment* of the domestic constitutional order. Here I refer to the well-known series of cases, concerning the judiciary as a whole as a guarantor of the rule of law and the well-known judicial reforms in Poland which began in 2015: *Xero Flor w Polsce sp. z o.o. v. Poland*, 2021, *Reczkowicz v. Poland*, 2021, *Grzęda v. Poland* [GC], 2022, *Juszczyszyn v. Poland*, 2022, etc. Each of these cases analyses one or several aspects of these reforms[19] finishing with a pilot judgment Walesa v. Poland[20].

Behind each violation found by the Court, most often under Article 6 or 8 of the Convention, is complex reasoning revealing various – and closely interconnected – defects of the domestic reform measured against Convention principles of independence, impartiality, separation of powers and the rule of law. Those judgments cannot be implemented by amending one or two articles in the relevant legislation: only the cumulative effect of multiple legislative changes may be able to restore guarantees of judicial independence and these changes have been promised by the new Government. Whether or not constitutional changes would be required, the extent of the restructuring of the judicial framework required could arguably be said to be at "at a constitutional level".

Such contexts are unusual for the Court, concerned as it is with fine-tuning a system through isolated human rights issues rather than with the structure of the system itself. Nevertheless, I think it fair to say that the judgments of the Strasbourg Court, as well as of the CJEU, have provided key reference points for identifying deficiencies

and thereby the solutions. It remains now to be seen how the Court can contribute to the reform of the reform of the Polish judicial system.

Conclusion

In conclusion, let me return to my starting point. In interacting with, and impacting on constitutional structures, the Strasbourg Court is not an immutable and disengaged arbiter placed on the top of a judicial pyramid. In reality, the Court is one element in a multidimensional system of human rights protection, which includes many other powerful actors including the constitutional Courts.

Endnotes

[1] Any opinions expressed are the speaker's own, and do not bind the ECtHR

[2] Examples: the Constitution of Romania mentions the Universal Declaration on Human Rights and "other treaties" in Article 20.1 of the Constitution; the Constitution of Portugal provides for the incorporation of the international treaties in Art. 8.2 and mentions the Universal Declaration of Human Rights in Art. 16; and the Constitution of the Czech Republic provides in Art. 10 for the incorporation/primacy of international treaties.

[3] This notion was articulated in the case-law as early as the late 1960s (Case "relating to certain aspects of the laws on the use of languages in education in Belgium", 1968) and it is one which has considerably evolved over the years along with the Convention system. In fact, defining and optimising subsidiarity, in light of our joint responsibility for ensuring human rights protection in Europe, was an overarching theme of the decade long "Interlaken" Convention reform process, cumulating in the amendment of the Convention's preamble to reference this notion (with the entry into force of Protocol No. 15 in August 2021).

[4] Articles 13 and 35 of the Convention. The obligation to exhaust domestic remedies forms part of customary international law (Interhandel case (Switzerland v. United States of America)). It is also to be found in other international human-rights treaties: the International Covenant on Civil and Political Rights (Article 41 (1) (c)) and the Optional Protocol thereto (Articles 2 and 5 (2) (b)); the American Convention on Human Rights (Article 46); and the African Charter on Human and Peoples' Rights (Articles 50 and 56 (5)).

[5] The Grand Chamber judgments against the Czech Republic (*Fu Quan, s.r.o. v. the Czech Republic* [GC]; and *Grosam v. the Czech Republic* [GC]) indicate the importance the Court attaches thereto as it took the time to redefine and reinforce the obligations on an applicant to ensure that the applicant raises before the national courts not only the impugned facts, but the precise legal arguments which it is intended to later invoke before the ECtHR.

[+] The applicants were absolved from exhausting the constitutional remedy in relatively recent cases against Poland since the Strasbourg Court found that the constitutional court could not be considered independent or rule-of-law compliant following recent reforms of the judiciary in Poland (*inter alia*, *Advance Pharma sp. z o.o v. Poland*, § 319, 2022; and *Juszczyszyn v. Poland*, §§ 149-153, 2022. The Court referred to and relied upon, *inter alia*, judgments of the

CJEU in this regard including *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982; and *Commission v. Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596.

[7] If the national courts have analysed in a comprehensive and convincing manner the contested legal measure on the basis of the relevant human rights standards and case-law, providing relevant and sufficient reasons for their decisions, the ECtHR would need "strong reasons" to substitute its own different analysis for that of the national judges. See the emphasis on process and reasoning as regards for example Article 8 in *Von Hannover v. Germany (no. 2)* [GC] (privacy), as applied in *Ndidi v. the United Kingdom* (immigration).

[8] *Animal Defenders International v. the United Kingdom* [GC], § 116, and, more recently, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §§ 192-195; *Garib v. the Netherlands* [GC], § 138; and *Correia de Matos v. Portugal* [GC], §§ 115-117.

[9] In this regard see, for example, the general principles and methodology set out in: *Ibrahim v. the United Kingdom* (respect for an accused's right of access to a lawyer under Article 6 §§ 1 and 3 (c) and provision of a non-exhaustive list of factors to be taken into account as appropriate when assessing the impact of a restriction on access to a lawyer on the fairness of the proceedings); *Schatschaschwili v. Germany* [GC] and *Al-Khawaja and Tahery v. the United Kingdom* [GC] (fairness of proceedings under Article 6 following the admission to evidence of the statements of absent witnesses and the provision of a three step test for domestic courts); Üner v. the Netherlands [GC] (criteria to be considered when balancing public and private interests with a view to a decision on the expulsion of a family member); and *Halet v. Luxembourg* [GC] (protection of whistle-blowers under Article 10).

[10] These trends towards a process-based review have been described by President Spano as a manifestation of the Court's commitment to the age of subsidiarity, where the primary responsibility for protecting Convention rights lies with the national authorities, particularly the national superior courts, see R. Spano, "Universality or Diversity of Human Rights? Strasbourg in the age of subsidiarity", Human Rights Law Review (2014) 14 (3), p. 487-502.

[11] The existence of a consensus has long played a role in the evolution of Convention protection: either to justify (*Goodwin v. the United Kingdom*) or refuse (*Odièvre v. France* [GC]) such developments.

[12] *Kemmache v. France (no. 3)*.

[13] *Fu Quan v. the Czech Republic* [GC], § 120.

[14] The most frequently cited example of express or deliberate dialogue is probably *R v. Horncastle and others* and *Al-Khawaja and Tahery v. the United Kingdom* concerning the compatibility with Article 6 of the use of statements of a witness who was not called to give evidence. The former decision of the UK Supreme Court intervened after a 7 judge Chamber of the Strasbourg Court had found a violation of Article 6 of the Convention but before the Grand Chamber, to which *Al-Khawaja* had been referred, handed down its judgment. The Grand Chamber concluded that, contrary to the conclusion reached by the Chamber, there had been no violation of Article 6 § 1 of the Convention.

[15] Since this event ECHR-KS has been launched in Turkish, Romanian and Ukrainian.

[16] Which allowed only Bosniacs, Croats and Serbs ("constituent peoples") to stand for election to the tripartite State Presidency and the upper chamber of the State Parliament, the House of Peoples.

[17] The Court's task may be more complicated if the national constitutional court has already proposed a certain reading of a particular constitutional provision, and that reading runs against the Court's interpretation of the Convention. Thus, for example, in *Fedotova and Others v. Russia*, 2023, the Court concluded that Article 8 of the Convention imposes on member States an obligation to recognise stable samesex couples. This legal recognition should not necessarily be identical to marriage, but it should be "adequate" for ensuring effective protection of the private and family life of such couples. Earlier, in 2006, the Russian Constitutional Court had held that there was no obligation on the State to create conditions for recognising that same-sex unions flowed from the Constitution and, indeed, the 2022 amendments to the Russian Constitution referred to "marriage in the form of a union between a man and a woman", and to a "traditional family". While at first glance the position of the Constitutional Court and the ensuing constitutional amendments were at odds with the judgment of the Court, neither prevented the legislator from providing for some form of legal recognition of the same-sex couples (falling short of marriage), the existing constitutional framework arguably leaving some space for the implementation of the Court's judgment.

[17] *Osman v. the United Kingdom* [GC], *Öneryildiz v. Turkey* [GC]

[18] The applicants did not demonstrate a *prima facie* case of a general and discriminatory passivity on the part of the Bulgarian authorities with respect to domestic violence against women and there was no evidence of anti-female bias by the State officials dealing specifically with the deceased woman's case.

[19] Such as, irregularities in the elections of the Constitutional Court judges, dissolution of the National Council for the Judiciary, the new method of election of its members, the legitimacy of the chamber of the Supreme Court dealing with judicial discipline, arbitrary replacement of presidents of the courts, etc.

[20] This judgment concerned the Supreme Court Chamber of Extraordinary Review (CERPA) which had reversed a final judgment in favour of the applicant. The CERPA had already been found not to be an 'independent and impartial tribunal established by law' (*Reczkowicz v. Poland*, *Dolińska-Ficek and Ozimek v. Poland*, and *Advance Pharma sp. z o.o v. Poland*). The Court found a violation of Article 6 on the same grounds and also because there had been a breach of the principle of legal certainty.

The Role of NGOs in the Dissemination of the Decisions of the Supranational Courts. World Jurist Association and the World Law Congress

Ms. Teodora Toma
Executive Director at World Jurist Association

Good afternoon,
Thank you very much for the invitation to participate as a speaker at the Second Annual Conference of the Balkan Constitutional Courts, and a special thank you to President Gresa Caka-Nimani.

I am here on behalf of the World Jurist Association, as Executive Director of the organization, and specifically on behalf of the President of the WJA, Mr. Javier Cremades, who would very much like to have been able to participate as well.

It is a great opportunity to hear you all speak but I am just a lucky person to be here, to hear top jurists such as yourself. I think the conclusions of today's sessions are very valuable and important. Justice Breyer former Justice of the Supreme court of the USA, in one of his interventions accepting the WJA medal of honor spoke about the fact that the democracy in the USA was an experiment; to see if the principles on which the USA was build can endure: freedom, equality and rule of law. He then asked, "can we?" And responded "none of us knows. All we know is that what we can do is try".

And that is exactly the mission of the World Jurist Association, to create awareness around the idea of upholding peace through law. We are an organization with Consultive Status before the United Nations and we work to create awareness of these ideas. This reflection is important in highlighting the importance of constantly working in creating awareness on the rule of law and democracy and share that with the civil society, because the peace and rule of law we enjoy today can turn to conflict in any moment, and the rule of law is a continue effort, of which the civil society must be constantly made aware of.
On this note I will leave you with the video of the WJA history and mission.
So how do we fulfill our mission?

Part of this mission materialized through the organization of Forums, Seminars and Congresses. To organize these forums, we have the important task of uniting the international legal society, conformed by Courts, judges, attorneys, as well as other professionals and policy makers and the civil society and involve them in our international dialog and analysis of different legal matters. To put this all together we are lucky enough to rely on the collaboration of esteemed professionals such as for example Reiner Arnold or President Gresa Caka-Nimani, but really all of you can participate in constructing this international legal debate. Surely our most important Forum is the World Law Congress, which we hold every two years bringing together thousands of Jurists.

The last conference was held in New York, USA, in July 2023, with two venues. The first day was held at the headquarters of the American Bar Association. The second, at the United Nations with the presence of Ursula Voder Leyen, The King of Spain, Justin Trudeau, and Guillermo Lasso (at that time president of Ecuador) among others.

Two years earlier, in December 2021, we held the previous edition of the World Law Congress in Barranquilla, Colombia, and two years before that, in 2019, the World Law Congress was held in Madrid, Spain. There were other relevant participations from Judges from Supranational Bodies and International courts such as:

- European Court of Human Rights;
- the European Court of Justice;
- the Inter-American Court of Human Rights;
- the International Criminal Court;
- the Economic Community of West African States (ECOWAS) The Community Court of Justice.

Our next World Law Congress will be held in the Dominican Republic, where we will award the World Peace and Liberty award to Justice Sotomayor.

To give you an idea of how Supranational Court Judges participated in the WLC I will give you some examples of interventions of the last two Congresses held in New York and Barranquilla. From Supranational Court Bodies, for instance, In NY, in the panel on the PROTECTION OF THE RULE OF LAW IN THE EUROPEAN UNION, some of the speakers were:

- Lucia Serena Rossi, from Italy;
- Sinisa Rodin, from Croatia; and
- Eugene Regan from Ireland; all of them Judges of the Court of Justice of the European Union.

Another example is the panel: JUDGES OF THE WORLD: SOLVING PROBLEMS INHERENT TO DIGITAL FREEDOM OF SPEECH. In this case some of the speakers were:

- Eduardo Ferrer Mac-Gregor, from Mexico, former President of the Interamerican Court of Human Rights
- Ricardo Pérez Manrique, from Uruguay, President of the Inter-American Court of Human Rights;
- Egils Levits, from Latvia, 10th President of Latvia and Judge of the European Court of Justice between 2004 and 2019, or
- Edward Asante, from Ghana, President of the Court of Justice of the Economic Community of West African States (ECOWAS)

From the Barranquilla, WLC 2021, I would like to highlight the panel entitled EQUALITY AND THE RULE OF LAW: FUNDAMENTAL PILLARS OF INTERNATIONAL COURTS, where the speakers were:

- Eduardo Ferrer Mac-Gregor, President of the Inter-American Court of Human Rights between 2018 and 2019) participated as Moderator and
- Roberto Spano, from Iceland, President of the European Court of Human Rights;
- Elisabeth Odio Benito, from Costa Rica, President of the Inter-American Court of Human Rights;
- Imani Daud Aboud, from Tanzania, President of the African Court on Human and Peoples' Rights;

- Rosario Silva Lapuerta, from Spain, Vice-President of the European Court of Justice, and Piotr J. Hofmański from Poland, President of the International Criminal Court.

Again, thank you for your attention and I hope to see you all in the Dominican Republic.

CLOSING REMARKS OF THE BALKAN CONSTITUTIONAL COURTS FORUM

Ms. Gresa Caka – Nimani

President of the Constitutional Court of the Republic of Kosovo

Esteemed Guests,
Dear Friends,

I begin by emphasizing that today has been a highly fruitful and inspiring day. Together, we have explored the landscapes of our constitutional justice systems, examining their trends, challenges, and achievements. We have opened our horizons to new possibilities for cooperation and identified areas where we must stand united to protect our shared fundamental values. Today's discussions have underscored the critical role of the institutions we represent in fostering the prosperity of our countries and our region, highlighting the importance of strengthening our collaboration. The Balkan Forum of Constitutional Courts, which we were truly honored to host this year, serves precisely this purpose. Beyond the invaluable discussions at today's conference, I look forward to tomorrow's conversations with the Presidents of the member courts on how we can further strengthen, expand, and advance this Forum.

While acknowledging that it has been a long but successful day, I will not summarize today's discussions and the corresponding conclusions, throughout these closing remarks, as this has already been brilliantly done by our moderators—Judge Remzije Istrefi Peci of the Kosovo Constitutional Court and President Sokol Sadushi of the Albanian High Court. I express my deep appreciation for their excellent contribution. However, I would like to take a moment to share a few additional words of gratitude.

First, I extend my heartfelt thanks to all participating members of the Balkan Forum. Your presence, active participation, and valuable contributions have honored us. You have consistently supported our Constitutional Court in bilateral and multilateral settings, including in forums where our voice is yet to be fully heard. Thank you!

I would like to specifically acknowledge President Panova, who initiated the establishment of this Forum. Her dedication and tireless efforts in founding it last year, deserve our gratitude and admiration. I also extend my thanks to President Zaçaj for her leadership and unwavering support for our Constitutional Court in international forums of constitutional justice. My gratitude goes to President Konstantinovski as well, whom I congratulate once again on his presidency of the Constitutional Court of North Macedonia. We wish you a successful journey! Similarly, I thank Vice-President Arlović for his continuous support and partnership, as well as the ongoing support of the Constitutional Court of Croatia. Vice-President Galić, thank you for your Court's steadfast support, despite the complexities involved. We deeply appreciate it. President Sadushi, thank you for being a partner and a friend. And finally, but no less importantly, President Özkaya of the Constitutional Court of Turkey—a court that has been a strong supporter of our country and our Constitutional Court, consistently raising its voice in our favor. President Özkaya, please accept our gratitude for your enduring friendship and partnership.

I also express particular gratitude to Judge Arabadjiev of the Court of Justice of the European Union. Although Kosovo is not yet a member of the European Union, we have actively embraced the values derived from your Court's case law. Judge Arabadjiev, we thank your Court for its openness and constructive cooperation in sharing these values with us.

Vice-President Kuijer, thank you! The Constitutional Court of the Netherlands is a strong supporter of our Constitutional Court, and the Venice Commission is a vital partner for our country as we work hard to consolidate our democracy and constitutional justice system. I also thank Ms. Toma for representing the World Law Foundation and for sharing inspiring videos with us. Your logo—"Peace Through Law"—is a powerful reminder of the importance of partnership among the courts we represent for fostering peace and stability in our region.

I must also acknowledge the representative of the Constitutional Court of Austria Mr. Boeckle. Your Court has supported us throughout our journey, and we are deep-

ly grateful. Professor Rainer, thank you for your insightful remarks today and your continued support for the Republic of Kosovo and our Constitutional Court over the years. You are a cherished friend and an inspiration through your work in constitutional law and justice worldwide. We are also honored by the presence of Professors Jackiewicz and Rytel-Warzocha — thank you for joining us.

Finally, I turn to Ms. Austin, representing the European Court of Human Rights, whose jurisprudence serves as a guiding and binding reference for our Constitutional Court. The values of your Court are reflected in the principles we uphold daily. Despite the fact that Kosovo is yet to become a member of the Council of Europe, the Presidents of the European Court of Human Rights have been remarkably supportive, fostering tailored partnerships and opening doors for visits and mentoring programs. These efforts and cooperation, have enabled us to meaningfully integrate the European Court's jurisprudence into our decision-making. Ms. Austin has tirelessly and generously shared her wealth of experience and expertise with us. Anna, you are a dear friend of our Court. You will always have our heartfelt appreciation, gratitude, and affection.

Although I am aware that I have used the word "finally" several times so far - please bear with me for a few final notes of appreciation. To our distinguished guests who have been with us all day—Chief State Prosecutor, Supreme Court President, former Vice-President of our Court, Bar Association President, the representative of the European Union Office in Kosovo - Jarmo, judges, prosecutors, lawyers, and civil society activists—thank you for your participation.

At the end and most importantly: Thank you to the Council of Europe and its dedicated staff - particularly Hana and Ljubisa - whose commitment to supporting our Constitutional Court is indistinguishable from that of our own team. You have our deepest gratitude. And thank you to my remarkable team at the Constitutional Court of the Republic of Kosovo. Your professionalism, tireless dedication, and commitment to excellence are truly humbling and inspiring. As I will soon complete my mandate at the Constitutional Court - I express confidence that you will continue to make future Presidents of this Court as proud as you have always made me. Thank you!

Now, let us share a moment of joy as we take a family photo. Afterward, we will give you some time to rest before we gather to enjoy our dinner.

Thank you very much!

Delegations and International Guests

Albania, Constitutional Court
Ms. Holta Zaçaj, President
Ms. Marsida Xhaferllari, Judge
Ms. Vilma Premti, Chief of Cabinet

Albania, Supreme Court
Mr. Sokol Sadushi, President
Mr. Ilir Panda, Vice President

Bosnia and Herzegovina, Constitutional Court
Ms. Valerija Galić, Vice President
Ms. Erda Začiragić, Head of the Office of the President

Bulgaria, Constitutional Court
Ms. Pavlina Panova, President
Mr. Philip Dimitrov, Judge
Mr. Valentin Georgiev, Secretary General
Ms. Desislava Kemalova, Senior Legal Expert

Croatia, Constitutional Court
Mr. Mato Arlović, Vice President

North Macedonia, Constitutional Court
Mr. Darko Kostadinovski, President
Mr. Osman Kadriu, Judge
Ms. Tatjana Vasikj-Bozadzieva, Judge

Türkiye, Constitutional Court
Mr. Kadir Özkaya, President
Mr. Muhterem İnce, Judge
Mr. Volkan Has, Chief Rapporteur-Judge

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

European Court of Human Rights
Ms. Anna Austin, Juristconsult
Ms. Stephanie Jung, Project Coordinator CoE

Court of Justice of the European Union
Mr. Alexander Arabadjiev, Judge

Venice Commission

Mr. Martin Kuijer, Vice - President

Mr. Ralph Boeckle, Director for International Relations/Liaison Officer to the Venice Commission/ Constitutional Court of Austria

World Law Foundation & World Jurist Association

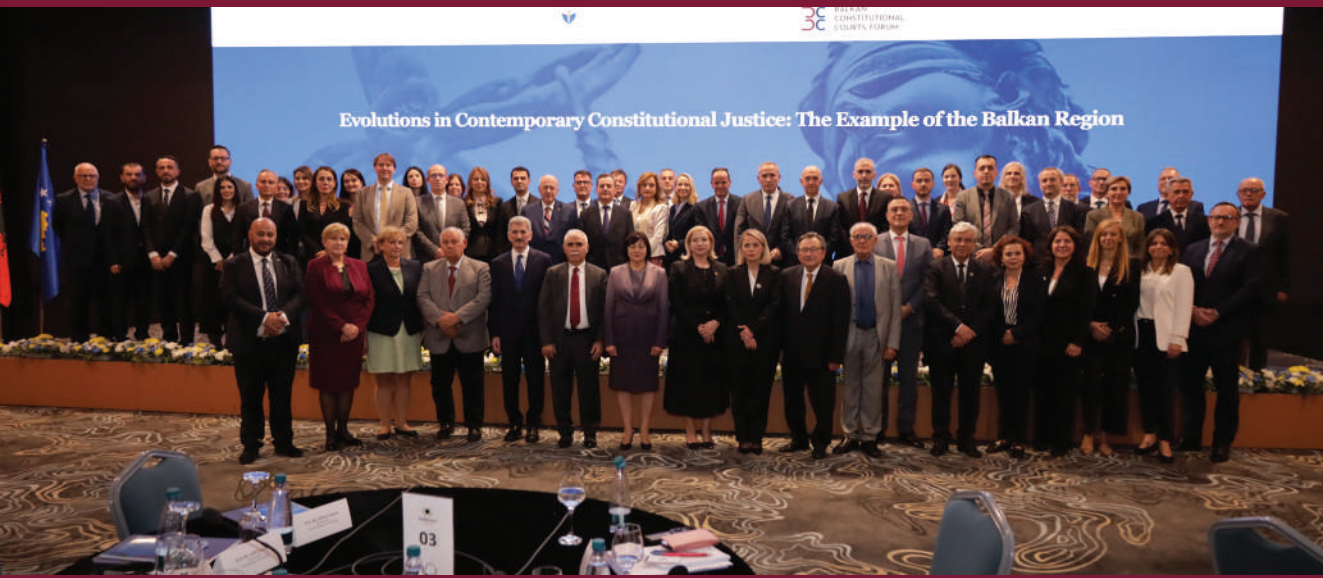
Ms. Teodora Toma, Executive Director

Other International Guests

Mr. Rainer Arnold, Professor at University of Regensburg

Ms. Anna Rytel-Warzocha, Prof. UG, Associate Professor

Mr. Andrzej Jackiewicz, Professor at University of Bialystok


Evolutions in Contemporary Constitutional Justice: The Example of the Balkan Region
03