14

VITI I KATËRMBËDHJETË
GJYQËSOR

FOURTEENTH JUDICIAL YEAR
ČETRNAESTA PRAVOSUDNA GODINA
QUATORZIÈME ANNÉE JUDICIAIRE

XIV JUDICIAL YEAR OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Conference proceedings of the Solemn Ceremony and International Conference

REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Tekstet e publikuara në këtë botim janë punime autoriale të autorëve përkatës, të prezantuara publikisht në Ceremoninë Solemne të Vitit të 14-të Gjyqësor të Gjykatës Kushtetuese, të mbajtur më 23 tetor 2023 në Prishtinë dhe me rastin e Konferencës Ndërkombëtare "Kontributi i Gjykatave Kushtetuese në mbrojtjen dhe forcimin e vlerave themelore të demokracisë, sundimit të ligjit dhe të drejtave dhe lirive themelore të njeriut", të organizuar më 24 tetor 2023 në Prishtinë.

Punimet janë publikuar me lejen e autorëve përkatës dhe qëndrimet e paraqitura në to nuk reflektojnë qëndrimet e Gjykatës Kushtetuese të Republikës së Kosovës

Tekstovi objavljeni u ovoj publikaciji su autorska dela relevantnih autora, javno predstavljena na Svečanoj ceremoniji 14. sudske godine Ustavnog suda, održanoj 23. oktobra 2023. godine u Prištini i povodom Međunarodne konferencije „Doprinos ustavnih sudova u zaštiti i jačanju osnovnih vrednosti demokratije, vladavine prava i osnovnih ljudskih prava i sloboda", organizovane 24. oktobra 2023. godine u Prištini.

Radovi su objavljeni uz dozvolu relevantnih autora i stavovi predstavljeni u njima ne odražavaju stavove Ustavnog suda Republike Kosovo.

The texts published in this publication are authorial works of the respective authors, publicly presented at the Solemn Ceremony of the 14th Judicial Year of the Constitutional Court, held on 23 October 2023 in Prishtina and on the occasion of the International Conference "Contribution of Constitutional Courts in the protection and strengthening of the fundamental values of democracy, the rule of law and fundamental human rights and freedoms", organized on 24 October 2023 in Prishtina.

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Les textes publiés dans cette publication sont les œuvres des auteurs respectifs, présentées publiquement lors de la cérémonie solennelle de la 14e année judiciaire de la Cour Constitutionnelle, qui s'est tenue le 23 octobre 2023 à Prishtina et à l'occasion de la Conférence internationale "Contribution des Tribunaux Constitutionnels dans la protection et le renforcement des valeurs fondamentales de la démocratie, de l'État de droit et des droits et libertés fondamentaux de l'homme", organisé le 24 octobre 2023 à Prishtina.

Les ouvrages sont publiés avec l'autorisation des auteurs respectifs et les positions qui y sont présentées ne reflètent pas les positions de la Cour Constitutionnelle de la République du Kosovo.

TABLE OF CONTENTS

REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

VITI I KATËRMBËDHJETË GJYQËSOR
FOURTEENTH JUDICIAL YEAR
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VITI I KATËRMBËDHJETË GJYQËSOR I GJYKATËS KUSHTETUESE TË REPUBLIKËS SË KOSOVËS

CEREMONIA SOLEMNE

Prishtinë, 23 tetor 2023

14. SUDSKA GODINA USTAVNOG SUDA REPUBLIKE KOSOVO

SVEČANO OTVARANJE

Priština, 23. Oktobra 2023. godine

FOURTEENTH JUDICIAL YEAR OF THE CONSTITUTIONAL CORUT OF THE REPUBLIC OF KOSOVO

SOLEMN CEREMONY

Prishtina, 23 October 2023

14EME ANNEE JUDICIAIRE DE LA COUR CONSTITUTIONNELLE DE LA REPUBLIQUE DU KOSOVO

CÉRÉMONIE D'OUVERTURE SOLENNELLE

Prishtina, 23 octobre 2023

CEREMONIA SOLEMNE E HAPJES

Salla "Beethoven", Hoteli "Emerald"

23 tetor 2023

AGJENDA

17:15 - 17:20	Fjala hyrëse e Ceremonisë Solemne të Vitit të 14-të Gjyqësor të Gjykatës Kushtetuese të Republikës së Kosovës
17:20 - 17:40	Fjala e znj. Gresa Caka-Nimani, Kryetare e Gjykatës Kushtetuese të Republikës së Kosovës
17:40 - 17:45	Fjalë rasti e SH.S. znj. Vjosa Osmani-Sadriu, Presidente e Republikës së Kosovës (video-adresim)
17:45 - 18:00	Fjala e z. John R. Tunheim, Gjyqtar Federal i Shteteve të Bashkuara dhe Këshilltari Kryesor i Shteteve të Bashkuara në mbështetje të procesit të krijimit të Kushtetutës së Republikës së Kosovës
18:00 - 18:25	Fjala kryesore e z. Laurent Fabius, Kryetar i Këshillit Kushtetues të Republikës së Francës
18:25 - 18:35	Shfaqja e video-dokumentarit për 14-vjetorin e Gjykatës Kushtetuese
18:35 - 18:45	Fjala përmbyllëse

SVEČANO OTVARANJE

Sala "Beethoven", hotel "Emerald"

23. oktobra 2023. godine

DNEVNI RED

17:15 - 17:20	Uvodni govor Svečane ceremonije 14. sudske godine Ustavnog suda Republike Kosovo
17:20 - 17:40	Obraćanje gđe Grese Caka-Nimani, predsednice Ustavnog suda Republike Kosovo
17:40 - 17:45	Pogodan govor NJ.E. gđe. Vjose Osmani-Sadriu, predsednica Republike Kosovo (video obraćanje)
17:45 - 18:00	Obraćanje g. Johna R. Tunheima, saveznog sudije Sjedinjenih Država i glavnog savetnika Sjedinjenih Država, koji je podržavao proces donošenja Ustava Republike Kosovo
18:00 - 18:25	Uvodno obraćanje g. Laurenta Fabiusa, predsednik Ustavnog saveta Republike Francuske
18:25 - 18:35	Projekcija video-dokumentarnog filma povodom 14. godišnjice Ustavnog suda
18:35 - 18:45	Završna reč

SOLEMN OPENING CEREMONY

"Beethoven" Hall, Hotel "Emerald"

23 October 2023

AGENDA

17:15 - 17:20	Opening remarks of the Solemn Ceremony of the 14th Judicial Year of the Constitutional Court of Republic of Kosovo
17:20 - 17:40	Address by Ms. Gresa Caka-Nimani, President of the Constitutional Court of the Republic of Kosovo
17:40 - 17:45	Video-address by H.E. Ms. Vjosa Osmani-Sadriu, President of the Republic of Kosovo
17:45 - 18:00	Address by Mr. John R. Tunheim, United States Federal Judge and the Lead United States Advisor supporting the constitution-making process of the Constitution of the Republic of Kosovo
18:00 - 18:25	Keynote address by Mr. Laurent Fabius, President of the Constitutional Council of the Republic of France
18:25 - 18:35	Screening of video-documentary on the 14th Anniversary of the Constitutional Court
18:35 - 18:45	Closing remarks

CÉRÉMONIE D'OUVERTURE SOLENNELLE

Salle "Beethoven", Hôtel "Emerald"

Prishtina, 23 octobre 2023

ORDRE DU JOUR

17:15 - 17:20	Discours d'ouverture de la Cérémonie Solennelle de la 14e Année Judiciaire de la Cour Constitutionnelle de la République du Kosovo
17:20 - 17:40	Allocution de Mme. Gresa Caka-Nimani, Présidente de la Cour Constitutionnelle de la République du Kosovo
17:40 - 17:45	Allocution de Mme. Vjosa Osmani, Présidente de la République du Kosovo (adresse vidéo)
17:45 - 18:00	Allocution de M. John R. Tunheim, Juge fédéral des États-Unis et conseiller principal des États-Unis ayant soutenu le processus d'élaboration de la Constitution de la République du Kosovo
18:00 - 18:25	Discours d'ouverture de M. Laurent Fabius, Président du Conseil Constitutionnel de la République française
18:25 - 18:35	Projection du documentaire sur le 14ème anniversaire de la Cour Constitutionnelle
18:35 - 18:45	Remarques finales

REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Fjala e Kryetares së Gjykatës Kushtetuese të Republikës së Kosovës,
znj. Gresa Caka-Nimani

Obraćanje predsednice Ustavnog suda Republike Kosovo,
gde Grese Caka-Nimani

Address by the President of the Constitutional Court of the Republic of Kosovo,
Ms. Gresa Caka-Nimani

Allocution de Mme. Gresa Caka-Nimani,
Présidente de la Cour Constitutionnelle de la République du Kosovo

Fjala e Kryetares së Gjykatës Kushtetuese të Republikës së Kosovës, znj. Gresa Caka-Nimani

Të nderuar pjesëmarrës të ceremonisë së shënimit të përvjetorit të katërmbëdhjetë të themelimit të Gjykatës Kushtetuese të Republikës së Kosovës;

Të nderuar deputetë, ministra, udhëheqës të pushtetit gjyqësor e të institucioneve të pavarura;

Të nderuar Presidentë Sejdiu e Jahjaga;

Të nderuar Ambasadorë e përfaqësues të institucioneve ndërkombëtare;

E nderuar ish-Kryetare e Gjykatës, Zonja Rama-Hajrizi e ish-gjyqtarë të Gjykatës Kushtetuese;

Të nderuar kryetarë komunash, përfaqësues të institucioneve, të shoqërisë civile dhe medies;

I nderuar z. Fabius, Kryetar i Këshillit Kushtetues të Francës;

Të nderuar Kryetarë të Gjykatave Kushtetuese e Supreme të Belgjikës - z. Nihoul dhe z. Lavrysen; të Estonisë - z. Kõve; të Holandës - zonja De Groot; të Letonisë - z. Laviņš; të Shqipërisë - zonja Zaçaj e z. Sadushi; dhe të Turqisë - z. Zühtü Arslan;

Të nderuar gjyqtarë të Gjykatave Kushtetuese e Supreme të Bosnje e Hercegovinës, Austrisë, Bullgarisë, Irlandës, Kroacisë, Lituanisë, Maqedonisë së Veriut, Portugalisë, Shqipërisë dhe Shteteve të Bashkuara të Amerikës – gjyqtar Tunheim;

Të nderuar përfaqësues të Gjykatës Evropiane për të Drejtat e Njeriut dhe të Komisionit të Venecias;

Të nderuar pjesëmarrës/Zonja dhe Zotërinj,

Ju lutem më lejoni që fillimisht të shprehë kënaqësinë e mirënjohjen e thellë për praninë tuaj. Prania juaj në shënimin e këtij përvjetori të Gjykatës Kushtetuese, na nderon. Pjesëmarrja e delegacioneve nga mbarë Bota reflekton respektin për Gjykatën tonë dhe solidaritetin e përkushtimin e palëkundur të Gjykatave për të bashkëpunuar në mbrojtje të vlerave të përbashkëta.

Sot, simbolikisht, shënojmë 14-të vjetorin e Gjykatës Kushtetuese, të themeluar përmes një Kushtetute, e cila ka kurorëzuar sakrificën e gjeneratave të tëra për liri e pavarësi, por edhe idealin e palëkundur të një populli për një shtet të së drejtës të bazuar në vlerat që reflekton tradita e përbashkët e shteteve demokratike.
Kjo Gjykatë, simbol i një rendi të pavarur kushtetues, është mveshur me detyrën e interpretimit dhe të mbrojtjes së kësaj Kushtetute. Themelimi i njëkohshëm i Republikës dhe Gjykatës së saj Kushtetuese, ka përcaktuar rolin e kësaj të fundit, që shkon përtej ushtrimit klasik të juridiksionit kushtetues, duke ngërthyer pashmangshëm edhe atë të formësimit dhe konsolidimit të identitetit shtetëror e ndërkombëtarë të Kosovës.

Katërmbëdhjetë vite më parë, gjenerata e parë e gjyqtarëve të Gjykatës Kushtetuese, mori përgjegjësinë për të interpretuar një Kushtetutë të posamiratuar të një Republike të posathemeluar.

Konteksti dinamik i shtetndërtimit, i ka mundësuar kësaj Gjykate që të ketë një rol thelbësor në përcaktimin e dinamikave të zhvillimit demokratik të Kosovës. Gjykata ka mbajtur baraspeshën në mes (i) të hovit të ndërtimit të shpejtë institucional të një shteti të ri; dhe (ii) detyrimit të konsolidimit të një rendi shoqëror e institucional bazuar në vlerat që ngërthente një Kushtetutë e re.

Si rezultat, sot, në gjysmën e parë të dekadës së saj të dytë, Gjykata tashmë ka një histori të jashtëzakonshme dhe një praktikë gjyqësore thelbësisht të pasur.

Janë dy karakteristika që burojnë nga kjo praktikë gjyqësore e që shënojnë rolin e palëkundur të Gjykatës Kushtetuese në realizimin e aspiratës që ngërthen Kushtetuta - për një shtet që qëndron krenarë në mesin e shteteve të familjes evropiane.

E para, ndërlidhet me kontributin e Gjykatës në mbrojtjen dhe avancimin e të drejtave dhe lirive themelore përgjatë konsolidimit të një shteti të përkushtuar për barazinë e të gjithëve para ligjit. Gjykata ka shërbyer si urë lidhëse në mes vlerave që reflekton praktika gjyqësore e Gjykatës Evropiane për të Drejtat e Njeriut dhe të drejtave dhe lirive të të gjithë qytetarëve dhe komuniteteve të Republikës, pa asnjë dallim.
Ndërsa, e dyta ndërlidhet me kontributin e çmuar të Gjykatës Kushtetuese në konsolidimin e parimit të ndarjes dhe balancimit të pushteteve në rendin kushtetues të Republikës së Kosovës. Kjo sepse, demokracia është e plotë vetëm atëherë kur ushtrimi i sovranitetit është i mbështetur nga sundimi i ligjit dhe ky i fundit, nuk mund të ekzistojë pa ndarjen dhe ndërveprimin e nevojshëm në mes tri pushteteve pavarura.

Të nderuar pjesëmarrës,

Marrë parasysh kontekstin e shtetndërtimit të Kosovës, përfshirë sfidën, por edhe përparësinë e ndërtimit të një rendi të ri kushtetues, çështjet që ndërlidhen me ndarjen dhe ndërveprimin e pushteteve, i janë nënshtruar vlerësimit të Gjykatës në mënyrë të vazhdueshme ndër vite.

Ajo ka dhënë fjalën e saj përfundimtare në një mori çështjesh që ngërthejnë ndërveprimin në mes pushteteve, përfshirë por pa u kufizuar në (i) procedurat e zgjedhjes e funksionin e Presidentit të Republikës; (ii) konstituimin e institucioneve pas zgjedhjeve parlamentare, përfshirë zgjedhjen e Qeverisë pas mocionit të mosbesimit; (iii) rolin mbikëqyrës të Kuvendit në raport me Qeverinë dhe institucionet e pavarura; dhe (iv) kufijtë e ndërveprimit në mes pushtetit lokal e qendror.

Kjo vendimmarrje e Gjykatës, me raste, ka rezultuar në ndryshime rrënjësore në dinamikën politike, por edhe bartjen dhe/ose përbërjen e pushtetit ekzekutiv dhe legjislativ. Të gjitha forcat politike kanë respektuar këto vendime, duke reflektuar kështu përkushtimin e palëkundur të Republikës për shtetin e së drejtës.

Thënë këtë, praktika gjyqësore dërrmuese e Gjykatës në kontekst të ndarjes dhe balancimit të pushteteve, ndërlidhet me kufijtë e ushtrimit të kompetencave të pushtetit ekzekutiv dhe/ose legjislativ në raport me atë gjyqësor dhe/ose institucione të pavarura kushtetuese.

Marrë parasysh historikun relativisht të ri të pavarësisë së pushtetit gjyqësor dhe institucioneve të pavarura, janë këto të fundit, që i ekspozohen rrezikut më të madh të mundësisë së cenimit të pavarësisë së tyre përmes ushtrimit të kompetencave të dy pushteteve tjera dhe kjo tendencë, sigurisht që nuk është karakteristikë vetëm e Republikës tonë.

Sipas, ndër të tjera, Opinioneve të Këshillit Konsultativ të Gjyqtarëve Evropian të Këshillit të Evropës, gjatë dekadave të fundit, marrëdhënia ndërmjet tri pushteteve është transformuar (i) duke rezultuar në zvogëlimin e funksionit mbikëqyrës të pushtetit legjislativ ndaj atij ekzekutiv; ndërsa (ii) rritja e kompetencës ekzekutive ka rezultuar në numër të shtuar të kontesteve në gjykata dhe kjo nga ana tjetër, ka rezultuar në pasojën e kontestimit të legjitimitetit të pushtetit gjyqësor në diskursin publik.

Një fenomen të tillë, në demokracitë me traditë më pak të konsoliduar, në mbrojtje të vlerave themelore të demokracisë, e kanë kundër-balancuar gjykatat me karakter supranacional, përkatësisht Gjykata Evropiane për të Drejtat e Njeriut dhe Gjykata e Drejtësisë e Bashkimit Evropian. Ndërsa, në Republikën e Kosovës, e ka kundër-balancuar Gjykata Kushtetuese.

Qëndrueshmërinë konsistente në mbrojtje të ndarjes, pavarësisë, por dhe ndërveprimit të pushteteve, me theks në pavarësinë e pushtetit gjyqësor, Gjykata e ka mbajtur duke u bazuar në parimet që burojnë nga Kushtetuta, por edhe nga praktika gjyqësore e dy gjykatave të lartcekura. Praktika gjyqësore e Gjykatës Evropiane për të Drejtat e Njeriut është detyrim kushtetues, ndërsa praktika gjyqësore e Gjykatës së Drejtësisë përkon me aspiratën kushtetuese për anëtarësimin në Bashkimin Evropian.
Të nderuar pjesëmarrës,

Ndërveprimi në mes të pushteteve, medoemos që reflekton edhe tension në mes tyre. Ky tension, të cilit Këshilli Konsultativ i Gjyqtarëve Evropian të Këshillit të Evropës i referohet si “tension kreativ”,

reflekton faktin që demokracia në Republikën e Kosovës funksionon. E kundërta, përkatësisht, mungesa e një tensioni të tillë, do të nënkuptonte që pushtetet nuk po e luajnë funksionin ndërveprues dhe/ose mbikëqyrës në mënyrë efektive, duke e dëmtuar kështu ruajtjen e ekuilibrit të duhur kushtetues.

Thënë këtë, ky tension, jo rrallëherë është manifestuar edhe me sulme publike kundër Gjykatës Kushtetuese, por edhe institucioneve tjera të pavarura. Një diskurs i tillë publik, gjithashtu, nuk është unik vetëm për Republikën tonë. Esenca e tij, dhe edhe pse jo i artikuluar në mënyrë të tillë, ngërthen diskutimin e nivelit teorik ndërlidhur me argumentin e kundër-balancimit të shumicës, i cili, në esencë, ngrit dilemën e mungesës së legjitimitetit të pushtetit gjyqësor dhe/ose Gjykatave Kushtetuese - pushteti i të cilave nuk buron në mënyrë të drejtpërdrejtë nga populli, për të vlerësuar ligjet e aktet miratuara nga përfaqësuesit e zgjedhur të popullit.

Megjithatë, në demokracitë me traditë më të konsoliduar kushtetuese është tejkaluar kjo dilemë dhe ka mbizotëruar qëndrimi/kundër-argumenti sipas të cilit legjitimiteti i kontrollit gjyqësor në raport me dy pushtetet tjera, buron nga Kushtetuta... nga besnikëria ndaj saj.

Sigurisht që legjitimiteti kushtetues i kontrollit gjyqësor është i ndërvarur nga legjitimiteti funksional i gjyqtarëve dhe prokurorëve, dhe të cilët, i nënshtrohen detyrimit kushtetues të vetëpërmbajtjes, profesionalizmit dhe llogaridhënies, duke kryer funksionin e tyre në mbrojtje të Kushtetutës dhe/ose ligjit. Në të kundërtën, janë vetë bartësit e pushtetit gjyqësor dhe sistemit prokurorial, të cilët do të cenonin autoritetin e një pushteti të tërë në dëm të ekuilibrit kushtetues. Këto parime, Gjykata i ka theksuar në mënyrë të vazhdueshme, përfshirë faktin që ndarja dhe ndërveprimi i pushteteve nuk nënkupton funksionimin e tyre në izolim, por bazuar në parimin e lojalitetit kushtetues, në mbështetje të njëri-tjetrit, për të siguruar funksionimin e mirëfilltë të rendit kushtetues në një shoqëri demokratike.

Zonja dhe Zotërinj,

Sigurisht që debati publik e teorik, përfshirë kritikën që është vlerë thelbësore e rendit tonë kushtetues, lidhur me burimin e legjitimitetit demokratik të kontrollit gjyqësor e kushtetues, është me vlerë. Thënë këtë, duhet gjithashtu të kujtojmë që teoria e ndarjes dhe ndërveprimit të pushteteve të pavarura, është e vetmja që i ka rezistuar kohës dhe përbën themelet e demokracive kushtetuese liberale.

Këto të fundit, për gati tre shekuj, i kanë qëndruar besnike, esencës së teorisë së zhvilluar përmes mendjeve më të rralla të mendimit filozofik e politik, përfshirë (i) mendimtarin francez Montesquieu përmes Frymës së Ligjeve; dhe (ii) Alexander Hamilton e James Madison përmes Letrave Federaliste, sipas të cilëve, në esencë, liritë civile dhe politike janë efektive vetëm përmes një sistemi të pushteteve të ndara e të kontrolluara për të pamundësuar koncentrimin e pushtetit dhe/ose arbitraritetin e secilës prej tyre.

Frymëzuar edhe nga Montesquieu, në një nga Letrat Federaliste (që në vitin 1788), në mënyrë të thjeshtësuar por madhështore, reflektohet pyetja thelbësore që ka sfiduar dhe formësuar modelet kushtetuese në kontekst të funksionit të pushteteve shekuj më pas dhe po citoj si në vijim:

“Nëse njerëzit do të ishin engjuj, asnjë qeverisje nuk do të ishte e nevojshme. Nëse engjujt do të qeverisnin njerëzit, asnjë kontroll i jashtëm ose i brendshëm në qeverisje nuk do të ishte i nevojshëm. Në formimin e një qeverisje të administruar nga njerëzit për njerëzit, vështirësia e madhe është në këtë: së pari duhet të mundësohet që qeverisja të kontrolloj të qeverisurit, dhe më pas, të obligohet të kontrolloj vetveten”.

Mbi frymën e këtyre koncepteve qëndrojnë ndër rendet më të vjetra demokratike në Botë. Mbi frymën e këtyre parimeve qëndron emëruesi i përbashkët i traditës kushtetuese të shteteve demokratike. Mbi parimet e kësaj trashëgime, qëndron edhe Kushtetuta e Republikës së Kosovës.

Është detyrë e Gjykatës Kushtetuese t’u qëndrojë besnike këtyre vlerave. E njëjta detyrë u takon edhe të gjitha autoriteteve publike. Kushtetuta është edhe përkushtimi kolektiv i të gjitha autoriteteve publike, në emër të qytetarëve, për një shtet të së drejtës në përputhje me vlerat që ngërthen Kushtetuta e parë e këtij shteti që fillon me shprehjen “Ne, Populli i Kosovës”. Gjykata, gjithnjë nën kufizimet që i përcakton Kushtetuta por pa marrë parasysh dinamikat e zhvillimet ditore, do t’i qëndrojë besnike këtyre parimeve.

Zonja dhe Zotërinj,

Katërmbëdhjetë vite pas themelimit, Gjykata Kushtetuese, sot qëndron dinjitoze mes Gjykatave Kushtetuese anëtare të Konferencës Botërore të Drejtësisë Kushtetuese. Ajo është ndër anëtaret më aktive të Forumit të Komisionit të Venecias. Praktika e saj gjyqësore është garanci e argument shtesë që Kosova e ka vendin në mes shteteve anëtare të Këshillit të Evropës.

Të arriturat e saj dhe përkundër sfidave, janë reflektim i përkushtimit të palëkundur të të gjitha gjeneratave të gjyqtarëve të Gjykatës Kushtetuese. Sigurisht, edhe i mbështetjes së pakursyer të gjykatave kushtetuese simotra nga mbarë bota, bashkëpunimi i thellë me të cilat reflektohet edhe nga pjesëmarrja e madhe e tyre në këtë ceremoni e të cilave, në emër të Gjykatës, ju shpreh edhe një herë mirënjohjen e thellë. Pjesëmarrja juaj e nderon Gjykatën tonë. Pjesëmarrja juaj e nderon Republikën e Kosovës.

Falënderime për një bashkëpunim e mbështetje të pakursyer duhet t’i drejtohen edhe Komisionit të Venecias dhe Këshillit të Evropës, me mbështetjen e të cilit, Gjykata ka vënë bashkëpunim të jashtëzakonshëm me Gjykatën Evropiane për të Drejtat e Njeriut. Jam thellësisht e bindur që, atëherë kur Republika jonë ta marr vendin e merituar si anëtare e Këshillit të Evropës, praktika gjyqësore e Gjykatës Kushtetuese do t’i bëjë ballë filtrit të mbikëqyrjes të Gjykatës Evropiane për të Drejtat e Njeriut.

Në fund, falënderime i shpreh Ambasadave të shteteve mike në Republikën e Kosovës dhe agjencive të tyre për bashkëpunim ndërkombëtar, të cilat në mënyrë të pakursyer kanë mbështetur Gjykatën tonë.

Mirënjohje e veçantë për dy shtete mike, ndër shumë sosh prezentë sot këtu, Shtetet e Bashkuara të Amerikës dhe Republikën e Francës, dhe të cilat, në këtë ceremoni, përfaqësohen nga dy folës të nderuar: (i) gjyqtari federal Tunheim, i cili ka lënë gjurmë në shtetndërtimin e Kosovës, përfshirë

përmes mbështetjes së Komisionit Kushtetues për hartimin e Kushtetutës tonë; dhe (ii) Kryetarit Fabius, mbështetja e pakursyer e të cilit ka lartësuar Gjykatën tonë, përfshirë me pasurinë e traditës së çmuar kushtetuese franceze.

Të dashur miq,

Republika e Kosovës është e ndërtuar nëpërmjet historive, në të cilat dhimbja gërshetohet me krenarinë dhe qëndresën.

Por, mbi të gjitha, Republika e Kosovës është një histori suksesi. Jo vetëm sa i përket rrugëtimit historik të shtetndërtimit, por edhe zhvillimit të demokracisë. Ky sukses është medoemos, edhe reflektim i mbështetjes e partneritetit të palëkundur të shteteve mike të Republikës së Kosovës.

Thënë këtë, demokracia është proces i vazhdueshëm, i cili i nënshtrohet edhe testit të përkushtimit... të durimit - të besimit të palëkundur për një ide të përbashkët që reflekton vet preambula e Kushtetutës – ndërtimit të një Republike që bazohet në vlerat e përbashkëta të shteteve paqedashëse në Botë.

Për tu kthyer edhe një herë te Montesquieu – nuk ka një popull më të fuqishëm se ai që respekton ligjet, jo nga arsyeja apo frika, por nga pasioni – nga përkushtimi e respekti për shtetin.

Duke ju falënderuar për vëmendjen tuaj - në emër të kolegëve të mi gjyqtarë të Gjykatës Kushtetuese: zëvendëskryetarit Bajram Ljatifi e gjyqtarëve Selvete Gërxhaliu-Krasniqi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci, Nexhmi Rexhepi e Enver Peci - urojmë dhe festojmë së bashku këto katërmbëdhjetë vite tradite të drejtësisë kushtetuese në Republikën e Kosovës.

Ju faleminderit!

Gresa Caka-Nimani

Kryetare e Gjykatës Kushtetuese të Republikës së Kosovës

Obraćanje predsednice Ustavnog suda Republike Kosovo, gđe Grese Caka-Nimani

Uvaženi učesnici ceremonije obeležavanja četrnaestogodišnjice osnivanja Ustavnog suda Republike Kosovo;

Poštovani poslanici, ministri, rukovodioci pravosudne vlasti i nezavisnih institucija;

Poštovani predsedniče Sejdiu i predsednice Jahjaga;

Poštovani ambasadori i predstavnici međunarodnih institucija;

Poštovana bivša predsednice Suda, gđo Rama-Hajrizi i bivše sudije Ustavnog suda;

Poštovani predsednici opština i predstavnici institucija, civilnog društva i medija;

Poštovani g. Fabiuse, predsedniče Ustavnog saveta Francuske;

Poštovani predsednici ustavnih i vrhovnih sudova Belgije – g. Nihoule i g. Lavrysene; Estonije – g. Kõve; Holandije – gđo De Groot; Letonije – g. Laviņš; Albanije – gđo Zaçaj i g. Sadushi; i Turske – g. Zühtü Arslan;

Poštovane sudije ustavnih i vrhovnih sudova Bosne i Hercegovine, Austrije, Bugarske, Irske, Hrvatske, Litvanije, Severne Makedonije, Portugala, Albanije i Sjedinjenih Američkih Država - sudijo Tunheime;

Poštovani predstavnici Evropskog suda za ljudska prava i Venecijanske komisije;

Poštovani učesnici/dame i gospodo,

Dozvolite mi da na početku izrazim svoje zadovoljstvo i duboku zahvalnost na vašem prisustvu. Svojim prisustvom obeležavanju ove godišnjice Ustavnog suda ukazali ste nam čast. Učešće delegacija iz celog sveta odražava poštovanje prema našem Sudu i solidarnost i nepokolebljivu posvećenost sudova da sarađuju u odbrani zajedničkih vrednosti.

Danas, simbolično, obeležavamo 14. godišnjicu Ustavnog suda, ustanovljenog Ustavom, koji je krunisao požrtvovanost čitavih generacija za slobodu i nezavisnost, ali i nepokolebljivi ideal jednog naroda za pravnu državu zasnovanu na vrednostima koje odražava zajednička tradicija demokratskih država.

Ovom Sudu, simbolu nezavisnog ustavnog poretka, dodeljena je dužnost tumačenja i zaštite ovog Ustava. Istovremeno osnivanje Republike i njenog Ustavnog suda odredilo je ulogu ovog poslednjeg, koja prevazilazi klasično vršenje ustavne nadležnosti, zahvativši neminovno i ulogu oblikovanja i konsolidovanja državnog i međunarodnog identiteta Kosova.

Pre četrnaest godina, prva generacija sudija Ustavnog suda, preuzela je odgovornost za tumačenje novousvojenog Ustava novoosnovane Republike.

Dinamičan kontekst izgradnje države omogućio je ovom Sudu da ima suštinsku ulogu u određivanju dinamika demokratskog razvoja Kosova. Sud je održavao ravnotežu između (i) zamaha brze institucionalne izgradnje jedne mlade države i (ii) obaveze konsolidovanja društvenog i institucionalnog poretka zasnovanog na vrednostima sadržanim u jednom novom Ustavu.

Kao rezultat toga, danas, u prvoj polovini svoje druge decenije, Sud već ima izuzetnu istoriju i suštinski bogatu sudsku praksu.

Dve su karakteristike koje proizilaze iz ove sudske prakse, a koje obeležavaju nepokolebljivu ulogu Ustavnog suda u ostvarivanju težnje koju oličava Ustav – za državom koja sa ponosom stoji među državama evropske porodice.

Prva se odnosi na doprinos Suda zaštiti i unapređenju osnovnih prava i sloboda tokom konsolidacije države koja je posvećena jednakosti svih pred zakonom. Sud je služio kao most između vrednosti koje se ogledaju u sudskoj praksi Evropskog suda za ljudska prava i prava i sloboda svih građana i zajednica Republike, bez ikakve razlike.

Druga se pak odnosi na dragoceni doprinos Ustavnog suda u konsolidovanju načela podele i ravnoteže vlasti u ustavnom poretku Republike Kosovo. To stoga što je demokratija potpuna samo onda kada je vršenje suvereniteta podržano vladavinom prava, a vladavina prava ne može postojati bez neophodnog razdvajanja i interakcije među trima nezavisnim vlastima.

Poštovani učesnici,

Uzimajući u obzir kontekst izgradnje države Kosovo, uključujući i izazov, ali i prioritet izgradnje jednog novog ustavnog poretka, pitanja koja se tiču podele i interakcije vlasti, bila su tokom godina neprestano predmet ocene Suda.

Ustavni sud je dao svoju konačnu reč u nizu pitanja koja uključuju interakciju između vlasti, uključujući ali ne ograničavajući se na (i) procedure izbora i funkciju predsednika Republike; (ii) konstituisanje institucija nakon parlamentarnih izbora, uključujući i izbor Vlade nakon izglasavanja nepoverenja; (iii) nadzornu ulogu Skupštine u odnosu na Vladu i nezavisne institucije; i (iv) granice interakcije između lokalne i centralne vlasti.

Ovo odlučivanje Suda je u pojedinim slučajevima rezultiralo temeljitim promenama u političkoj dinamici, ali i prenosu i/ili sastavu izvršne i zakonodavne vlasti. Sve političke snage su poštovale ove odluke, pokazujući tako nepokolebljivu posvećenost Republike vladavini prava.

Pri tome, preovladavajuća sudska praksa Suda u kontekstu podele i ravnoteže vlasti odnosi se na granice vršenja ovlašćenja izvršne i/ili zakonodavne vlasti u odnosu na sudsku vlast i/ili nezavisne ustavne institucije.

S obzirom na relativno noviju istoriju nezavisnosti sudske vlasti i nezavisnih institucija, upravo su ove poslednje te koje su izložene najvećem riziku od mogućnosti da njihova nezavisnost bude narušena vršenjem ovlašćenja druge dve vlasti, a ova tendencija svakako nije karakteristična samo za našu Republiku.

Prema, između ostalog, mišljenjima Konsultativnog veća evropskih sudija Saveta Evrope, tokom poslednjih decenija došlo je do transformacije odnosa između triju vlasti (i) što je rezultiralo smanjenjem nadzorne funkcije zakonodavne vlasti nad izvršnom vlašću; dok je (ii) povećanje izvršne nadležnosti rezultiralo povećanim brojem sporova pred sudovima, a to je s druge strane imalo za posledicu osporavanje legitimiteta sudske vlasti u javnom diskursu.

Ovakvu pojavu su u demokratijama sa manje konsolidovanom tradicijom, u odbrani osnovnih vrednosti demokratije, uravnotežavali sudovi nadnacionalne prirode, odnosno Evropski sud za ljudska prava i Sud pravde Evropske unije. U Republici Kosovo je ovu pojavu uravnotežavao Ustavni sud.

Doslednu stabilnost u odbrani podele, nezavisnosti, ali i interakcije vlasti, sa naglaskom na nezavisnosti sudske vlasti, Sud je održavao na osnovu načela koja proističu iz Ustava, ali i iz sudske prakse dva gore navedena suda. Sudska praksa Evropskog suda za ljudska prava je ustavna obaveza; dok se sudska praksa Suda pravde poklapa sa ustavnom težnjom za članstvom u Evropskoj uniji.

Poštovani učesnici,

Interakcija između vlasti bezuvetno odražava i tenziju među njima. Ova tenzija, koju Konsultativno veće evropskih sudija Saveta Evrope naziva „kreativnom tenzijom“, odražava činjenicu da demokratija u Republici Kosovo funkcioniše. Nasuprot tome, odsustvo takve tenzije značilo bi da vlasti ne igraju delotvorno interaktivnu i/ili nadzornu funkciju, čime bi naštetile održavanju odgovarajuće ustavne ravnoteže.

Naime, ova tenzija se neretko manifestovala i javnim napadima na Ustavni sud, ali i druge nezavisne institucije. Takav javni diskurs nije svojstven samo našoj Republici. Njegova suština, iako nije artikulisan na takav način, podrazumeva diskusiju na teorijskom nivou po pitanju argumenta protivteže većini, koja, u suštini, otvara dilemu nedostatka legitimiteta sudske vlasti i/ili ustavnih sudova – čija vlast ne potiče direktno od naroda, da ocenjuju zakone ili akte koje su usvojili izabrani predstavnici naroda.

Međutim, u demokratijama sa konsolidovanijom ustavnom tradicijom ova dilema je prevaziđena i preovladao je stav/protivargument prema kojem legitimitet sudske kontrole u odnosu na dve druge vlasti potiče iz Ustava... iz privrženosti njemu.

Naravno, ustavni legitimitet sudske kontrole zavisi od funkcionalnog legitimiteta sudija i tužilaca, koji podležu ustavnoj obavezi uzdržanosti, profesionalizma i odgovornosti prilikom vršenja svoje funkcije u odbrani Ustava i/ili zakona. U suprotnom bi sami nosioci sudske vlasti i tužilačkog sistema bili ti koji bi narušili autoritet čitave vlasti na štetu ustavne ravnoteže. Sud je dosledno isticao ova načela, uključujući i činjenicu da podela i interakcija vlasti ne znači da je njihovo funkcionisanje izolovano, već zasnovano na načelu ustavne lojalnosti, u međusobnoj podršci, kako bi se obezbedilo pravilno funkcionisanje ustavnog poretka u demokratskom društvu.

Dame i gospodo,

Svakako je dragocena i javna i teorijska debata, uključujući i kritiku koja čini suštinsku vrednost našeg ustavnog poretka, po pitanju izvora demokratskog legitimiteta sudske i ustavne kontrole.

Naime, moramo takođe zapamtiti da je teorija podele i interakcije nezavisnih vlasti jedina koja je izdržala test vremena i predstavlja temelje liberalnih ustavnih demokratija.

Ove poslednje su, skoro tri veka, ostale verne suštini teorije koju su razvili retki umovi filozofske i političke misli, uključujući (i) francuskog mislioca Montesquieua koji je to učinio svojim delom „O duhu zakona“ i (ii) Alexandera Hamiltona i Jamesa Madisona putem „Federalističkih spisa“, prema kojima su, građanske i političke slobode, u suštini, delotvorne samo kroz sistem odvojenih i kontrolisanih vlasti kako bi se onemogućila koncentracija vlasti i/ili arbitrarnost svake od njih.

Inspirisano i Montesquieueom, u jednom od Federalističkih spisa (još 1788. godine) je na pojednostavljen, ali veličanstven način, prikazano fundamentalno pitanje koje je vekovima kasnije izazivalo i oblikovalo ustavne modele u kontekstu funkcije vlasti, a ja citiram sledeće:

„Kad bi ljudi bili anđeli, tada ne bi ni trebalo da postoji nikakva vlast. Kada bi anđeli vladali ljudima, ne bi bilo potrebe ni za kakvom, ni spoljašnjom, niti unutrašnjom kontrolom. A pri uspostavljanju sistema vladavine koju će ljudi sprovoditi nad ljudima, velika poteškoća se sastoji u sledećem: prvo morate omogućiti vladi da kontroliše one kojima vlada - a zatim je obavezati da kontroliše samu sebe“.

Na duhu ovih koncepata počivaju najstariji demokratski poreci u svetu. Na duhu ovih načela počiva zajednički imenitelj ustavne tradicije demokratskih država. Na načelima ovog nasleđa počiva i Ustav Republike Kosovo.

Dužnost je Ustavnog suda da ostane privržen ovim vrednostima. Ista dužnost pripada i svim javnim vlastima. Ustav je i kolektivno zalaganje svih javnih organa vlasti, u ime građana, za pravnu državu u skladu sa vrednostima sadržanim u prvom Ustavu ove države koji počinje frazom – „Mi, građani Kosova“. Sud će, uvek prema ograničenjima propisanim Ustavom, ali bez obzira na svakodnevne dinamike i dešavanja, ostati privržen ovim načelima.

Dame i gospodo,

Četrnaest godina nakon osnivanja, Ustavni sud danas stoji dostojanstveno među ustavnim sudovima koji su članovi Svetske konferencije ustavne pravde. On je među najaktivnijim članovima Foruma Venecijanske komisije. Njegova sudska praksa je dodatna garancija i argument da Kosovo ima svoje mesto među državama članicama Saveta Evrope.

Njegova dostignuća su, uprkos izazovima, odraz nepokolebljive posvećenosti svih generacija sudija Ustavnog suda. Naravno i nesebične podrške sestrinskih ustavnih sudova iz celog sveta, duboka saradnja sa kojima se ogleda i u njihovom velikom učešću na ovoj svečanosti, na čemu im, u ime Suda, još jednom izražavam duboku zahvalnost. Svojim učešćem ste ukazali čast našem Sudu. Svojim učešćem ste ukazali čast Republici Kosovo.

Zahvalnost na saradnji i nesebičnoj podršci treba uputiti i Venecijanskoj komisiji i Savetu Evrope, uz čiju podršku je Sud uspostavio izvanrednu saradnju sa Evropskim sudom za ljudska prava. Duboko sam uverena da će sudska praksa Ustavnog suda, onda kada naša Republika bude zauzela zasluženo mesto u Savetu Evrope, izdržati filter nadzora Evropskog suda za ljudska prava.

Na kraju, izražavam zahvalnost ambasadama prijateljskih zemalja u Republici Kosovo i njihovim agencijama za međunarodnu saradnju, koje su nesebično podržavale naš Sud.

Posebno se zahvaljujemo dvema prijateljskim državama, među mnogima koje su prisutne danas ovde, Sjedinjenim Američkim Državama i Republici Francuskoj, a koje na ovoj ceremoniji predstavljaju dvojica uvaženih govornika: (i) savezni sudija Tunheim, koji je ostavio svoj trag u izgradnji države Kosovo, uključujući i putem podrške Ustavnoj komisiji za izradu našeg Ustava; i (ii) predsednik Fabius, čija je nesebična podrška izdigla naš Sud, obuhvatajući i blago dragocene francuske ustavne tradicije.

Dragi prijatelji,

Republika Kosovo je građena kroz priče u kojima se bol prepliće sa ponosom i izdržljivošću.

Ali, povrh svega, Republika Kosovo je priča o uspehu. I to ne samo u pogledu istorijskog puta izgradnje države, već i razvoja demokratije. Ovaj uspeh je svakako i odraz podrške i nepokolebljivog partnerstva prijateljskih država Republike Kosovo.

Naime, demokratija je neprekidni proces, koji podleže i testu posvećenosti... strpljenja – nepokolebljive vere u zajedničku ideju koju odražava sama preambula Ustava – izgradnje Republike zasnovane na zajedničkim vrednostima miroljubivih država u svetu.

Vratiću se još jednom misliocu Montesquieu - nema moćnijeg naroda od onog koji poštuje zakone, ne iz razuma ili straha, već iz strasti - zbog privrženosti i poštovanja prema državi.

Zahvaljujući vam se na pažnji – u ime mojih kolega sudija Ustavnog suda: zamenika predsednika Bajrama Ljatifija i sudija Selvete Gërxhaliu-Krasniqi, Safeta Hoxhe, Radomira Labana, Remzije Istrefi-Peci, Nexhmija Rexhepija i Envera Pecija – zajedno čestitamo i slavimo ovih četrnaest godina tradicije ustavnog pravosuđa u Republici Kosovo.

Hvala!

Grese Caka-Nimani

Predsednica Ustavnog suda Republike Kosovo

Address by the President of the Constitutional Court of the Republic of Kosovo, Ms. Gresa Caka-Nimani

Dear participants and guests of the ceremony of marking the 14th anniversary of the establishment of the Constitutional Court of the Republic of Kosovo;

Honorable Deputies, Ministers, leaders of the Judiciary and Independent Institutions;

Honorable President Sejdiu and President Jahjaga;

Honorable Ambassadors and representatives of international institutions;

Honorable former-president of the Court, Mrs. Rama-Hajrizi and former-judges of the Constitutional Court;

Honorable mayors, representatives of institutions, civil society and media;

Dear Mr. Fabius, President of the Constitutional Council of France;

Honorable Presidents of the Constitutional and Supreme Courts of Belgium - Mr. Nihoul and Mr. Lavrysen; of Estonia - Mr. Kõve; the Netherlands - Mrs. De Groot; of Latvia - Mr. Laviņš; of Albania - Mrs. Zaçaj and Mr. Sadushi and of Turkey - Mr. Zühtü Arslan;

Honorable judges of the Constitutional and Supreme Courts of Bosnia and Herzegovina, Austria, Bulgaria, Ireland, Croatia, Lithuania, North Macedonia, Portugal and the United States of America – judge Tunheim;

Honorable representatives of the European Court for Human Rights and the Venice Commission;

Dear participants/Ladies and Gentlemen,

Please allow me to begin by expressing my delight and deep gratitude for your presence. Your presence in marking this anniversary of the Constitutional Court - honors us. The participation of delegations from all over the world reflects the respect for our Court and the unwavering solidarity and commitment of the Courts to cooperate in the protection of the common values.

Today, symbolically, we mark the 14th anniversary of the Constitutional Court, established through a Constitution, which has crowned the sacrifice of entire generations for freedom and independence, but also the steadfast ideal of a nation for a state that reflects the values enshrined in the common tradition of democratic states.

This Court, a symbol of an independent constitutional order, has been vested with the task of interpreting and protecting this Constitution. The simultaneous establishment of the Republic and its Constitutional Court, has determined the role of the latter, which goes beyond the classical exercise

of its constitutional jurisdiction, having an inevitable role on the shaping and consolidating of Kosovo's state and international identity.

Fourteen years ago, the first generation of Constitutional Court judges, took the responsibility to interpret a newly adopted Constitution of a newly established Republic.

The dynamic context of a state-building has enabled this Court to have an essential role in determining the dynamics of democratic development of Kosovo. The Court has struck the balance between (i) the vigor of a rapid institutional building of a young state; and (ii) the obligation to consolidate a social and institutional order based on the values that a new Constitution enshrined.

As a result, today - in the first half of its second decade, the Court already has a remarkable history and a tremendously rich case-law. There are two characteristics that derive from this case-law that mark the unwavering role of the Constitutional Court in attaining the aspiration that the Constitution embodies - for a state that stands proudly among the states of the European family.

The first, pertains to the Court's contribution to the protection and advancement of fundamental rights and freedoms throughout the consolidation of a state committed to the equality of all before the law. The Court has served as a bridge between the values reflected in the case-law of the European Court of Human Rights and the rights and freedoms of all the citizens and communities of the Republic of Kosovo, with no distinction.

Whereas the second, pertains to the valuable contribution of the Constitutional Court in consolidating the principle of separation and balancing of powers in the constitutional order of the Republic of Kosovo. This because, democracy is only complete when the exercise of sovereignty is supported by the rule of law and the latter cannot exist without the necessary separation and interaction between the three independent powers.

Dear participants,

Taking into consideration the context of the state-building of Kosovo, including the challenge but also the advantage of building a new constitutional order, issues pertaining to the separation and interaction of powers, have been subject to the Court's assessment continuously over the years.

The Court has given its final word on a multitude of issues that involve the interaction between the branches of power, including but not limited to: (i) the procedures for the election and the role of President of the Republic; (ii) the establishment of institutions after the parliamentary elections, including the election of the Government after a vote of no-confidence; (iii) the oversight role of the Assembly in relation to the Government and the independent institutions; and (iv) limitations to the interaction between the local and central power.

This decision-making by the Court, on some occasions, has resulted in signficant changes in the political dynamics – but also the transfer and/or the composition of the executive and legislative branches. All the political forces have honored these decisions, thus reflecting the unwavering commitment of the Republic to the state of law.

Having said that, the overwhelming case-law of the Court in the context of the separation and balancing of powers pertains to the limits of exercising the competences of the executive and/or legislative branches in relation tothe judicial branch and/or constitutionally independent institutions.

Taking into account the relatively recent history of the independence of the judicial branch and independent institutions, it is the latter that are exposed to a greater risk of possible infringement of their independence through the exercise of the competences of the other two branches, and this tendency is certainly not a characteristic of our Republic only.

According to, among others, the Opinions of the Consultative Council of European Judges of the Council of Europe, during the last decades, the relationship between the three branches of government has been transformed (i) resulting into the reduction of the oversight function of the legislative branch over the executive one; while (ii) the increase in executive power has resulted in an increased number of disputes in the courts and this, in turn, has resulted in the chalenging of the legitimacy of the judicial power in the public discourse.

Such a phenomenon, in the democracies with a less consolidated tradition, in defense of the basic values of democracy, has been counterbalanced by the supranational courts, namely the European Court of Human Rights and the Court of Justice of the European Union. Whereas in the Republic of Kosovo, has been counterbalanced by the Constitutional Court.

The consistent persistence in defense of the separation and interaction of branches of power with an emphasis on the independence of the judicial branch, was maintained by the Court based on the principles stemming from the Constitution, but also the case-law of the two aforementioned courts. The jurisprudence of the European Court of Human Rights, is a constitutional obligation; whereas the jurisprudence of the Court of Justice, coincides with the constitutional aspiration for membership in the European Union.

Dear participants,

The interaction between the branches of government does necessarily also reflect tension among them. This tension, which the Consultative Council of European Judges of the Council of Europe refers to as “creative tension”, reflects the fact that democracy in the Republic of Kosovo functions. The opposite, respectively, the absence of such tension, would mean that the respective branches are not exercising their respective interactive and/or oversight functions effectively, thereby infringing upon the maintenance of the proper constitutional balance.

Having said that, this tension has, at times also been manifested through public attacks against the Constitutional Court but also other independent institutions. Such a public discourse is not unique to our Republic either. Its essence, although not articulated as such, reflects the theoretical level discussion related to the counter-majoritarian difficulty argument which, in essence, entails the dilemma of the lack of legitimacy of the judicial branch and/or the Constitutional Courts - whose power does not stem directly from the people to review the laws and acts adopted by the elected representatives of the people.

However, in democracies with a more consolidated constitutional tradition, this dilemma has been overcome and the position/counter-argument has prevailed, according to which the legitimacy of judicial control in relation to other branches of power, stems from the Constitution... from loyality to it.

Certainly, the constitutional legitimacy is inter-dependent with the functional legitimacy of judges and prosecutors, who are subject to the constitutional duty of self-restraint, professionalism and accountability, in excercising their function in defense of the Constitution and/or the law. On the contrary, the holders of judicial and prosecutorial powers themselves would be the ones to diminish the authority of an entire branch of power to the detriment of the constitutional balance. These principles have been consistently emphasized by the Court, including the fact that the separation and interaction of branches of government does not mean their functioning in isolation, but rather based on the principle of constitutional loyalty, in support of each other, in order to ensure the proper functioning of constitutional order in a democratic society.

Ladies and Gentlemen,

Surely the public and theoretical debate, including critisim, which is an essential value of our constitutional order, regarding the source of democratic legitimacy of judicial and constitutional review, is valuable. Having said that, we must also remember that the theory of the separation and interaction of independent branches of power, is the only one that has stood the test of time and constitutes the foundation of liberal constitutional democracies.

The latter, for almost three centuries, have remained faithful to the essence of the theory developed through the rarest minds of philosophical and political thought, including (i) the French thinker Montesquieu through "The Spirit of the Laws"; and (ii) Alexander Hamilton and James Madison through the Federalist Papers, according to which, essentially, civil and political liberties are effective only through a system of separated and controlled branches of powers designed to prevent the concentration of power and/or the arbitrariness of each of them.

Inspired also by Montesquieu, in one of the Federalist Papers (back in 1788), in a simplified but magnificent way, the essential question that has challenged and shaped the constitutional designs for centuries afterwards is reflected, and I quote as follows:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

In the spirit of these concepts, stand among the oldest democratic orders in the World. In the spirit of these principles, lies the common denominator of the constitutional tradition of democratic states. On the principles of this heritage, stands the Constitution of the Republic of Kosovo.

It is the duty of the Constitutional Court to remain faithful to these values. The same duty belongs to all public authorities. The Constitution is also the collective commitment of all public authorities, in the name of the citizens, for a state that functions in accordance with the values embodied in the

first Constitution of this state which begins with the words - "*We, the people of Kosovo*". The Court, always within the limitations stipulated by the Constitution but without taking into account the daily dynamics and developments, will remain faithful to these principles.

Ladies and Gentlemen,

Fourteen years after its establishment, the Constitutional Court, today stands dignified among the Constitutional Courts members of the World Conference on Constitutional Justice. The Court is one of the most active members of the Venice Commission Forum. Its jurisprudence is an additional guarantee and argument that Kosovo has its place among the member states of the Council of Europe.

The Court's achievements, despite the challenges, are a reflection of the steadfast commitment of all generations of judges of the Constitutional Court. Surely, also of the endless support of peer constitutional courts from around the world, the deep cooperation with which is also reflected by their large participation in this ceremony, to which, on behalf of the Court, I once again express my deep gratitude. Your participation honors our Court. Your participation honors the Republic of Kosovo.

Gratitude for cooperation and endless support should also be addressed to the Venice Commission and the Council of Europe, with whose support, the Court has established an extraordinary cooperation with the European Court of Human Rights. I am deeply convinced that, when our Republic takes its deserved place as a member of the Council of Europe, the case-law of the Constitutional Court will withstand the oversight filter of the European Court of Human Rights.

Last, I express gratitude to the Embassies of friendly nations in the Republic of Kosovo and their agencies for international cooperation, which have generously supported our Court.

Special gratitude to the Unites States of America and the Republic of France, two friends/states among many present here today, which today are represented by two honorable speakers (i) Federal Judge Tunheim, who has left his mark in the state-building of Kosovo, including through his support in the making of our Constitution; and (ii) President Fabius, the extraordinary support of whom has enriched our Court, including with the richness of the French constitutional tradition.

Dear Friends,

The Republic of Kosovo has been built through stories in which the pain meets the pride and resistance. But, above all, the Republic of Kosovo is a success story. Not only in terms of the historical state-building journey but also of the development of democracy. This success is necessarily, also a reflection of the support and strong partnership of friend nations of the Republic of Kosovo.

Having said this, democracy is a continuous process, which is subject to the test of commitment... the unwavering belief and commitment to a common idea that is reflected in the very preamble of the Constitution - the building of a Republic that is based on the common values of peace-loving nations in the world. To return to Montesquieu – there is no nation so powerful, as the one that obeys its laws not from principals of fear or reason, but from passion – from the commitment and respect for the state.

Thanking you for your attention – on behalf of my colleague judges of the Constitutional Court: Deputy President Bajram Ljatifi and Judges Selvete Gërxhaliu-Krasniqi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci, Nexhmi Rexhepi and Enver Peci - we congratulate and celebrate together these fourteen years of tradition of constitutional justice in the Republic of Kosovo.

Thank you!

Gresa Caka-Nimani

President of the Constitutional Court of the Republic of Kosovo

Allocution de Mme. Gresa Caka-Nimani, Présidente de la Cour Constitutionnelle de la République du Kosovo

Chers participants de la cérémonie marquant le 14e anniversaire de la création de la Cour Constitutionnelle de la République du Kosovo;

Chers députés, ministres, dirigeants du pouvoir judiciaire et des institutions indépendantes;

Chers Présidents Sejdiu et Jahjaga;

Chers ambassadeurs et représentants des institutions internationales;

Chère ancienne présidente de la Cour, Madame Rama-Hajrizi et anciens juges de la Cour Constitutionnelle;

Chers maires, représentants des institutions, de la société civile et des médias;

Cher Monsieur Fabius, Président du Conseil Constitutionnel de France;

Chers Présidents des Cours Constitutionnelles et Suprêmes de Belgique -M. Nihoul et M. Lavrysen, d'Estonie - M. Kõve, des Pays-Bas - Mme. De Groot, de Lettonie - M. Laviņš, d'Albanie - Mme Zaçaj et M.Sadushi; et de Turquie - M. Zühtü Arslan;

Chers Juges des Cours Constitutionnelles et Suprêmes de Bosnie-Herzégovine, d'Autriche, de Bulgarie, d'Irlande, de Croatie, de Lituanie, de Macédoine du Nord, du Portugal et des États-Unis d'Amérique, cher juge Tunheim;

Chers représentants de la Cour Européenne des Droits de l'Homme et de la Commission de Venise;

Chers participants/Mesdames et Messieurs,

Permettez-moi d'abord de vous exprimer mon immense plaisir et ma profonde gratitude pour votre présence. Votre présence à l'occasion de cet anniversaire de la Cour Constitutionnelle nous honore. La participation de délégations du monde entier reflète le respect pour notre Cour; et la solidarité ainsi que l'engagement assuré des Cours à coopérer à la protection des valeurs communes.

Aujourd'hui, symboliquement, nous marquons le 14e anniversaire de la Cour Constitutionnelle, établie par une Constitution qui a couronné le sacrifice de générations entières pour la liberté et l'indépendance, mais aussi l'idéal inébranlable d'un peuple pour un État de droit fondé sur des valeurs qui reflètent la tradition commune des états démocratiques.

Cette Cour, symbole d'un ordre constitutionnel indépendant est chargée du devoir d'interprétation et de protection de cette Constitution. La création simultanée de la République et de sa Cour Constitutionnelle a déterminé le rôle de cette dernière qui va au-delà de l'exercice classique de juridiction

constitutionnelle, en y incluant inévitablement la configuration et la consolidation de l'identité nationale et internationale du Kosovo.

Il y a quatorze ans, la première génération des juges de la Cour Constitutionnelle s'engageait à interpréter une Constitution nouvellement adoptée d'une République nouvellement créée.

Le contexte dynamique de construction de l'état a permis à cette Cour de jouer un rôle essentiel dans la détermination de la dynamique du développement démocratique du Kosovo. La Cour a maintenu l'équilibre entre (i) la précipitation d'une construction institutionnelle rapide d'un nouvel État; et (ii) l'obligation de consolider un ordre social et institutionnel basé sur les valeurs incluses dans une nouvelle Constitution.

De ce fait, aujourd'hui, dans la première moitié de sa deuxième décennie, la Cour dispose déjà d'une histoire extraordinaire et d'une pratique judiciaire particulièrement riche.

Les deux caractéristiques suivantes découlent de cette pratique judiciaire et marquent le rôle assidu de la Cour Constitutionnelle dans la réalisation de l'aspiration qu'incarne la Constitution -pour un État qui se maintient digne parmi les États de la famille européenne.

La première est liée à la contribution de la Cour à la protection et à la promotion des droits et libertés fondamentaux lors de la consolidation d'un État qui s'est engagé pour l'égalité de tous devant la loi. La Cour a servi de pont entre les valeurs reflétées dans la pratique judiciaire de la Cour Européenne des Droits de l'Homme et les droits et libertés, de tous les citoyens et de toutes les communautés de la République, sans aucune distinction.

La seconde concerne la précieuse contribution de la Cour Constitutionnelle à la consolidation du principe de séparation et d'équilibre des pouvoirs dans l'ordre constitutionnel de la République du Kosovo. En effet, la démocratie n'est entière que lorsque l'exercice de la souveraineté est soutenu par l'État de droit et celui-ci ne peut exister sans la séparation et l'interaction nécessaires entre les trois pouvoirs indépendants.

Chers participants,

Compte tenu du contexte de la construction de l'État du Kosovo, y compris du défi mais aussi de la priorité de la création d'un nouvel ordre constitutionnel, les questions liées à la séparation et à l'interaction des pouvoirs ont fait l'objet d'une appréciation continue de la Cour au cours des dernières années.

Elle a exprimé son dernier mot sur une multitude de questions impliquant l'interaction entre les pouvoirs, y compris, mais sans s'y limiter dans (i) les procédures d'élection et le rôle du Président de la République; (ii) la constitution des institutions après les élections législatives, y compris le vote du Gouvernement après la motion de censure; (iii) le rôle de supervision de l'Assemblée à l'égard du Gouvernement et des institutions indépendantes ; et (iv) les limites de l'interaction entre le pouvoir local et central.

Ces décisions de la Cour ont, dans certains cas, entraîné des changements radicaux dans la dynamique politique, mais aussi le transfert et/ou la composition du pouvoir exécutif et législatif. Toutes les forces politiques ont respecté ces décisions, reflétant ainsi l'engagement solide de la République en faveur de l'État de droit.

Cela dit, la pratique judiciaire prédominante de la Cour dans le contexte de la séparation et de l'équilibre des pouvoirs est liée aux limites de l'exercice des compétences des pouvoirs exécutifs et/ou législatifs par rapport au judiciaire et/ou aux institutions constitutionnelles indépendantes.

Compte tenu de l'histoire relativement récente de l'indépendance du pouvoir judiciaire et des institutions indépendantes, ce sont ces derniers qui sont exposés au plus grand risque de manquement à leur indépendance par l'exercice des compétences des deux autres pouvoirs, et cette tendance ne caractérise certainement pas uniquement notre République.

Selon, entre autres, les Avis du Conseil Consultatif des Juges Européens du Conseil de l'Europe, au cours des dernières décennies, les relations entre les trois pouvoirs se sont transformées, (i) entraînant une réduction de la fonction de contrôle du pouvoir législatif sur le pouvoir exécutif; tandis que (ii) l'augmentation des compétences exécutives a entraîné une augmentation du nombre de litiges devant les tribunaux et cela a, d'autre part, abouti à la contestation de la légitimité du pouvoir judiciaire dans le discours public.

Une telle tendance, dans les démocraties de tradition moins consolidée, dans la protection des valeurs fondamentales de la démocratie a été contrebalancée par les juridictions à caractère supranational, à savoir la Cour Européenne des Droits de l'Homme et la Cour de Justice de l'Union Européenne. Or, dans la République du Kosovo, elle a été contrebalancée par la Cour Constitutionnelle.

La Cour a préservé la stabilité dans la protection de la séparation, de l'indépendance mais aussi de l'interaction des pouvoirs en mettant l'accent sur l'indépendance du pouvoir judiciaire, en se basant sur les principes issus de la Constitution, mais aussi de la pratique judiciaire des deux Cours susmentionnées. La pratique judiciaire de la Cour Européenne des Droits de l'Homme est une obligation constitutionnelle; tandis que la pratique judiciaire de la Cour de Justice coïncide avec l'aspiration constitutionnelle à l'adhésion à l'Union Européenne.

Chers participants,

L'interaction entre les pouvoirs reflète nécessairement la tension qui les oppose. Cette tension, que le Conseil Consultatif des Juges Européens du Conseil de l'Europe qualifie de « tension créatrice », reflète le fait que la démocratie dans la République du Kosovo fonctionne. Le contraire, respectivement l'absence d'une telle tension, signifierait que les pouvoirs ne jouent pas la fonction interactive et/ou de supervision de manière efficace, nuisant ainsi au maintien du bon équilibre constitutionnel.

Cela dit, cette tension s'est maintes fois manifestée par des attaques publiques contre la Cour Constitutionnelle, mais aussi d'autres institutions indépendantes. Un tel discours public ne caractérise pas uniquement notre République. Le fond de celui-ci reflète, bien qu'il ne soit pas articulé en tant que tel, la discussion au niveau théorique liée à l'argument contrebalançant de la majorité, lequel,

en substance, soulève le dilemme du manque de légitimité du pouvoir judiciaire et/ou des Cours Constitutionnelles - dont le pouvoir ne découle pas directement du peuple pour apprécier les lois et les actes adoptés par les représentants élus du peuple.

Cependant, dans les démocraties de tradition constitutionnelle plus consolidée, ce dilemme est dépassé et prévaut la position/le contre-argument selon lesquels la légitimité du contrôle judiciaire par rapport aux deux autres pouvoirs découle de la Constitution... de la loyauté envers elle.

Bien entendu, la légitimité constitutionnelle du contrôle judiciaire est dépendante de la légitimité fonctionnelle des juges et des procureurs, qui sont soumis à l'obligation constitutionnelle d'imperturbabilité, de professionnalisme, de responsabilité, dans l'exercice de leur fonction de protection de la Constitution et/ou de la loi. Dans le cas contraire, ce sont les détenteurs du pouvoir judiciaire et du système de poursuite judiciaire eux-mêmes qui enfreindraient l'autorité de tout un pouvoir au détriment de l'équilibre constitutionnel. La Cour a continuellement souligné ces principes, notamment le fait que la séparation et l'interaction des pouvoirs ne signifient pas leur fonctionnement isolé, mais fondé sur le principe de loyauté constitutionnelle, en se soutenant mutuellement, pour assurer le bon fonctionnement de l'ordre constitutionnel dans une société démocratique.

Mesdames et Messieurs,

Bien entendu, le débat public et théorique, comprenant la critique, valeur primordiale de notre ordre constitutionnel, sur la source de la légitimité démocratique du contrôle judiciaire et constitutionnel est précieux. Cela dit, il faut également rappeler que la théorie de la séparation et de l'interaction des pouvoirs indépendants est la seule qui ait résisté à l'épreuve du temps et qui constitue le fondement des démocraties constitutionnelles libérales.

Celles-ci, depuis près de trois siècles, sont restées fidèles à l'essence de la théorie développée par les esprits les plus érudits de la pensée philosophique et politique, parmi lesquels (i) le philosophe français Montesquieu dans l'Esprit des Lois; et (ii) Alexander Hamilton et James Madison dans les Papiers Fédéralistes selon lesquels les libertés civiles et politiques ne sont efficaces qu'à travers un système de pouvoirs séparés et contrôlés pour empêcher la concentration du pouvoir et/ou l'arbitraire dans chacun d'eux.

Également inspirée par Montesquieu, dans une des Lettres fédéralistes, (déjà en 1788), se reflète d›une manière simplifiée mais imposante la question fondamentale qui a remis en question et façonné les modèles constitutionnels pendant des siècles et je cite comme suit:

"Si les hommes étaient des anges, il n'y aurait besoin d'aucun gouvernement. Si les anges devaient gouverner les hommes, il n'y aurait besoin d'aucun contrôle externe ou interne sur le gouvernement. La grande difficulté, s'agissant d'élaborer un gouvernement qui doit être administré par des hommes sur des hommes est la suivante: il faut d'abord habiliter le gouvernement à contrôler les gouvernés et ensuite l'obliger à se contrôler lui-même."

Les ordres démocratiques parmi les plus anciens du monde reposent sur l'esprit de ces concepts. Le dénominateur commun de la tradition constitutionnelle des états démocratiques repose sur l'esprit de ces principes. La Constitution de la République du Kosovo repose sur les principes de cet héritage.

Il est du devoir de la Cour Constitutionnelle de rester fidèle à ces valeurs. Le même devoir incombe à toutes les autorités publiques. La Constitution est aussi l'engagement collectif de toutes les autorités publiques, au nom des citoyens, pour un État de droit conforme aux valeurs incarnées dans la première Constitution de cet État qui commence par l'expression *"Nous, peuple du Kosovo"*. La Cour, toujours dans les limites fixées par la Constitution mais sans tenir compte des dynamiques et des évènements quotidiens, restera fidèle à ces principes.

Mesdames et Messieurs,

Quatorze ans après sa création, la Cour Constitutionnelle demeure aujourd'hui digne parmi les Cours Constitutionnelles membres de la Conférence Mondiale de la Justice Constitutionnelle. Elle est l'un des membres les plus actifs du Forum de la Commission de Venise. Sa pratique judiciaire est une garantie et un argument complémentaires que le Kosovo a sa place parmi les États membres du Conseil de l'Europe.

Ses réalisations, malgré les défis, reflètent l'engagement inaltérable de toutes les générations de juges de la Cour Constitutionnelle. Certainement, aussi le soutien sans réserve des Cours Constitutionnelles du monde entier dont la vaste coopération se reflète également dans l'importante participation à cette cérémonie, pour laquelle, au nom de la Cour, j'exprime une fois de plus ma profonde gratitude. Votre participation fait honneur à notre Cour. Votre participation honore la République du Kosovo.

Un remerciement pour leur coopération et leur soutien sans faille doit être adressé à la Commission de Venise et au Conseil de l'Europe, avec le soutien desquels la Cour a établi une coopération extraordinaire avec la Cour Européenne des Droits de l'Homme. Je suis profondément convaincue que, lorsque notre République occupera la place qu'elle mérite en tant que membre du Conseil de l'Europe, la pratique judiciaire de la Cour Constitutionnelle se mesurera au filtre de surveillance de la Cour Européenne des Droits de l'Homme.

Enfin, merci aux Ambassades des pays amis de la République du Kosovo et à leurs services de coopération internationale qui ont soutenu sans réserve notre Cour.

Une gratitude particulière pour les Etats-Unis d'Amérique et la République fançaise, deux états amis, parmi beaucoup d'autres présents ici aujourd'hui, et qui sont représentés aujourd'hui par deux locuteurs très respectables: (i) le juge fédéral Tunheim, qui a laissé son empreinte dans l' édification du Kosovo, entre autres par son soutien à la Commission Constitutionnelle pour la rédaction de notre Constitution; et (ii) le président Fabius dont le soutien sans faille a exalté notre Cour entre autres de la richesse de la tradition précieuse constitutionnelle française.

Chers amis,

La République du Kosovo s'est construite à travers des histoires dans lesquelles la douleur se tisse avec la fierté et la résistance.

Mais, avant tout, la République du Kosovo est une réussite, non seulement en termes de parcours historique de construction de l'État, mais aussi de développement de la démocratie. Ce succès reflète aussi certainement le soutien inéluctable des pays amis de la République du Kosovo.

Cela dit, la démocratie est un processus continuel, soumis à l'épreuve de l'engagement... de la patience, de la foi imperturbable en une idée commune que décrit le préambule même de la Constitution – la création d'une République basée sur les valeurs communes des pays épris de paix dans le monde.

Pour revenir encore une fois à Montesquieu- il n y a pas de peuple plus puissant que celui qui respecte les lois, non par raison ou par peur - mais par passion- par engagement et respect de l'Etat.

En vous remerciant de votre attention, au nom de mes collègues juges de la Cour Constitutionnelle- le vice-président Bajram Latifi et les juges Selvete Gërxhaliu-Krasniqi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci, Nexhmi Rexhepi et Enver Peci -je vous souhaite nos meilleurs voeux et vous invite à célébrer ensemble ces quatorze années de tradition de justice constitutionnelle en République du Kosovo.

Je vous remercie!

Gresa Caka-Nimani

Présidente de la Cour Constitutionnelle de la République du Kosovo

Fjala e z. John R. Tunheim,
Gjyqtar Federal i Shteteve të Bashkuara dhe Këshilltari Kryesor i Shteteve të Bashkuara në mbështetje të procesit të krijimit të Kushtetutës së Republikës së Kosovës

Obraćanje g. Johna R. Tunheima,
saveznog sudije Sjedinjenih Država i glavnog savetnika Sjedinjenih Država, koji je podržavao proces donošenja Ustava Republike Kosovo

Address by Mr. John R. Tunheim,
United States Federal Judge and the Lead United States Advisor supporting the constitution-making process of the Constitution of the Republic of Kosovo

Allocution de M. John R. Tunheim,
Juge fédéral des États-Unis et conseiller principal des États-Unis ayant soutenu le processus d'élaboration de la Constitution de la République du Kosovo

Fjala e z. John R. Tunheim, Gjyqtar Federal i Shteteve të Bashkuara dhe Këshilltari Kryesor i Shteteve të Bashkuara në mbështetje të procesit të krijimit të Kushtetutës së Republikës së Kosovës

Faleminderit zonja Kryetare. Është një nder i madh që më është kërkuar të flas sot me rastin e veçantë të Vitit të 14-të Gjyqësor të Gjykatës Kushtetuese të Republikës së Kosovës. Një mirëseardhje e ngrohtë për të gjithë anëtarët dhe ish-anëtarët e Gjykatës Kushtetuese, për ish-Presidentët e Republikës, të nderuar Ambasadorë dhe një mirëseardhje e veçantë për delegacionet dhe vizitorët ndërkombëtarë këtu me ne. Faleminderit të gjithëve që erdhët.

Sot ne festojmë një arritje të jashtëzakonshme – Kushtetutën e Kosovës dhe Gjykatën që e ka interpretuar me aq besnikëri dhe guxim atë dokument që nga pavarësia në vitin 2008. Ka qenë një nga privilegjet e mëdha të jetës sime që kam qenë i përfshirë kaq shumë në zhvillimin e sistemit juridik në Kosovë, këtu në zemër të Evropës.

Vizita ime e parë ishte në dimrin e ftohtë të viteve 1999-2000, kur shkatërrimet mizore dhe çnjerëzore të luftës ishin të dukshme kudo. Po, unë solla një çantë gjumi dhe më duhej çdo natë. Detyra

jonë ishte të ndihmonim Kombet e Bashkuara të rifillonte një sistem ligjor që ishte shkatërruar si shumë institucione. Çuditërisht, një nga shumë pyetjet e vështira ishte se cili ligj duhet të jetë në fuqi në Kosovë? Disa prej jush do të kujtojnë udhëtimet tona të gjata në tërë territorin dhe programin "Fillimi i Shpejtë" që rezultoi, i cili ringjalli Kosovën dhe sundimin e ligjit.

Mbikëqyrja e zgjedhjeve të para të lira në vjeshtën e vitit 2000 ishte një përvojë e jashtëzakonshme. Jam kthyer shumë herë gjatë viteve, duke hartuar kode, duke vlerësuar progresin e gjyqësorit, duke sjellë gjyqtarë amerikanë të punojnë në sistemin ndërkombëtar të gjyqtarëve, vetëm duke dhënë këshilla dhe duke punuar në shumë çështje të sundimit të ligjit, të shumta për t'u përmendur sot. Ndihem se si Kosova është bërë një shtëpi e dytë për mua gjatë këtyre më shumë se pesëdhjetë vizitave. Është e mrekullueshme të shihet ndryshimi gjatë këtij çerek shekulli progresi.

Ne e filluam krijimin e Kushtetutës së Kosovës me shpresat dhe ëndrrat për një dokument themelor që do të rivalizonte çdo demokraci perëndimore në mbrojtjen e të drejtave të njeriut, në mbështetjen e saj për sundimin e ligjit dhe në krijimin e një republike moderne parlamentare. Triumfi përfundimtar i shpresës mbi frikën.

Shkurtimisht, qëllimi ishte të propozohej një kushtetutë moderne që do të ndihmonte në fshirjen e historisë së fundit të luftës dhe dhunës etnike dhe të mishëronte madhështitë e sundimit të ligjit. Dhe më e rëndësishmja, qëllimi ishte t'i dëshmohej botës se Kosova ishte e gatshme për pavarësi dhe mund të ishte një vend i gatshëm për të mbrojtur të gjithë qytetarët e saj.

Zonja Kryetare, e cila në atë kohë ishte këshilltare e lartë në USAID organizoi shumë nga punët e nevojshme për të zhvilluar një Kushtetutë. Profesorja Warren dhe Profesori Aucoin, të cilët janë këtu sot, ishin me të vërtetë anëtarë të rëndësishëm të ekipit.

Filluam duke identifikuar kërkesat themelore që priten nga Bashkimi Evropian, nga Komisioni i Venecias dhe nga korniza e mëparshme e Ahtisaarit për paqen që doli nga Bisedimet e Vjenës.

Një Komision Kushtetues shumë-etnik, shumëpartiak, i mençur dhe i arsyeshëm, disa prej të cilëve janë sot këtu, u caktua për të marrë vendime të rëndësishme dhe për të udhëhequr përpjekjet e hartimit. Znj. Kelmendi dhe z. Kuçi u treguan liderë të shquar. Dhe kjo ishte punë e vështirë.

Edhe pse bota ofron shumë shembuj të mirë, një kushtetutë duhet të përfshijë jo vetëm marrëveshjet ndërkombëtare, por edhe të pasqyrojë kulturën dhe normat e vendit. Historia është e rëndësishme dhe njerëzit që do të qeverisen duhet të pranojnë kushtet e qeverisjes. Kjo nuk ishte një detyrë e lehtë sidomos kur në fazat e hershme nuk mund të konsultohej me publikun.

Një bllokim i parashikueshëm ndodhi në verë, kur anëtarët e Komisionit nuk arritën të pajtohen lidhur me çështjen e rëndësishme se si të ndahen pushtetet midis një presidenti dhe një kryeministri. Dikush sugjeroi se duhej të sillnim diplomatin veteran Richard Holbrooke për të ndërmjetësuar. Por kjo nuk ishte e nevojshme - përkundrazi, me ndihmën e shefes së misionit amerikan, Tina Kaidanow, Gresa dhe unë kaluam një javë intensive duke negociuar një marrëveshje kritike për ndarjen e pushtetit midis liderëve politikë që i hapi rrugën komisionit për të hartuar pjesë të Kushtetutës së propozuar. Ish-presidenti Sejdiu luajti një rol shumë të rëndësishëm në këtë marrëveshje.

Një konferencë e madhe në vjeshtë pranë Mitrovicës nxori në pah detajet dhe ne u siguruam që formulimi përfundimtar të ishte shumë i saktë – në secilën nga gjuhët e Kosovës.

Kushtetuta ishte thelbësore për atë që erdhi më pas, Deklaratën konsekuente të Pavarësisë më 17 shkurt 2008. Kuvendi e ratifikoi shpejt Kushtetutën, pas një ceremonie emocionale festive të nënshkrimit gjatë së cilës anëtarët e Komisionit paraqitën rekomandimet e tyre për liderët e Kosovës, më pak se një vit pasi procesi kishte filluar. Ëndrra e kahershme e pavarësisë u bë realitet dhe një Kushtetutë vizionare ishte në fuqi për të udhëhequr vendin e ri.

Dua të përshëndes për një moment Kushtetutën e Kosovës sepse është një dokument i jashtëzakonshëm që pasqyron idealet kushtetuese të njohura në mbarë botën.

Ajo inkorporon plotësisht dispozitat e tetë pakteve ndërkombëtare për të drejtat e njeriut dhe u jep mbrojtje dhe të drejta shumë të rëndësishme vetëqeverisëse popullatës joshumicë të Kosovës. Këtu janë të pranishme konceptet e federalizmit, ndarjes së pushtetit midis qeverisë qendrore dhe rajonale, një vlerë e rëndësishme.

Mbrojtja kushtetuese ndaj trajtimit diskriminues është e gjerë dhe barazia është e garantuar për të gjithë. Këto mbrojtje duhet të interpretohen në përputhje me vendimet e Gjykatës Evropiane për të Drejtat e Njeriut. Të drejtat e njeriut janë një nga vlerat më të rëndësishme që vendet duhet të sigurojnë në kushtetutat ose dokumentet e tyre themelore – dhe garancitë e barazisë së Kosovës janë po aq të forta sa të gjitha në botë.

Në mesin e shumë neneve të saj që adresojnë të drejtat e njeriut dhe dinjitetin njerëzor, Kushtetuta e Kosovës garanton të drejtën për arsimim falas, të drejtën e fortë të privatësisë, lirinë fetare, akademike dhe mediatike dhe të drejtën për punë. Dokumenti përfshin gjithashtu dispozita të rëndësishme dhe specifike kundër torturës ose trajtimit poshtërues. Një dispozitë unike dhe veçanërisht vizionare kërkon që njësitë qeveritare të marrin parasysh ndikimin mjedisor të të gjitha vendimeve – më e rëndësishme sot me ndryshimin e klimës mbi ne.

Po aq e rëndësishme në panteonin e madh të vlerave tona të përbashkëta kushtetuese është sundimi i ligjit. Dhe një nga detyrat më të rëndësishme të një gjykate kushtetuese është të mbrojë sundimin e ligjit. Gjykata Kushtetuese e Kosovës është plotësisht e autorizuar për të interpretuar Kushtetutën dhe për t'u siguruar se vendimet e saj janë të detyrueshme për qeverinë dhe gjyqësorin dhe për të gjithë personat dhe institucionet në Kosovë.

E pranoj plotësisht hartimin e versionit përfundimtar të nenit 116, sepse doja të bëja shumë të qartë se vendimet e gjykatave kushtetuese janë përfundimtare dhe më tej, se parimi i artikuluar në një vendim të gjykatës kushtetuese është një precedent për vendimet e ardhshme. Për këtë, nuk duhet të ketë asnjë dyshim dhe Komisioni u pajtua menjëherë.

Dhe krahas gjykatës, u krijua edhe gjyqësori shumë i pavarur për të zbatuar plotësisht ligjet e vendit. Një gjyqësor i pavarur është themeli i sundimit të ligjit – pavarësia strukturore dhe vendimtare. Pa një gjyqësor të pavarur, nuk mund të mbahen premtimet për sundim të ligjit.

Dhe, falë Kushtetutës, Kosova ka një demokraci parlamentare moderne të stilit evropian me dispozita që synojnë të shmangin ngërçet e gjata. Një pjesë e gjeniut të shkrimit të kushtetutës është parashikimi i problemeve të mundshme që i pengojnë qeverisjes së mirë. Ne po shohim probleme të tilla në ngecjen aktuale se kush do të bëhet kryetari i ardhshëm në Dhomën tonë të Përfaqësuesve. Nuk mund të parashikohen plotësisht të gjitha çështjet e ardhshme, por mendoj se Kushtetuta e Kosovës është afër.

Dhe duke folur për demokracinë, e drejta e votës është e gjerë dhe gjithëpërfshirëse, duke mundësuar pjesëmarrjen e plotë të qytetarëve në procesin e vendimmarrjes përmes zgjedhjeve të lira dhe të ndershme.

Të integruara në këtë Kushtetutë janë më shumë koncepte të stilit amerikan të ndarjes së pushteteve dhe kontrolleve dhe ekuilibrave. Këto dispozita i japin secilës degë të qeverisë aftësinë për të kufizuar kompetencat e degëve të tjera, duke siguruar llogaridhënie dhe fuqizuar popullsitë e pakicave. Kompetencat ekzekutive ndahen mes Presidentit dhe Kryeministrit, nuk mund të pezullohet parimi i kontrollit civil të ushtrisë dhe policisë dhe kompetencat emergjente ndahen. Këto janë ideale klasike që pengojnë përqendrimin e pushtetit që shpesh kanë qenë dhe vazhdojnë të jenë shkatërruese për botën tonë.

Po, Kushtetuta e Kosovës është një dokument i jashtëzakonshëm, po aq vizionar sot sa ishte kur u ratifikua në vitin 2008. Por të mbash një demokraci të prekshme dhe të gjallë është punë e vështirë – shumë më e vështirë se hartimi i një kushtetute. Vigjilenca kërkohet çdo ditë - pa përjashtim.

Një nga themeluesit e Amerikës, Benjamin Franklin, me daljen e Konventës Kushtetuese në Filadelfia në 1787, u pyet se çfarë lloj qeverie kishin krijuar delegatët. Përgjigja e tij? “Një republikë, zotëri, nëse mund ta mbani atë.” Kjo, miqtë e mi, është sfida e madhe e një demokracie dhe sundimit të ligjit... ruajtja e saj.

Gjykata Kushtetuese e Kosovës, për mendimin tim, ka bërë punë të jashtëzakonshme në 14 vitet e saj. Të jesh interpretues origjinal i një Kushtetute – duke vepruar pa precedentë – nuk është e lehtë. Pavarësisht ndryshimeve të shpeshta në përbërje dhe vonesave fatkeqe në emërimin e anëtarëve të rinj, Gjykata ka qenë një interpretues besnik dhe i guximshëm i fjalëve të Kushtetutës, një fener i ndritshëm në rrugën përpara. Dhe me të vërtetë, një ndërtues i respektit publik për sundimin e ligjit - thelbësor për “mbajtjen e tij”.

Puna e Gjykatës, përmes udhëheqjes së Kryetarit Enver Hasani, Kryetares Arta Rama dhe tani Kryetares Caka-Nimani, është frymëzuar dhe ka ndihmuar në vendosjen e rrugës së Kosovës drejt një të ardhmeje solide dhe të sigurt. Gjykata me siguri ka ndihmuar në “mbajtjen” e kësaj republike sipas fjalëve të Franklin.

Dhe sundimi i ligjit, siç duhet, ka çuar në prosperitet dhe rritje ekonomike. Ka qenë privilegji im të punoj me Gjykatën në miratimin dhe rishikimet të rregullores së saj të punës dhe në proces, të shikoj punën e Gjykatës nga afër, duke zgjidhur shumë çështje të vështira me të cilat përballet ky vend ende shumë i ri.

Ne festojmë sot punën e jashtëzakonshme të kësaj Gjykate, ashtu siç festojmë dokumentin vizionar që për Kosovën është mishërim i shkruar i sundimit të ligjit. E festojmë edhe punën e Komisionit që udhëhoqi hartimin e kushtetutës. E dini, unë shpesh e mbaj me vete këtë Kushtetutë me madhësi xhepi. Më kujton se çfarë është e mirë në këtë botë dhe çfarë nevojitet për të luftuar të keqen në kaq shumë vende.

Dhe shpresoj që në vitet që vijnë kur të shkruhet historia e fillimeve të kësaj republike në zemër të Evropës, kjo Kushtetutë dhe kjo Gjykatë të konsiderohen si themeli i fortë që e bënë Kosovën një histori suksesi.

Kosova ka bërë një rrugë të gjatë që nga ai dimër i ftohtë dhe i dëshpëruar i vitit 1999. Një arsye e madhe për këtë përparim të jashtëzakonshëm ka qenë sundimi i ligjit dhe përkushtimi ndaj të drejtave të njeriut për të gjithë. Premtimet që janë të përcaktuara në Kushtetutë dhe të mundësuara nga përkushtimi i Gjykatës Kushtetuese. Ato së bashku janë shpirti i Kosovës. Ka shumë më tepër punë për të bërë, por rruga përpara është e qartë dhe e ndritshme.

Një republikë, zotëri, nëse mund ta ruani. Le ta mbajmë.

Faleminderit shumë!

John R. Tunheim

Gjyqtar Federal i Shteteve të Bashkuara dhe Këshilltari Kryesor i Shteteve të Bashkuara në mbështetje të procesit të krijimit të Kushtetutës së Republikës së Kosovës

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Hvala, gospođo predsednice. Velika mi je čast što sam zamoljen da danas govorim povodom 14. sudske godine Ustavnog suda Republike Kosovo. Srdačna dobrodošlica svim članovima i bivšim članovima Ustavnog suda, bivšim predsednicima Republike, uvaženim ambasadorima, i posebna dobrodošlica međunarodnim delegacijama i posetiocima koji su ovde sa nama. Hvala svima što ste došli.

Danas slavimo izuzetno dostignuće — Ustav Kosova i Sud koji je tako verno i hrabro tumačio taj dokument od nezavisnosti 2008. godine. Bila je jedna od velikih privilegija u mom životu što sam bio uključen u razvoj tolikog dela pravnog sistema na Kosovu, ovde u srcu Evrope.

Moja prva poseta je bila hladne zime 1999-2000, kada su okrutna i nehumana ratna razaranja bila očigledna svuda. Da, poneo sam vreću za spavanje i bila mi je potrebna svake noći. Naš zadatak je bio da pomognemo Ujedinjenim nacijama da ponovo pokrenu pravni sistem koji je bio uništen poput mnogih institucija. Začudo, jedno od mnogih teških pitanja je bilo koji zakon treba da bude na snazi na Kosovu? Neki od vas će se setiti naših dugih putovanja širom teritorije i rezultirajućeg programa „Brzi početak“ koji je ponovo oživeo Kosovo i vladavinu zakona.

Nadgledanje prvih slobodnih izbora u jesen 2000. godine bilo je neverovatno iskustvo. Vraćao sam se mnogo puta tokom godina, praveći nacrte kodeksa, procenjujući napredak pravosuđa, dovodeći američke sudije da rade u međunarodnom sudijskom sistemu, samo dajući savete i radeći na mnogim pitanjima vladavine prava koja su previše brojna da bih ih danas pominjao. Osećam se kao da mi je Kosovo postalo drugi dom tokom ovih više od pedeset poseta. Izvanredno je videti promenu tokom ovih četvrt veka napretka.

Kreiranje Ustava Kosova smo započeli sa nadama i snovima o temeljnom dokumentu koji bi parirao svakoj zapadnoj demokratiji u zaštiti ljudskih prava, u podršci vladavini prava i stvaranju moderne parlamentarne republike. Krajnji trijumf nade nad strahom.

Ukratko, cilj je bio da se predloži moderan ustav koji bi pomogao da se zbriše nedavna istorija rata i etničkog nasilja i otelotvore veliki ideali vladavine prava. I što je najvažnije, cilj je bio da se svetu dokaže da je Kosovo spremno za nezavisnost i da može biti zemlja spremna da zaštiti sve svoje građane.

Gospođa predsednica, koja je tada bila viši savetnik u USAID-u, organizovala je veliki deo posla potrebnog za izradu Ustava. Profesor Warren i profesor Aucoin, koji su danas ovde, bili su zaista, zaista važni članovi tima.

Počeli smo tako što smo identifikovali temeljne zahteve koje očekuju Evropska unija, Venecijanska komisija i raniji Ahtisarijev okvir za mir koji je proistekao iz pregovora u Beču.

Mudra i razumna višeetička, višestranačka Ustavna komisija, od kojih su neki danas ovde, imenovana je da donosi važne odluke i vodi rad na izradi nacrta. Gospođa Keljmendi i gospodin Kuči su se pokazali kao izvanredni lideri. A ovo je bio težak posao.

Iako svet pruža mnogo dobrih primera, ustav mora da obuhvata ne samo međunarodne sporazume, već i da odražava lokalnu kulturu i norme. Istorija je važna i ljudi kojima će se upravljati moraju prihvatiti uslove upravljanja. Ovo nije bio lak zadatak, posebno kada se u ranim fazama nije mogla konsultovati javnost.

Do predvidljivog ćorsokaka je došlo leta kada članovi Komisije nisu mogli da se slože oko važnog pitanja kako podeliti ovlašćenja između predsednika i premijera. Neko je sugerisao da moramo da dovedemo veterana diplomatu Ričarda Holbruka da posreduje. Ali to nije bilo neophodno — umesto toga, uz pomoć američke šefice misije Tine Kajdanov, Gresa i ja smo proveli intenzivnu nedelju pregovarajući o ključnom sporazumu o podeli vlasti među političkim liderima koji je utro put komisiji da izradi delove predloženog ustava. Bivši predsednik Sejdiu je odigrao veoma važnu ulogu u ovom sporazumu. Velika jesenja konferencija u blizini Mitrovice razjasnila je detalje i pobrinuli smo se da konačna formulacija bude veoma precizna — na svakom od kosovskih jezika.

Ustav je bio od suštinskog značaja za ono što je usledilo, posledičnu Deklaraciju nezavisnosti 17. februara 2008. godine. Skupština je brzo ratifikovala Ustav, nakon emotivne slavljeničke ceremonije potpisivanja tokom koje su članovi Komisije izneli svoje preporuke kosovskim liderima, manje od godinu dana nakon što je proces započet. Dugogodišnji san o nezavisnosti je postao stvarnost, a vizionarski Ustav je bio na mestu da vodi novu zemlju.

Želim da na trenutak pozdravim Ustav Kosova, jer je to izuzetan dokument koji odražava ustavne ideale priznate u celom svetu.

On u potpunosti uključuje odredbe osam međunarodnih konvencija o ljudskim pravima i daje veoma značajnu zaštitu i prava na samoupravu nevećinskom stanovništvu Kosova. Ovde su prisutni koncepti federalizma, podela vlasti između centralne i regionalne vlade, što je važna vrednost.

Ustavna zaštita od diskriminatornog tretmana je široka i jednakost je zagarantovana za sve. Ove zaštite treba tumačiti u skladu sa odlukama Evropskog suda za ljudska prava. Ljudska prava su jedna od najvažnijih vrednosti koje zemlje moraju da unesu u svoje ustave ili temeljna dokumenta — a kosovske garancije jednakosti su jake kao i bilo koje druge u svetu.

Među brojnim članovima koji se bave ljudskim pravima i ljudskim dostojanstvom, Ustav Kosova daje pravo na besplatno obrazovanje, snažno pravo na privatnost, versku, akademsku i slobodu medija i pravo na rad. Dokument takođe uključuje značajne i posebne odredbe protiv torture ili ponižavajućeg

postupanja. Jedinstvena i posebno vizionarska odredba zahteva od državnih organa da uzmu u obzir uticaj svih odluka na životnu sredinu – što je danas važnije kada su klimatske promene pred nama.

Jednako važna u velikom panteonu naših zajedničkih ustavnih vrednosti je vladavina prava. A jedan od najvažnijih zadataka ustavnog suda je zaštita vladavine prava. Ustavni sud Kosova je u potpunosti ovlašćen da tumači Ustav i da bude uveren da su njegove odluke obavezujuće za vladu i pravosuđe i za sva lica i institucije na Kosovu.

U potpunosti priznajem izradu konačne verzije člana 116, jer sam želeo da bude jasno da su odluke ustavnog suda konačne i dalje, da je princip artikulisan u odluci ustavnog suda presedan za buduće odluke. U to ne bi trebalo biti sumnje i Komisija se spremno složila.

Pored suda, uspostavljeno je veoma nezavisno pravosuđe da u potpunosti sprovodi zakone zemlje. Nezavisno pravosuđe je sam temelj vladavine prava – kako strukturne nezavisnosti tako i nezavisnosti odlučivanja. Bez nezavisnog pravosuđa, obećanja o vladavini prava se ne mogu održati.

A, zahvaljujući Ustavu, Kosovo ima modernu parlamentarnu demokratiju evropskog tipa sa odredbama koje nastoje da izbegnu duge zastoje. Deo genijalnosti pisanja ustava je predviđanje potencijalnih problema koji stoje na putu dobrog upravljanja. Takve probleme vidimo u trenutnom sukobu oko toga ko će postati sledeći predsedavajući u našem Predstavničkom domu. Ne mogu se u potpunosti predvideti sva buduća pitanja, ali mislim da je Ustav Kosova blizu.

A kada govorimo o demokratiji, pravo glasa je široko i sveobuhvatno, omogućavajći puno učešće građana u procesu donošenja odluka putem slobodnih i fer izbora.

U ovaj Ustav su ugrađeni koncepti podele vlasti i kontrole i ravnoteže više u američkom stilu. Ove odredbe daju svakoj grani vlasti mogućnost da ograniči ovlašćenja drugih grana, osiguravajući odgovornost i osnažujući manjinsko stanovništvo. Izvršna ovlašćenja su podeljena između predsednika i premijera, princip civilne kontrole vojske i policije ne može se suspendovati, a vanredne nadležnosti su podeljene. To su klasični ideali koji sprečavaju koncentraciju moći koja je često bila i nastavlja da bude pogubna za naš svet.

Da, Ustav Kosova je izvanredan dokument, danas vizionarski kao što je bio kada je ratifikovan 2008. godine. Ali održavanje demokratije živom i živopisnom je težak posao – mnogo teži od izrade ustava. Oprez je potreban svaki dan - bez izuzetaka.

Jedan od osnivača Amerike, Bendžamin Frenklin, po izlasku sa Ustavne konvencije u Filadelfiji 1787. godine, upitan je kakvu su vladu delegati stvorili. Njegov odgovor? „Republika, gospodine, ako je možete održati“. To je, prijatelji moji, veliki izazov demokratije i vladavine prava... održati je.

Ustavni sud Kosova je, po mom mišljenju, uradio izuzetan posao u svojih 14 godina. Biti originalni tumači Ustava — koji rade bez presedana — nije lako. Uprkos čestim promenama u sastavu i nesrećnim kašnjenjima u imenovanju novih članova, Sud je bio veran i hrabar tumač reči Ustava, svetao svetionik za put koji je pred nama. I zaista, graditelj javnog poštovanja za vladavinu prava – što je od suštinskog značaja za „održavanje iste”.

-A vladavina prava, kako i treba, dovela je do prosperiteta i ekonomskog rasta. Bila mi je čast da radim sa Sudom na usvajanju i reviziji njegovog poslovnika i u procesu, da izbliza posmatram rad Suda, rešavajući mnoga teška pitanja sa kojima se suočava ova još uvek nova zemlja.

Danas slavimo izuzetan rad ovog Suda, kao što slavimo vizionarski dokument koji je za Kosovo pisano oličenje vladavine prava. Slavimo i rad Komisije koja je vodila izradu ustava. Znate, često nosim sa sobom ovaj džepni Ustav. Podseća me na ono što je dobro na ovom svetu i šta je potrebno za borbu protiv zla na toliko mesta.

I nadam se da će se u godinama koje dolaze kada se piše istorija o počecima ove republike u srcu Evrope, ovaj Ustav i ovaj Sud smatrati čvrstim temeljom koji je Kosovo učinio pričom o uspehu.

Kosovo je prešlo dug put od te hladne i očajne zime 1999. godine. Veliki razlog za ovaj izuzetan napredak je bila vladavina prava i posvećenost ljudskim pravima za sve. Obećanja koja su upisana u Ustav i omogućena posvećenošću Ustavnog suda. Zajedno, oni su duša Kosova. Ima još mnogo posla, ali put pred nama je jasan i svetao.

Republika, gospodine, ako je možete održati. Održimo je.

Mnogo vam hvala!

Johna R. Tunheima

Saveznog Sudije Sjedinjenih Država i glavnog savetnika Sjedinjenih Država, koji je podržavao proces donošenja Ustava Republike Kosovo

Address by Mr. John R. Tunheim, United States Federal Judge and the Lead United States Advisor supporting the constitution-making process of the Constitution of the Republic of Kosovo

Thank you, Madam President. It is a great honor to be asked to speak today on the special occasion of the 14th Judicial Year of the Constitutional Court of the Republic of Kosovo. A warm welcome to all of the Members and former Members of the Constitutional Court, to former Presidents of the Republic, Honorable Ambassadors, and a special welcome to the international delegations and visitors here with us. Thank you all for coming.

Today we celebrate a remarkable achievement — the Kosovo Constitution and the Court that has so faithfully and courageously interpreted that document since independence in 2008. It has been one of the great privileges of my life to have been involved in the development of so much of the legal system in Kosovo, here in the heart of Europe.

My first visit was in cold winter of 1999-2000 when the cruel and inhumane ravages of war were apparent everywhere. Yes, I brought a sleeping bag and needed it every night. Our task was to help the United Nations re-start a legal system that had been destroyed like so many institutions. Amazingly, one of the many difficult questions was what law should be in effect in Kosovo? Some of you will recall our long travels throughout the territory and the resulting "Quick Start" program that reinvigorated Kosovo and the rule of law.

Supervising the first free elections in the fall of 2000 was an incredible experience. I have returned many times over the years, drafting codes, assessing the progress of the judiciary, bringing American judges to work in the international judge system, just giving advice and working on many rule of law issues too numerous to mention today. I feel like Kosovo has become a second home to me over these more than fifty visits. It is remarkable to see the change over this quarter of a century of progress.

We began the creation of the Kosovo Constitution with hopes and dreams of a foundational document that would rival any western democracy in its protection of human rights, in its support for the rule of law and in its creation of a modern parliamentary republic. The ultimate triumph of hope over fear.

In short, the goal was to propose a modern constitution that would help sweep away the recent history of war and ethnic violence and embody the grand ideals of the rule of law. And importantly, the goal was to prove to the world that Kosovo was ready for independence and could be a country willing to protect all of its citizens.

Madame President, who was then a senior advisor at USAID organized much of the work needed to develop a Constitution. Professor Warren and Professor Aucoin, who are here today, were really, really important members of the team.

We began by identifying the foundational requirements expected by the European Union, by the Venice Commission and by the earlier Ahtisaari framework for peace arising out of the Vienna Talks.

A wise and sensible multi-ethic, multi-party Constitutional Commission, some of whom are here today, was appointed to the make the important decisions and lead the drafting efforts. Ms. Kelmendi and Mr. Kuçi proved to be outstanding leaders. And this was hard work.

Although the world provides many good examples, a constitution must encompass not only international agreements, but also reflect local culture and norms. History is important and the people to be governed must accept the terms of governance. This was not an easy task especially when in the early stages the public could not be consulted.

A predictable impasse was reached in the summer when members of the Commission could not agree on the important question of how to divide powers between a President and a Prime Minister. Someone suggested that we needed to bring in the veteran diplomat Richard Holbrooke to mediate. But that wasn't necessary — instead, with the help of American Chief of Mission Tina Kaidanow, Gresa and I spent an intense week negotiating a critical power sharing agreement among the political leaders that paved the way for the commission to draft sections of the proposed constitution. Former President Sejdiu played a very important role in this agreement. A large fall conference near Mitrovica hammered out the details and we made sure that the final wording was very precise — in each of Kosovo's languages.

The Constitution was essential for what came next, the consequential Declaration of Independence on February 17, 2008. The Assembly quickly ratified the Constitution, following an emotional celebratory signing ceremony during which Commission members presented their recommendations to Kosovo's leaders, less than one year after the process was begun. The long-held dream of independence became a reality, and a visionary Constitution was in place to guide the new country.

I want to salute the Kosovo Constitution for a moment because it is a remarkable document that reflects constitutional ideals recognized throughout the world.

It fully incorporates the provisions of eight international covenants on human rights and grants very significant protections and self-government rights to Kosovo's non-majority populations. Concepts of federalism, the division of power between the central and regional governments are present here, an important value.

The constitutional protections against discriminatory treatment are extensive and equality is guaranteed for all. These protections are to be interpreted consistent with the decisions of the European Court on Human Rights. Human rights is one of the most important values that countries must enshrine in their constitutions or foundational documents — and Kosovo's guarantees of equality are as strong as any in the world.

Among its many articles addressing human rights and human dignity, the Kosovo Constitution grants a right to free education, a strong right of privacy, religious, academic and media freedom and a right to work. The document also includes significant and specific provisions against torture or degrading treatment. A unique and particularly visionary provision requires governmental entities to consider the environmental impact of all decisions – more important today with climate change upon us.

Equally important in the grand pantheon of our shared constitutional values is the rule of law. And one of the most important tasks of a constitutional court is to protect the rule of law. The Kosovo Constitutional Court is fully empowered to interpret the Constitution and to be assured that its decisions are binding on the government and on the judiciary and on all persons and institutions in Kosovo.

I fully admit to drafting the final version of Article 116 because I wanted to make very clear that constitutional court decisions are final and further, that the principle articulated in a constitutional court decision is a precedent for future decisions. Of this, there should be no doubt and the Commission readily agreed.

And alongside the court, the very independent judiciary was established to fully enforce the laws of the country. An independent judiciary is the very foundation of the rule of law – both structural and decisional independence. Without an independent judiciary, the promises of the rule of law cannot be kept.

And, thanks to the Constitution, Kosovo has a modern European-style parliamentary democracy with provisions that seek to avoid lengthy impasses. Part of the genius of constitution-writing is anticipating potential problems that stand in the way of good governance. We are seeing such problems in the current standoff over who will become the next speaker in our House of Representatives. One cannot fully anticipate all future issues, but I think the Kosovo Constitution comes close.

And speaking of democracy, the right to vote is broad and all-encompassing, allowing the full participation of citizens in the decision-making process through free and fair elections.

Built into this Constitution are more American-style concepts of separation of powers and checks and balances. These provisions give each branch of government the ability to limit the powers of the other branches, ensuring accountability and empowering minority populations. Executive powers are divided between the President and the Prime Minister, the principle of civilian control of military and police cannot be suspended, and emergency powers are divided. These are classic ideals that prevent the concentration of power that often have been and continue to be devastating for our world.

Yes, the Kosovo Constitution is a remarkable document, as visionary today as it was when it was ratified in 2008. But keeping a democracy vibrant and alive is hard work – much harder than drafting a constitution. Vigilance is required every single day — no exceptions.

One of America's Founders, Benjamin Franklin, on exiting the Constitutional Convention in Philadelphia in 1787, was asked what sort of government the delegates had created. His answer? "A republic, sir, if you can keep it." That, my friends, is the great challenge of a democracy and the rule of law... keeping it.

The Kosovo Constitutional Court, in my view, has done outstanding work in its 14 years. Being the original interpreters of a Constitution — operating without precedents — is not easy. Despite frequent changes in composition and unfortunate delays in appointing new members, the Court has been a faithful and courageous interpreter of the words of the Constitution, a bright beacon for the path ahead. And truly, a builder of public respect for the rule of law — essential to "keeping it."

The Court's work, through the leadership of President Enver Hasani, President Arta Rama and now President Caka-Nimani, has been inspired and has helped to set Kosovo's path to a solid and secure future. The Court has surely helped to "keep" this republic in the words of Franklin.

And the rule of law, as it should, has led to prosperity and economic growth. It has been my privilege to work with the Court in its adoption and revisions of its rules of procedure and in the process, to watch the work of the Court from up close, resolving many difficult issues faced by this still very new country.

We celebrate today the exceptional work of this Court, just as we celebrate the visionary document that for Kosovo is the written embodiment of the rule of law. We celebrate too, the work of the Commission that guided the drafting of the constitution. You know, I often carry with me this pocket-sized Constitution. It reminds me of what is good in this world and what is needed to combat evil in so many places.

And it is my hope that in the years to come when the history is written of the beginnings of this republic in the heart of Europe, that this Constitution and this Court are regarded as the firm foundation that made Kosovo a success story.

Kosovo has come a long way since that cold and desperate winter of 1999. A big reason for this remarkable progress has been the rule of law and the commitment to human rights for all. The promises that are enshrined in the Constitution and enabled by the dedication of the Constitutional Court. Together, they are the soul of Kosovo. There is much more work to do, but the path ahead is clear and bright.

A republic, sir, if you can keep it. Let's keep it.

Thank you very much!

John R. Tunheim

United States Federal Judge and the Lead United States Advisor supporting the constitution-making process of the Constitution of the Republic of Kosovo

Allocution de M. John R. Tunheim, Juge fédéral des États-Unis et conseiller principal des États-Unis ayant soutenu le processus d'élaboration de la Constitution de la République du Kosovo

C'est un grand honneur d'être invité à prendre la parole aujourd'hui à l'occasion spéciale du 14ème anniversaire judiciaire de la Cour Constitutionnelle de la République du Kosovo. Une bienvenue à tous les membres et anciens membres de la Cour Constitutionnelle, aux anciens présidents de la République, aux honorables Ambassadeurs, et une bienvenue particulière aux délégations et visiteurs internationaux ici parmi nous. Merci à vous tous d'être venus.

Aujourd'hui, nous célébrons un anniversaire remarquable — celui de la Constitution du Kosovo et la Cour qui a interprété ce document avec tant de fidélité et de courage depuis l'indépendance en 2008. Cela a été l'un des grands privilèges de ma vie d'avoir participé à l'élaboration d'une si grande partie du système juridique au Kosovo, ici au cœur de l'Europe.

Ma première visite a eu lieu au cours de l'hiver rigoureux de 1999-2000, lorsque les ravages cruels et inhumains de la guerre étaient encore visibles partout. Oui, j'avais apporté un sac de couchage et j'en avais besoin tous les soirs. Notre tâche était d'aider les Nations Unies à relancer un système juridique qui avait été détruit, comme tant d'institutions. Étonnamment, l'une des nombreuses questions difficiles était de savoir quelle loi devait être en vigueur au Kosovo ? Certains d'entre vous se souviendront de nos longs voyages à travers le territoire et du programme « Quick Start » qui en a résulté et qui a revigoré le Kosovo et l'État de droit.

Superviser les premières élections libres à l'automne 2000 a été une expérience incroyable. J'y suis revenu à plusieurs reprises au fil des ans, rédigeant des codes, évaluant les progrès du système judiciaire, faisant travailler des juges américains dans le système judiciaire international, prodiguant simplement des conseils et travaillant sur de nombreuses questions d'état de droit, trop nombreuses pour être mentionnées aujourd'hui. J'ai l'impression que le Kosovo est devenu pour moi une deuxième maison au fil de ces quelques cinquante visites, si ce n'est plus. Il est remarquable de voir le changement au cours de ce quart de siècle de progrès.

Nous avons commencé l'élaboration de la Constitution du Kosovo avec l'espoir et le rêve d'un document fondateur qui rivaliserait avec n'importe quelle démocratie occidentale dans sa protection des droits de l'homme, dans son soutien à l'État de droit et dans sa création d'une république parlementaire moderne. L'ultime triomphe de l'espoir sur la peur.

En bref, l'objectif était de proposer une constitution moderne qui contribuerait à balayer l'histoire récente de guerre et de violence ethnique et à incarner les grands idéaux de l'État de droit. Et surtout, l'objectif était de prouver au monde que le Kosovo était prêt pour l'indépendance et pouvait être un pays disposé à protéger tous ses citoyens.

Madame la Présidente, qui était alors conseillère principale à l'USAID, a organisé une grande partie du travail nécessaire à l'élaboration d'une Constitution. Les professeurs Warren et Aucoin, qui sont ici aujourd'hui, étaient des membres très importants de l'équipe.

Nous avons commencé par identifier les exigences fondamentales attendues par l'Union européenne, par la Commission de Venise et par le cadre de paix Ahtisaari antérieur, issu des pourparlers de Vienne.

Une Commission constitutionnelle multipartite, multi-ethnique, sage et sensée, dont certains membres sont présents ici aujourd'hui, a été nommée pour prendre les décisions importantes et diriger les efforts de rédaction. Mme. Kelmendi et M. Kuçi se sont révélés être des dirigeants exceptionnels. Et c'était un travail dur.

Bien que le monde fournisse de nombreux bons exemples, une constitution doit non seulement englober les accords internationaux, mais également refléter la culture et les normes locales. L'histoire est importante et les peuples à gouverner doivent accepter les conditions de gouvernance. Cela n'a pas été une tâche facile, surtout lorsqu'au début le peuple n'a pas pu être consulté.

Une impasse prévisible s'est produite cet été lorsque les membres de la Commission n'ont pas pu se mettre d'accord sur la question importante de la répartition des pouvoirs entre un président et un premier ministre. Quelqu'un a suggéré que nous devions faire appel au diplomate chevronné Richard Holbrooke pour servir de médiateur. Mais ce n'était pas nécessaire : au lieu de cela, avec l'aide de la chef de mission américaine Tina Kaidanow, Gresa et moi avons passé une semaine intense à négocier un accord crucial de partage du pouvoir entre les dirigeants politiques qui a ouvert la voie à la commission pour rédiger des sections du projet de loi Constitution. L'ancien président Sejdiu a joué un rôle très important dans cet accord. Une grande conférence organisée à l'automne près de Mitrovica a peaufiné les détails et nous avons veillé à ce que la formulation finale soit très précise – dans chacune des langues courantes du Kosovo.

La Constitution a été essentielle pour ce qui a suivi, la Déclaration d'indépendance, le 17 février 2008. L'Assemblée a rapidement ratifié la Constitution, à la suite d'une cérémonie de signature émouvante au cours de laquelle les membres de la Commission ont présenté leurs recommandations aux dirigeants du Kosovo, moins d'un an après le processus a été entamé. Le rêve d'indépendance de longue date est devenu réalité et une Constitution visionnaire a été mise en place pour guider le nouveau pays.

Je tiens à saluer un instant la Constitution du Kosovo, car c'est un document remarquable qui reflète les idéaux constitutionnels reconnus dans le monde entier.

Il intègre pleinement les dispositions de huit pactes internationaux relatifs aux droits de l'homme et accorde des protections et des droits à l'autonomie gouvernementale très importants aux populations non majoritaires du Kosovo. Les concepts de fédéralisme, de division du pouvoir entre le gouvernement central et les gouvernements régionaux sont ici présents, une valeur importante.

Les protections constitutionnelles contre les traitements discriminatoires sont étendues et l'égalité est garantie pour tous. Ces protections doivent être interprétées conformément aux décisions de la Cour européenne des droits de l'homme. Les droits de l'homme sont l'une des valeurs les plus importantes que les pays doivent consacrer dans leur constitution ou leurs documents fondateurs – et les garanties d'égalité du Kosovo sont aussi fortes que partout ailleurs dans le monde.

Parmi ses nombreux articles traitant des droits de l'homme et de la dignité humaine, la Constitution du Kosovo accorde le droit à l'éducation gratuite, un droit fort à la vie privée, la liberté religieuse, académique et des médias et le droit au travail. Le document comprend également des dispositions importantes et spécifiques contre la torture ou les traitements dégradants. Une disposition unique et particulièrement visionnaire exige que les entités gouvernementales prennent en compte l'impact environnemental de toutes les décisions – plus important aujourd'hui avec le changement climatique à nos portes.

Tout aussi important dans le grand panthéon de nos valeurs constitutionnelles communes, c'est l'État de droit. Et l'une des tâches les plus importantes d'une Cour constitutionnelle est de protéger l'État de droit. La Cour Constitutionnelle du Kosovo est pleinement habilitée à interpréter la Constitution et à s'assurer que ses décisions sont contraignantes pour le gouvernement, le pouvoir judiciaire et toutes les personnes et institutions du Kosovo.

J'admets pleinement avoir rédigé la version finale de l'article 116 parce que je voulais préciser très clairement que les décisions de la Cour constitutionnelle sont définitives et, en outre, que le principe énoncé dans une décision de la Cour Constitutionnelle constitue un précédent pour les décisions futures. Il ne devrait y avoir aucun doute sur ce point et la Commission a accepté sans hésiter.

Et à côté du tribunal, un pouvoir judiciaire indépendant a été créé pour faire pleinement respecter les lois du pays. Un système judiciaire indépendant est le fondement même de l'État de droit – tant sur le plan structurel que décisionnel. Sans un système judiciaire indépendant, les promesses de l'État de droit ne peuvent être tenues.

Et grâce à la Constitution, le Kosovo dispose d'une démocratie parlementaire moderne de type européen, dotée de dispositions visant à éviter de longues impasses. Une partie du génie de la rédaction d'une constitution consiste à anticiper les problèmes potentiels qui font obstacle à la bonne gouvernance. Nous constatons de tels problèmes dans l'impasse actuelle sur la question de savoir qui deviendra le prochain président de notre Chambre des représentants. On ne peut pas anticiper pleinement toutes les questions futures, mais je pense que la Constitution du Kosovo s'en rapproche.

Et en parlant de démocratie, le droit de vote est large et global, permettant la pleine participation des citoyens au processus décisionnel par le biais d'élections libres et équitables.

Cette Constitution intègre des concepts plus américains de séparation des pouvoirs et de freins et contrepoids. Ces dispositions donnent à chaque branche du gouvernement la possibilité de limiter les pouvoirs des autres branches, garantissant ainsi la responsabilité et l'autonomisation des populations minoritaires. Les pouvoirs exécutifs sont partagés entre le Président et le Premier ministre, le principe du contrôle civil de l'armée et de la police ne peut être suspendu et les pouvoirs d'urgence sont partagés. Ce sont des idéaux classiques qui empêchent la concentration du pouvoir qui a souvent été et continue d'être dévastatrice pour notre monde.

Oui, la Constitution du Kosovo est un document remarquable, aussi visionnaire aujourd'hui qu'elle l'était lors de sa ratification en 2008. Mais maintenir une démocratie dynamique et vivante est un travail difficile – bien plus difficile que de rédiger une constitution. La vigilance est de mise chaque jour — sans exception.

L'un des fondateurs de l'Amérique, Benjamin Franklin, à sa sortie de la Convention constitutionnelle de Philadelphie en 1787, fut interrogé sur le genre de gouvernement que les délégués avaient créé. Sa réponse ? « Une république, monsieur, si vous pouvez la garder ». Voilà, mes amis, le grand défi de la démocratie et de l'État de droit, ...le préserver.

La Cour Constitutionnelle du Kosovo, à mon avis, a accompli un travail remarquable au cours de ses 14 années d'existence. Être les premiers interprètes d'une Constitution – opérant sans précédent – n'est pas facile. Malgré de fréquents changements dans sa composition et des retards regrettables dans la nomination de nouveaux membres, la Cour a été une interprète fidèle et courageuse des paroles de la Constitution, un phare lumineux pour la voie à suivre. Et véritablement, un bâtisseur du respect public pour l'État de droit – essentiel pour « le maintenir ».

Le travail de la Cour, sous la direction du Président Enver Hasani, due la Présidente Arta Rama et désormais de la Présidente Caka-Nimani, a été inspiré et a contribué à ouvrir la voie au Kosovo vers un avenir solide et sûr. La Cour a sûrement contribué à « garder » cette république, selon les mots de Franklin.

Et l'État de droit, comme il se doit, a conduit à la prospérité et à la croissance économique. Ce fut pour moi un privilège de travailler avec la Cour à l'adoption et à la révision de son règlement intérieur et, ce faisant, d'observer de près le travail de la Cour, résolvant de nombreux problèmes difficiles auxquels est confronté ce pays encore très jeune.

Nous célébrons aujourd'hui le travail exceptionnel de cette Cour, tout comme nous célébrons le document visionnaire qui, pour le Kosovo, est l'incarnation écrite de l'État de droit. Nous célébrons également le travail de la Commission qui a guidé la rédaction de la constitution. Vous savez, j'emporte souvent avec moi cette Constitution au format de poche. Cela me rappelle ce qui est bon dans ce monde et ce qui est nécessaire pour combattre le mal dans de nombreux endroits.

Et j’espère que dans les années à venir, lorsque l’histoire des débuts de cette république au cœur de l’Europe sera écrite, cette Constitution et cette Cour seront considérées comme la base solide qui a fait du Kosovo une réussite.

Le Kosovo a parcouru un long chemin depuis cet hiver froid et désespéré de 1999. Ces progrès remarquables s’expliquent en grande partie par l’État de droit et l’engagement en faveur des droits de l’homme pour tous. Des promesses inscrites dans la Constitution et rendues possibles par le dévouement de la Cour Constitutionnelle. Ensemble, ils constituent l’âme du Kosovo. Il y a encore beaucoup de travail à faire, mais le chemin à parcourir est clair et lumineux.

Une république, monsieur, si vous pouvez la maintenir. Gardons-le.

Merci beaucoup!

John R.Tunheim

Juge fédéral des États-Unis et conseiller principal des États-Unis ayant soutenu le processus d'élaboration de la Constitution de la République du Kosovo

CONSEIL CONSTITUTIONNEL

Fjala kryesore e z. Laurent Fabius,
Kryetar i Këshillit Kushtetues të
Republikës së Francës

Uvodno obraćanje g. Laurenta Fabiusa,
predsednik Ustavnog saveta
Republike Francuske

Keynote address by Mr. Laurent Fabius,
President of the Constitutional Council
of the Republic of France

Discours d'ouverture de M. Laurent Fabius,
Président du Conseil Constitutionnel
de la République française

Fjala kryesore e z. Laurent Fabius, Kryetar i Këshillit Kushtetues të Republikës së Francës

Zonja Kryetare e Gjykatës Kushtetuese,
Zonja Zëvendës Kryeministre,
Zonja Ministre e Drejtësisë,
Të nderuar Zotërinj ministra,
Zonja dhe Zotërinj deputetë të Kuvendit të Kosovës,
Të nderuar zotërinj kryetarë të institucioneve të pavarura gjyqësore,
Zotëri Sejdiu, ish President i Republikës,
Zonja Jahjaga, ish Presidente e Republikës,
Të nderuar kryetarë komunash,
Zonja dhe Zotërinj, të ftuar kryetarë të Gjykatave Kushtetuese,
Zonja dhe Zotërinj ambasadorë dhe përfaqësues të organizatave ndërkombëtare,
Zonja dhe Zotërinj, të nderuar kolegë dhe miq.

Ju falënderoj përzemërsisht që më ftuat në manifestimet për të shënuar Vitin e 14-të Gjyqësor të Gjykatës suaj dhe 15-vjetorin e Kushtetutës suaj.

Duke më mundësuar të flas në ceremoninë e hapjes, ndjej se po dërgoni një shenjë miqësie jo vetëm për Këshillin Kushtetues Francez, por edhe për institucionet e vendit tim dhe, ndoshta mund të

them, për Francën. Në këtë rast shoh jehonën e vëllazërisë mes Francës dhe Kosovës, e cila është shfaqur në shumë mënyra që nga viti 1999, përfshirë këtu edhe në fushën e drejtësisë dhe ndërtimit të shtetit ligjor.

Sikur të gjithë ju të pranishëm këtu, unë vlerësoj progresin e bërë, arritjet në aspektin e sundimit të ligjit në një kohë të shkurtër, dhe do të na gjeni pranë jush për të përballuar vështirësitë që mbeten ende për t'u zgjidhur. Sepse, siç e dimë të gjithë, mbeten shumë vështirësi për t'u zgjidhur. Periudha aktuale është e rrezikshme. Kjo fjalë duhet përdorur pa ndrojtje të rreme. Duhet të mbizotërojnë ligji dhe shteti i së drejtës. Edhe vendi im, gjatë historisë së tij, ka kaluar periudha me rreziqe. Kushtetuta jonë aktuale buron nga njëra prej tyre.

1. Kontrolli kushtetues dhe sovraniteti popullor: shembulli i Francës

Për sa i përket pikërisht përvojës franceze, nuk do të kem kohë të mjaftueshme për të përshkruar këtu plotësisht rrugëtimin e Këshillit Kushtetues që nga krijimi i tij në vitin 1958.
Megjithatë, dua të theksoj se kjo rrugë e konsiderueshme është shenjëzuar nga vendime që kanë formësuar jurisprudencën tonë me forcë, por edhe në kërkim të ekuilibrit.

Një nga shenjëzimet kryesore në afirmimin e Këshillit Kushtetues si një Gjykatë Kushtetuese e vërtetë është vendimi i 16 korrikut 1971 i njohur si "liria e asociimit" me të cilin Këshilli pohoi se i takon atij të kontrollojë përputhshmërinë e ligjeve me të gjithë elementët që figurojnë në katalogun e të drejtave themelore të cilave u referohet Kushtetuta franceze, domethënë Deklarata e famshme e të Drejtave të Njeriut dhe Qytetarit të vitit 1789, Preambula e Kushtetutës së vitit 1946 dhe Karta e Mjedisit të vitit 2004.

Kontrolli i përputhshmërisë *së ligjeve me rregullat tona kushtetuese është vendosur më pas vazhdimisht, veçanërisht që nga krijimi nga vetë Konstituenti në vitin 2008 të Çështjes Prioritare të Kushtetutshmërisë, të cilën më pëlqen ta quaj "çështje qytetare". Kjo çështje përbën një progres demokratik pasi mundëson që çdo palë ndërgjyqëse në një proces gjyqësor t›ia referojë çështjen Këshillit Kushtetues nëpërmjet filtrit të instancave më të larta të drejtësisë civile dhe penale ose të drejtësisë administrative për të kontestuar përputhshmërinë e çdo ligji, pavarësisht nga data e miratimit të tij, me të drejtat dhe liritë që garanton Kushtetuta. Është një sukses i madh.*

Afirmimi i Këshillit Kushtetues si Gjykatë Kushtetuese mund të kuptohet edhe nëpërmjet jurisprudencës që e ka krijuar dhe nëpërmjet vendimeve "të mëdha" që i ka marrë. Duke kontrolluar ligjet që i janë paraqitur, Këshilli Kushtetues siguroi respektimin e parimeve të ndryshme: barazinë, laicitetin, lirinë e shprehjes, lirinë e ndërgjegjes, të drejtën për grevë, të drejtën e pronës, respektimin e jetës private, paprekshmërinë e shtëpisë, të drejtën për të pasur një jetë normale familjare, prezumimi i pafajësisë dhe së fundmi vëllazërimin, mbrojtjen e mjedisit dhe brezave të ardhshëm – si dhe të disa parimeve të tjera kushtetuese.

Në kontrollin tonë të përputhshmërisë së ligjit me kërkesat kushtetuese, gjithmonë kemi parasysh faktin se konstituenti mund të avancojë strukturën e këtyre kërkesave, por dimë gjithashtu se ndërhyrja e tij duhet të konceptohet në përputhje me rregullat e parapara në Kushtetutë, përveç nëse shfuqizohet.

Sundimi i ligjit sigurisht që mund të evoluojë, por shteti i së drejtës duhet të ruhet absolutisht.

E njëjta gjë vlen edhe për mënyrën se si Këshilli Kushtetues e parasheh artikulimin ndërmjet ligjit kombëtar dhe ligjit të Bashkimit Evropian. Nga ky këndvështrim, kontrolli ynë kontribuon në rritjen e mbrojtjes së shtetit të së drejtës që reflekton jo konkurrencën, por komplementaritetin ndërmjet zyrave kushtetuese në përputhje me kushtet e Traktatit të Bashkimit Evropian. Shtoj se Këshilli Kushtetues, edhe pse nuk e vlerëson përputhshmërinë e ligjit kombëtar me Konventën Evropiane për Mbrojtjen e të Drejtave të Njeriut, megjithatë e ka në fokus dialogun me Gjykatën Evropiane të të Drejtave të Njeriut, veçanërisht në formën e dialogut të praktikave tona gjyqësore, me një perspektivë të përbashkët të mbrojtjes së shtetit të së drejtës.

2. Vlerat e përbashkëta me Kushtetutën e Kosovës

Pas këtij evokimi të shkurtër të akseve kryesore të kontrollit kushtetues të praktikuar në Francë, dëshiroj të nënvizoj konvergjencat midis të drejtave dhe lirive të mbrojtura nga kushtetutat e dy vendeve tona dhe të shumë prej të pranishmëve në këtë ceremoni.

Kushtetuta e Kosovës, të cilës ia garantoni respektimin në germë dhe në frymë, ka përfituar nga përvojat pozitive dhe negative të vendeve të tjera. Përpiluesëve të saj u është dashur të kenë parasysh edhe rrethanat që çuan nga lufta e 1999-ës në pavarësinë e vitit 2008. Në veçanti për nga vlerat mbi të cilat mbështetet, Kushtetuta e Kosovës është posaçërisht moderne. Më befason veçanërisht përfshirja në Kushtetutë e teksteve ndërkombëtare në të cilat Republika e Kosovës ende nuk është palë.

Kështu Kushtetuta e Kosovës përmban në nenin 22 të saj tekstet e rëndësishëm të Kombeve të Bashkuara, në veçanti Paktin për të Drejtat Civile dhe Politike dhe Konventën Evropiane për të Drejtat e Njeriut si dhe protokollet e saj. U jep këtyre teksteve një vlerë më të lartë se ligji në hierarkinë e standardeve dhe ua njeh zbatueshmërinë e drejtpërdrejtë. Kuvendi i Kosovës ka dëshiruar gjithashtu t'i mbështes progreset normative duke u dhënë të njëjtën vlerë teksteve ndërkombëtare të miratuara pas vitit 2008.

Në këtë dispozitë e cila mundëson zbatimin e një teksti të cilit Kosova ende nuk mund të anëtarësohet, unë shoh ambicien e lavdërueshme për t'iu ofruar qytetarëve tuaj mbrojtjen më të mirë të të drejtave. Shoh gjithashtu aspiratën legjitime për të qenë në gjendje t'u bashkoheni këtyre instrumenteve ndërkombëtare. Franca e mbështet këtë dëshirë. Paralelisht, për shumë vite Franca vepron në mënyrë aktive drejt normalizimit të marrëdhënieve me Serbinë, që, përkundër vështirësive, është rruga që Republika e Kosovës duhet të ndjek për të gjetur vendin e merituar në bashkësinë ndërkombëtare.

Këto tekste, Franca i ka nënshkruar, në fakt, edhe shpesh i ka frymëzuar. Bazamentin që e formojnë e kemi të përbashkët, ai na bashkon në një projekt demokratik dhe humanist.

Dëshiroj të vë në dukje në veçanti një pikë të përbashkët midis vlerave tona që krijojnë të drejtat dhe liritë e garantuara nga Kushtetutat tona përkatëse: laiciteti dhe neutraliteti i shtetit në çështjet e bindjeve fetare. Ky parim i laicitetit është i shënuar në paragrafin e parë të nenit të parë të Kushtetutës sonë. Në të thuhet se "Franca është një Republikë e pandashme, laike, demokratike dhe sociale. Ajo siguron barazi para ligjit për të gjithë qytetarët, pa dallim origjine, race apo feje. Ajo respekton të gjitha besimet (...)".

Në fakt, ky parim i laicitetit është i vjetër. Ndarja daton në vitin 1905. Këshilli Kushtetues me një vendim të datës 21 shkurt 2013 e bëri parimin e laicitetit një nga të drejtat që Kushtetuta garanton në kuptim të nenit 61§1 të Kushtetutës. Ky vendim ka një rëndësi praktike: komponentët e laicitetit, domethënë respektimi i të gjitha besimeve, barazia e të gjithë qytetarëve pa dallim feje dhe garantimi i kultit, tani janë të gjitha të drejta që mund të inicohen nga palët ndërgjyqëse. Laiciteti nuk është më vetëm një parim për organizimin e marrëdhënieve të kulteve me autoritetet publike, ai është shndërruar tani në burimin ose themelin e të drejtave individuale. Padyshim që mund të kemi një dialog të frytshëm mbi këtë temë dhe mbi çështjet e zbatimit të saj të cilat mund të shfaqen.

Një tjetër lëmi për të cilën mund të diskutojmë sepse po ecim në të njëjtin drejtim është tema delikate e të drejtës për martesë për çiftet e të njëjtës gjini. Kur u miratua, Kushtetuta e Kosovës ishte për këtë temë një hap përpara në krahasim me dispozitat që ekzistonin në Francë në të njëjtën kohë. Duke njohur të drejtën e martesës pa e kufizuar atë në çifte të gjinive të ndryshme, Kosova ka vendosur një moment historik të rëndësishëm në një rrugë që ne e kishim kaluar tashmë – në vitin 1999 e patëm vendosur të drejtën për çiftet e të njëjtës gjini për të hyrë në një partneritet civil të njohur nga ligji. Nëse mund të shprehem kështu, ju kemi kaluar në këtë rrugë të barazisë dhe dinjitetit, duke miratuar një ligj në vitin 2013, i cili i jep të gjithëve të drejtën për martesë. Këto dy ligje, ai i vitit 1999 dhe ai i vitit 2013, nuk u miratuan lehtë. Kemi patur debate, disa herë të ashpra, dhe çështja kaloi në Këshillin Kushtetues. Ai vendosi se zgjedhja e ligjvënësit nuk ishte në kundërshtim me asnjë parim kushtetues. E paraqes këtë temë me kujdes, sepse e di që Parlamentit tuaj do t'i paraqitet një tekst që reformon kodin civil, se ky tekst mund të përfshijë dispozita për martesën dhe se do t'i takojë Gjykatës Kushtetuese të vlerësojë përputhshmërinë e këtij ligji të ardhshëm me Kushtetutën. Prandaj nuk do të shkoj përtej përmendjes së përvojës sonë ose praktikës gjyqësore të Gjykatës Evropiane të të Drejtave të Njeriut. Megjithatë, theksoj – sepse kjo duhet mediuar – kontrastin midis vrullit, për të mos thënë tërbimit, të debateve që u zhvilluan në vitin 2013 në Francë, dhe qetësisë të rishfaqur që nga miratimi i ligjit. Pse kjo qetësi? Ndoshta sepse të gjithë tani e kanë kuptuar që ky ligj u solli disa të drejta të reja pa i hequr asnjë të drejtë të gjithëve.

3. Gjykatat kushtetuese, garantuese të shtetit ligjor

Zonja Kryetare, zonja dhe zotërinj, "Çdo shoqëri në të cilën nuk garantohet siguria e të drejtave dhe nuk përcaktohet ndarja e pushteteve, nuk ka Kushtetutë": kështu thuhej, qartë dhe fuqishëm, në Deklaratën e të Drejtave të Njeriut dhe të Qytetarit më 26 gusht 1789. Më lejoni të përmend një nga këto aspekte, atë të pavarësisë së drejtësisë.

Zonja Kryetare, organizimi i drejtësisë në institucionet e Republikës së Kosovës e bën gjykatën tuaj ekuivalente me tre institucionet tona franceze: Këshillin Kushtetues, Këshillin e Shtetit, organ suprem i drejtësisë administrative dhe Gjykatën e Kasacionit. Kuptoj ngarkesën e punës dhe veçanërisht peshën e përgjegjësive që janë tuajat.

Përtej specifikave organizative të çdo vendi, pavarësia e drejtësisë është në qendër të jurisprudencës së Gjykatës Evropiane të të Drejtave të Njeriut, e cila i kushton vigjilencën më të madhe mbrojtjes statutore dhe funksionale të gjyqësorit përballë rreziqeve të ndërhyrjes nga pushteti ekzekutiv. Garancitë formale dhe mbarëvajtja e procedurave për emërimin e gjyqtarëve dhe prokurorëve janë në qendër të shtetit ligjor dhe rrjedhimisht funksionimit të duhur të institucioneve. Përzgjedhja e kujdesshme e gjyqtarëve dhe caktimi në kohë të duhur i autoriteteve përgjegjëse për funksionimin e duhur të drejtësisë meritojnë vëmendje të vazhdueshme.

Institucionet evropiane, Komisioni i Venecias të cilit i bëj nderime, dhe në mënyrë më të përgjithshme institucionet e Këshillit të Evropës, të cilët Kosova dëshiron t'u bashkohet, mund t'ju ndihmojnë.

Ndarja e pushteteve për të cilën ju këmbëngulët zonja Kryetare është padyshim thelbësore. Ajo bazohet veçanërisht në respektimin (e gjësë së gjykuar) e res judicata. Kryesisht është përgjegjësi e ekzekutivit të sigurojë që vendimet e gjykatave të zbatohen në mënyrë efektive, qofshin ato vendime të shkallës së parë ose, natyrisht, vendime të Gjykatës Kushtetuese. Është një parim konstituiv i shtetit të së drejtës, është gjithashtu garantimi i sigurisë juridike pa të cilën asnjë ekonomi nuk mund të zhvillohet në mënyrë të qëndrueshme, asnjë shoqëri nuk mund të lulëzojë vërtetë dhe asnjë demokraci nuk mund ta meritojë emrin e saj.

Respektimi i res judicata nënkupton edhe sigurimin e efektivitetit të garancive dhe mbrojtjeve të parashikuara nga tekstet kushtetuese ose legjislative. Kosova garanton në tekste një shkallë të lartë të mbrojtjes së pakicave ose më mirë të komuniteteve dhe pjesëtarëve të tyre, të cilëve u kushtohet një kapitull i tërë i Kushtetutës suaj. Këtë mbrojtje duhet ta shohin dhe ta ndjejnë çdo ditë pjesëtarët e komuniteteve pakicë që jetojnë këtu. Kosova që bashkësia ndërkombëtare (të paktën shumica e anëtarëve të saj) dëshironte ta shihte të pavarur është një Kosovë multietnike. Mbajtja e gjallë dhe funksionale e këtij ekuilibri është çelësi i suksesit të këtij projekti dhe Gjykata juaj luan dhe do të luajë një rol të konsiderueshëm.

4. Pozicionimi ndërkombëtar i Gjykatës

Jam i vetëdijshëm se si interpretues të fundit të Kushtetutës mund të ndiheni disa herë të vetmuar përballë pritshmërive, kritikave, madje edhe presioneve nga të tjerët. Situata e gjyqtarëve rrallëherë është e lehtë. Duke iu përgjigjur në masë të madhe ftesës suaj për të kremtuar 15-vjetorin e Kushtetutës, të gjithë ne, kryetarë dhe anëtarë të Gjykatave të tjera Kushtetuese, deshëm t'ju tregojmë solidaritetin tonë.

Programi i konferencës pas kësaj ceremonie solemne do të jetë një mundësi për shkëmbime mbi temat që na shqetësojnë të gjithëve. Do të flasim për forcimin e demokracisë dhe shtetit ligjor nëpërmjet kontrollit kushtetues, për ndërveprimet me gjykatat supranacionale dhe kontrollin e kushtetutshmërisë së akteve. Mendoj se këto prezantime do të vejnë në pah sesi, përmes zgjidhjeve ndonjëherë të ndryshme, po punojmë në të njëjtin drejtim.

15 vjet më parë shumë instanca ndërkombëtare e kanë inkurajuar Republikën e re të Kosovës. Gjykata juaj tani ka fituar vendin e saj dhe respektin që e shoqëron brenda komunitetit tonë të gjykatave. Ju merrni pjesë në ndërtimin e kuptimit dhe interpretimeve të përbashkëta jo vetëm duke integruar plotësisht praktikën gjyqësore përkatëse nga gjykatat e tjera, por edhe duke e bërë praktikën tuaj gjyqësore lehtësisht të qasshme. E vlerësoj veçanërisht faktin që ju e bëni atë në frëngjisht në faqen tuaj të internetit. Dhe jam i bindur se Gjykata juaj e ka vendin në kuadër të Shoqatës së Gjykatave Kushtetuese frankofone.

Zonja Kryetare, të nderuar kolegë,

"Kushtetuta", duke pasur parasysh etimologjinë e saj, është ajo që "na mban të bashkuar". Në fund të këtij fjalimi, dua të kujtoj, padyshim sikur ju, bashkësinë e vlerave për të cilat veprojmë dhe të cilat i mbrojmë. Kujtoj kërkesën tonë të përbashkët për ndarjen e pushteteve, për pavarësi, paanshmëri dhe respektim të ligjit. Kujtoj dialogun e nevojshëm ndërmjet gjyqtarëve kombëtarë dhe supranacional në veçanti për të përputhur evoluimin e kërkesave kushtetuese dhe respektimin e rregullave. Më në fund kujtoj solidaritetin dhe vëllazërinë e gjykatave kushtetuese.

Zonja Kryetare,

Prandaj besoj se mund të veproj si zëdhënës i të gjitha gjykatave të pranishme këtu, duke ju shprehur mirënjohjen tonë që na bashkuat këtu dhe duke ju përgëzuar për detyrën e kryer tashmë.

Laurent Fabius
Kryetar i Këshillit Kushtetues të Republikës së Francës

Uvodno obraćanje g. Laurenta Fabiusa, predsednik Ustavnog saveta Republike Francuske

Gospođo predsednice Ustavnog suda,
Gospođo zamenice premijera,
Gospođo ministarko pravde,
Poštovana gospodo ministri,
Dame i gospodo, poslanici Skupštine Kosova,
Poštovana gospodo, predsednici nezavisnih pravosudnih institucija,
Gospodine Sejdiu, bivši predsedniče Republike,
Gospođo Jahjaga, bivša predsednice Republike,
Poštovani predsednici opština,
Dame i gospodo, pozvani predsednici ustavnih sudova,
Dame i gospodo, ambasadori i predstavnici međunarodnih organizacija,
Dame i gospodo, drage kolege i prijatelji,
Iskreno Vam se zahvaljujem što ste me pozvali na manifestacije povodom 14. sudske godišnjice Suda i 15. godišnjice Vašeg Ustava.

Omogućujući mi da govorim na ceremoniji otvaranja, osećam da šaljete znak prijateljstva ne samo francuskom ustavnom savetu, već i institucijama moje zemlje i, mogao bih reći, Francuskoj. U ovom slučaju vidim eho bratstva između Francuske i Kosova, koje se na mnogo načina javlja od 1999. godine, uključujući i oblast pravosuđa i izgradnje vladavine prava.

Kao i svi prisutni, cenim postignuti napredak, dostignuća u pogledu vladavine prava za kratko vreme i naći ćete nas pored sebe da se suočimo sa poteškoćama koje još uvek treba da se reše. Jer, kao što svi znamo, mnoge poteškoće ostaju da se reše. Sadašnji period je opasan. Ovu reč treba koristiti bez lažne stidljivosti. Zakon i vladavina prava moraju prevladati. Čak je i moja zemlja, kroz svoju istoriju, prolazila kroz periode opasnosti. Naš sadašnji ustav proističe iz jednog od njih.

1. Ustavna kontrola i narodni suverenitet: primer Francuske

Što se konkretno tiče francuskog iskustva, neću imati dovoljno vremena da ovde u potpunosti opišem put Ustavnog saveta od njegovog stvaranja 1958. godine.

Međutim, želim da istaknem da je ovaj značajan put obeležen odlukama koje su na silu, ali i u potrazi za ravnotežom, oblikovale našu jurisprudenciju.

Jedan od glavnih znakova u afirmaciji Ustavnog saveta, kao pravog Ustavnog suda, je odluka od 16. jula 1971. godine poznata kao „sloboda udruživanja“, kojom je Savet naglasio da je na njemu da proverava usklađenost zakona sa svim elementima koji se pojavljuju u katalogu osnovnih prava na

koje se francuski Ustav poziva, a to su čuvena Deklaracija o pravima čoveka i građanina iz 1789. godine, Preambula ustava iz 1946. godine i Povelja o životnoj sredini iz 2004. godine.

Kontrola usklađenosti zakona sa našim ustavnim pravilima je uspostavljena u kontinuitetu, posebno od kada je sam Ustav 2008. godine kreirao Prioritetno pitanje ustavnosti, koje volim da zovem „građansko pitanje“. Ovo pitanje predstavlja demokratski napredak, jer omogućava svakom parničaru da predmet uputi Ustavnom savetu kroz filter viših instanci građanskog i krivičnog pravosuđa ili administrativnog pravosuđa da oceni usklađenost bilo kog zakona, bez obzira na datum njegovog donošenja, sa pravima i slobodama zagarantovanim Ustavom. To je veliki uspeh.

Afirmacija Ustavnog saveta kao Ustavnog suda može se razumeti i kroz jurisprudenciju koja ga je stvorila i kroz „velike“ odluke koje je doneo. Proverom zakona koji su mu prezentovani, Ustavni savet je obezbedio poštovanje različitih načela: ravnopravnosti, sekularizma, slobode izražavanja, slobode savesti, prava na štrajk, prava na imovinu, poštovanja privatnog života, nepovredivosti doma, pravo na normalan porodični život, pretpostavku nevinosti i nedavno bratstvo, zaštitu životne sredine i budućih generacija – kao i neka druga ustavna načela.

U našoj kontroli usklađenosti zakona sa ustavnim zahtevima, uvek uzimamo u obzir činjenicu da konstituent može unaprediti strukturu ovih zahteva, ali takođe znamo da njegova intervencija mora biti koncipirana u skladu sa pravilima predviđenim u Ustavu, osim ako se ukine.

Vladavina prava svakako može evoluirati, ali vladavina zakona mora biti apsolutno očuvana.

Isto važi i za način na koji Ustavni savet predviđa artikulaciju između nacionalnog prava i prava Evropske unije. Sa ove tačke gledišta, naša kontrola doprinosi povećanju zaštite vladavine prava koja ne odražava konkurenciju, već komplementarnost između ustavnih funkcija u skladu sa odredbama Ugovora o Evropskoj uniji. Dodajem da se Ustavni savet, iako ne ocenjuje usaglašenost nacionalnog prava sa Evropskom konvencijom za zaštitu ljudskih prava, ipak fokusira na dijalog sa Evropskim sudom za ljudska prava, posebno u formi dijaloga naših sudskih praksi, sa zajedničkom perspektivom zaštite vladavine prava.

2. Zajedničke vrednosti sa Ustavom Kosova

Nakon ovog kratkog osvrta na glavne osovine ustavne kontrole praktikovane u Francuskoj, želeo bih da podvučem konvergencije između prava i sloboda zaštićenih ustavima naše dve zemlje i mnogih prisutnih na ovoj svečanosti.

Ustav Kosova, za koji garantujete da ćete ga poštovati slovom i duhom, imao je koristi od pozitivnih i negativnih iskustava drugih zemalja. Njegovi sastavljači su morali da uzmu u obzir i okolnosti koje su dovele od rata 1999. godine do nezavisnosti 2008. godine. Konkretno, u pogledu vrednosti na kojima se zasniva, Ustav Kosova je posebno moderan. Posebno sam iznenađen uvrštavanjem u Ustav međunarodnih tekstova u kojima Republika Kosovo još uvek nije strana.

Dakle, Ustav Kosova u svom članu 22 sadrži važne tekstove Ujedinjenih nacija, posebno Međunarodni pakt o građanskim i političkim pravima i Evropsku konvenciju o ljudskim pravima, kao i njene protokole. Ovim tekstovima daje veću vrednost od zakona u hijerarhiji standarda i priznaje njihovu direktnu primenljivost. Skupština Kosova je takođe želela da podrži normativni napredak, dajući istu vrednost međunarodnim tekstovima odobrenim posle 2008. godine.

U ovoj odredbi, koja omogućava sprovođenje teksta u kojem Kosovo još uvek ne može da postane član, vidim hvale vrednu ambiciju da svojim građanima ponudi najbolju zaštitu prava. Vidim i legitimnu težnju da se pridruži ovim međunarodnim instrumentima. Francuska podržava ovu želju. Francuska paralelno već dugi niz godina aktivno radi na normalizaciji odnosa sa Srbijom, što je, uprkos poteškoćama, put kojim Republika Kosovo mora da ide kako bi našla mesto koje joj pripada u međunarodnoj zajednici.

Francuska je potpisala ove tekstove, i u stvari, često ih je inspirisala. Mi delimo osnovu koju oni formiraju, ona nas ujedinjuje u demokratski i humanistički projekat.

Želeo bih posebno da istaknem zajedničku tačku između naših vrednosti koje stvaraju prava i slobode zagarantovane našim relevantnim ustavima: sekularizam i neutralnost države u pitanjima verskog uverenja. Ovo načelo sekularizma je navedeno u prvom stavu prvog člana našeg Ustava. U njemu se navodi da je „Francuska nedeljiva, sekularna, demokratska i socijalna republika. Osigurava jednakost pred zakonom za sve građane, bez obzira na poreklo, rasu ili veru. Poštuje sve vere (...)".

U stvari, ovo načelo sekularizma je staro. Razdvajanje datira još od 1905. godine. Ustavni savet je odlukom od 21. februara 2013. godine uvrstio načelo sekularizma u jedno od Ustavom zagarantovanih prava u smislu člana 61, stav 1 Ustava. Ova odluka ima praktičan značaj: komponente sekularizma, odnosno poštovanje svih vera, jednakost svih građana bez obzira na veroispovest i garancija bogosluženja, sada su sva prava koja parničari mogu pokrenuti. Sekularizam nije više samo načelo za organizovanje odnosa kultova sa javnim vlastima, on je sada postao izvor ili temelj individualnih prava. Svakako možemo imati plodonosan dijalog o ovoj temi i o pitanjima njene implementacije koja se mogu pojaviti.

Još jedna oblast o kojoj možemo da razgovaramo, jer se krećemo u istom pravcu, je delikatna tema prava na brak za istopolne parove. Kada je usvojen, Ustav Kosova je po ovom pitanju bio korak napred u odnosu na odredbe koje su postojale u Francuskoj u isto vreme. Priznavanjem prava na brak bez ograničavanja na parove različitog pola, Kosovo je postavilo važan istorijski momenat na putu koji smo već prošli – 1999. godine smo ustanovili pravo za istopolne parove da stupe u građansko partnerstvo koje priznaje zakon. Ako mogu tako da se izrazim, postavili smo vas na ovaj put jednakosti i dostojanstva donošenjem zakona 2013. godine koji svima daje pravo na brak. Ova dva zakona, onaj iz 1999. godine i onaj iz 2013. godine, nisu lako usvojena. Imali smo rasprave, ponekad žestoke, i to pitanje je upućeno Ustavnom savetu. On je ocenio da izbor zakonodavca nije u suprotnosti ni sa jednim ustavnim načelom. Pažljivo iznosim ovu temu, jer znam da će se vašem parlamentu izneti tekst o reformi građanskog zakonika, da ovaj tekst može da sadrži odredbe o braku i da će na Ustavnom sudu biti da oceni usaglašenost ovog budućeg zakona sa Ustavom. Stoga, neću ići dalje od pominjanja našeg iskustva ili sudske prakse Evropskog suda za ljudska prava. Međutim, naglašavam

– jer o tome treba razmisliti – kontrast između žestine, da ne kažem besa, rasprava koje su se vodile 2013. godine u Francuskoj, i mira koji se ponovo pojavio od donošenja zakona. Zašto ovaj mir? Možda zato što su sada svi shvatili da je ovaj zakon doneo neka nova prava, a da nije svima oduzeo prava.

3. Ustavni sudovi, garant vladavine prava

Gospođo predsednice, dame i gospodo, „Svako društvo u kome nije zagarantovana sigurnost prava i nije definisana podela vlasti nema ustav“: to je jasno i snažno rečeno u Deklaraciji o pravima čoveka i građanina od 26. avgusta 1789. godine. Dozvolite mi da pomenem jedan od ovih aspekata, onaj o nezavisnosti pravde.

Gospođo predsednice, organizacija pravosuđa u institucijama Republike Kosovo čini vaš sud ekvivalentnim sa naše tri francuske institucije: sa Ustavnim savetom, Državnim savetom, vrhovni organ administrativne pravde, i Kasacionim sudom. Razumem opterećenje posla, a posebno težinu vaših odgovornosti.

Pored organizacionih specifičnosti svake zemlje, nezavisnost pravosuđa je u središtu jurisprudencije Evropskog suda za ljudska prava, koji posvećuje najveću pažnju statutarnoj i funkcionalnoj zaštiti pravosuđa u suočavanju sa rizicima uplitanja od strane izvršne vlasti. Formalne garancije i nesmetano odvijanje procedura za imenovanje sudija i tužilaca su u središtu vladavine prava, a samim tim i pravilnog funkcionisanja institucija. Pažljiv izbor sudija i blagovremeno imenovanje organa nadležnih za pravilno funkcionisanje pravosuđa zaslužuju stalnu pažnju.

Evropske institucije, Venecijanska komisija, kojoj odajem počast, i uopšteno institucije Saveta Evrope, kome Kosovo želi da se pridruži, mogu vam pomoći.

Podela vlasti na kojoj ste insistirali, gospođo predsednice, je nesumnjivo suštinska. Ona se posebno zasniva na poštovanju (već presuđene stvari) res judicata. To je pre svega odgovornost izvršne vlasti da obezbedi da se odluke sudova efikasno sprovode, bilo da se radi o prvostepenim odlukama ili, naravno, o odlukama Ustavnog suda. To je konstitutivni princip vladavine prava, kao i garancija pravne sigurnosti bez koje se nijedna ekonomija ne može održivo razvijati, nijedno društvo ne može istinski cvetati i nijedna demokratija ne može zaslužiti njeno ime.

Poštovanje res judicata takođe znači obezbeđivanje delotvornosti garancija i zaštite predviđenih ustavnim ili zakonodavnim tekstovima. Kosovo u tekstovima garantuje visok stepen zaštite manjina, odnosno zajednica i njihovih pripadnika, kojima je posvećeno jedno celo poglavlje vašeg Ustava. Ovu zaštitu moraju svakodnevno da vide i osećaju pripadnici manjinskih zajednica koji ovde žive. Kosovo, koje je međunarodna zajednica (barem većina njenih članica) želela da vidi, je nezavisno multietničko Kosovo. Održavanje ove ravnoteže u životu i funkcionisanju je ključno za uspeh ovog projekta i vaš sud igra i igraće značajnu ulogu.

4. Međunarodno pozicioniranje Suda

Svestan sam da se kao konačni tumač Ustava ponekad možete osećati usamljeno pred očekivanjima, kritikama, pa čak i pritiscima drugih. Situacija sudija je retko laka. Pošto smo se u velikoj meri odazvali Vašem pozivu za proslavu 15. godišnjice Ustava, svi mi, predsednici i članovi drugih ustavnih sudova, želeli smo da Vam pokažemo našu solidarnost.

Program konferencije nakon ove svečane ceremonije biće prilika za razmenu tema koje se tiču svih nas. Govorićemo o jačanju demokratije i vladavine prava kroz ustavnu kontrolu, o interakciji sa nadnacionalnim sudovima i kontroli ustavnosti akata. Smatram da će ove prezentacije ukazati na to kako, kroz ponekad različita rešenja, radimo u istom pravcu.

Pre 15 godina, mnoga međunarodna tela su podsticala novu Republiku Kosovo. Vaš Sud je sada zaslužio svoje mesto i poštovanje koje ga prati u našoj sudskoj zajednici. Učestvujete u izgradnji zajedničkog razumevanja i tumačenja ne samo tako što ćete u potpunosti integrisati relevantnu sudsku praksu drugih sudova, već i tako što svoju sudsku praksu učinite lako dostupnom. Posebno cenim činjenicu da to radite na francuskom jeziku na vašoj internet stranici. I uveren sam da Vaš Sud ima svoje mesto u Asocijaciji frankofonih ustavnih sudova.

Gospođo predsednice, poštovane kolege,

„Ustav“, s obzirom na njegovu etimologiju, je ono što nas „drži zajedno“. Na kraju ovog govora želim da se setim, sigurno kao i vi, zajednice vrednosti za koju delujemo i koju branimo. Sećam se našeg zajedničkog zahteva za podelu vlasti, nezavisnost, nepristrasnost i poštovanje zakona. Sećam se neophodnog dijaloga između nacionalnih i nadnacionalnih sudija posebno kako bi se uskladio sa razvojem ustavnih zahteva i poštovanjem pravila. Konačno, sećam se solidarnosti i bratstva ustavnih sudova.

Gospođo predsednice,

Stoga, verujem da mogu da budem portparol svih sudova koji su ovde prisutni, izražavajući našu zahvalnost što ste nas okupili ovde i čestitajući vam na već obavljenom zadatku.

Laurenta Fabiusa
Predsednik Ustavnog saveta Republike Francuske

Keynote address by Mr. Laurent Fabius, President of the Constitutional Council of the Republic of France

Madam President of the Constitutional Court,
Madam Deputy Prime Minister,
Madam Minister of Justice,
Dear Ministers,
Ladies and Gentlemen, deputies of the Assembly of Kosovo,
Dear gentlemen, presidents of independent judicial institutions,
Mr. Sejdiu, former President of the Republic,
Mrs. Jahjaga, former President of the Republic,
Dear presidents of municipalities,
Ladies and Gentlemen, invited presidents of the Constitutional Courts,
Ladies and Gentlemen, ambassadors and representatives of international organizations,

Ladies and Gentlemen, dear colleagues and friends,

I sincerely thank you for inviting me to the manifestations of the 14th judicial anniversary of the Court and the 15th anniversary of your Constitution.

By allowing me to speak at the opening ceremony, I feel that you are sending a sign of friendship not only to the French Constitutional Council, but also to the institutions of my country and, perhaps I might say, to France. In this case, I see the echo of the brotherhood between France and Kosovo, which has appeared in many ways since 1999, including in the field of justice and the building of the rule of law.

As all of you present here, I appreciate the progress made, the achievements in terms of the rule of law in a short time, and you will find us by your side to face the difficulties that still remain to be solved. Because, as we all know, many difficulties remain to be resolved. The current period is dangerous. This word should be used without false shyness. Law and the rule of law must prevail. Even my country, throughout its history, has gone through periods of danger. Our current constitution stems from one of them.

1. Constitutional control and popular sovereignty: the example of France

Precisely regarding the French experience, I will not have enough time to fully describe here the journey of the Constitutional Council since its creation in 1958.

However, I want to emphasize that this significant path has been marked by decisions that have shaped our jurisprudence with force, but also in search of balance.

One of the main signs in the affirmation of the Constitutional Council as a true Constitutional Court is the decision of 16 July 1971 known as “freedom of association” whereby the Council emphasized that it is up to it to check the compatibility of laws with all the elements that appear in the catalog of

fundamental rights to which the French Constitution refers, namely the famous Declaration of the Rights of Man and of the Citizen of 1789, the Preamble of the Constitution of 1946 and the Charter for the Environment of 2004.

The control of the compatibility of laws with our constitutional rules has been established continuously, especially since the creation by the Constituent itself in 2008 of the Priority Issue of Constitutionality, which I like to call the "citizen issue". This case constitutes a democratic progress as it enables any litigant in a trial to refer the case to the Constitutional Council through the filter of higher instances of civil and criminal justice or administrative justice to assess the compatibility of any law, regardless of the date of its adoption, with the rights and freedoms guaranteed by the Constitution. It is a great success.

The affirmation of the Constitutional Council as a Constitutional Court can be understood through the case law that it created and through the "big" decisions it rendered. By checking the LAWS submitted before it, the Constitutional Council ensured respect for various principles: equality, secularism, freedom of expression, freedom of conscience, the right to strike, the right to property, respect for private life, the inviolability of the home, the right to have a normal family life, the presumption of innocence and finally fraternity, the protection of the environment and future generations - as well as some other constitutional principles.

In our control of the compatibility of the law with the constitutional requirements, we always take into account the fact that the constituent can advance the structure of these requirements, but we also know that its intervention must be conceived in accordance with the rules provided in the Constitution, unless repealed.

The rule of law can certainly evolve, but the rule of law must be absolutely preserved.

The same applies to the way the Constitutional Council envisages the articulation between national law and European Union law. From this point of view, our control contributes to increasing the protection of the rule of law that reflects not competition, but complementarity between constitutional offices in accordance with the terms of the European Union Treaty. I add that the Constitutional Council, although it does not assess the compatibility of the national law with the European Convention for the Protection of Human Rights, nevertheless focuses on the dialogue with the European Court of Human Rights, especially in the form of the dialogue of our case laws, with a common perspective of protecting the rule of law.

2. Common values with the Constitution of Kosovo

After this brief evocation of the main axes of constitutional control practiced in France, I would like to underline the convergences between the rights and freedoms protected by the constitutions of our two countries and of many of those present at this ceremony.

The Constitution of Kosovo, to which you guarantee respect in letter and spirit, has benefited from the positive and negative experiences of other countries. Its drafters had to take into account the circumstances that led from the war of 1999 to the independence of 2008. In particular, in terms of the values on which it rests, the Constitution of Kosovo is particularly modern. I am particularly surprised by the inclusion in the Constitution of international texts to which the Republicof Kosovo is not yet a party.

Thus, the Constitution of Kosovo contains in its Article 22 the important texts of the United Nations, in particular the Covenant on Civil and Political Rights and the European Convention on Human Rights as well as its protocols. It gives these texts a higher value than the law in the hierarchy of standards and recognizes their direct applicability. The Assembly of Kosovo has also wished to support normative progress by giving the same value to international texts approved after 2008.

In this provision which enables the implementation of a text to which Kosovo cannot yet join, I see the commendable ambition to offer your citizens the best protection of rights. I also see the legitimate aspiration to be able to join these international instruments. France supports this desire. In a parallel way, for many years France has been actively working towards the normalization of relations with Serbia, which, despite the difficulties, is the path that the Republic of Kosovo must follow in order to find its rightful place in the international community.

France has signed these texts, in fact, it has often inspired them. We share the foundation they form, it unites us in a democratic and humanistic project.

I would like to point out in particular a common point between our values that create the rights and freedoms guaranteed by our respective Constitutions: secularism and the neutrality of the state in matters of religious belief. This principle of secularism is stated in the first paragraph of the first article of our Constitution. It states that "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs (...)".

In fact, this principle of secularism is old. The separation dates back to 1905. The Constitutional Council, by a decision dated 21 February 2013, made the principle of secularism one of the rights guaranteed by the Constitution in terms of Article 61§1 of the Constitution. This decision has practical significance: the components of secularism, namely the respect of all beliefs, the equality of all citizens regardless of religion and the guarantee of worship, are now all rights that can be initiated by litigants. Secularism is no longer just a principle for organizing the relations of cults with public authorities, it has now become the source or foundation of individual rights. We can undoubtedly have a fruitful dialogue on this topic and on the implementation issues that may arise.

Another issue we can discuss because we are moving in the same direction is the sensitive topic of the right to marriage of same-sex couples. When it was adopted, the Constitution of Kosovo was on this subject a step forward compared to the provisions that existed in France at the same time. By recognizing the right to marry without limiting it to couples of different sexes, Kosovo has set an important historical moment on a path that we had already passed - in 1999 we established the right for same-sex couples to enter into a civil partnership recognized by law. If I may say so, we have put you on this path of equality and dignity by passing a law in 2013 that gives everyone the right to marry. These two laws, the one of 1999 and the one of 2013, were not easily approved. We had debates, several times severe, and the matter went to the Constitutional Council. It ruled that the election of the legislator was not contrary to any constitutional principle. I present this topic carefully, because I know that your Parliament will present a text reforming the civil code, that this text may include provisions on marriage, and that it will be up to the Constitutional Court to assess the compatibility of this future law with the Constitution. Therefore, I

will not go beyond mentioning our experience or the case law of the European Court of Human Rights. However, I emphasize - because this should be pondered - the contrast between the vigor, not to say the fury, of the debates that took place in 2013 in France, and the serenity that has reappeared since the law was passed. Why this calm? Maybe because everyone has now realized that this law brought some new rights without taking away any rights from everyone.

3. Constitutional courts, guaranteeing the rule of law

Madam President, ladies and gentlemen, "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.": this was said, clearly and strongly, in the Declaration of Human and Citizen Rights on 26 August 1789. Let me mention one of these aspects, that of the independence of justice.

Madam President, the organization of justice in the institutions of the Republic of Kosovo makes your court equivalent to our three French institutions: the Constitutional Council, the Council of State, the supreme body of administrative justice and the Court of Cassation. I understand the workload and especially the weight of the responsibilities that are yours.

Beyond the organizational specifics of each country, the independence of justice is at the center of the jurisprudence of the European Court of Human Rights, which devotes the greatest vigilance to the statutory and functional protection of the judiciary in the face of the risks of interference from the executive power. Formal guarantees and the smooth running of the procedures for the appointment of judges and prosecutors are at the center of the rule of law and therefore the proper functioning of the institutions. The careful selection of judges and the timely appointment of authorities responsible for the proper functioning of justice deserve constant attention.

The European institutions, the Venice Commission to which I pay tribute, and more generally the institutions of the Council of Europe, which Kosovo wants to join, can help you.

Separation of powers, which you insisted on Madam President, is obviously essential. It is based in particular on the respect of (adjudicated matter) *res judicata*. It is primarily the executive's responsibility to ensure that the decisions of the courts are effectively implemented, be they first instance decisions or, of course, decisions of the Constitutional Court. It is a constitutive principle of the rule of law, it is also the guaranteeing of legal certainty without which no economy can develop sustainably, no society can truly flourish and no democracy can deserve its name.

Respecting *res judicata* also means ensuring the effectiveness of guarantees and protections provided by constitutional or legislative texts. Kosovo guarantees in the texts a high degree of protection of minorities or rather of communities and their members, to whom a whole chapter of your Constitution is dedicated. This protection must be seen and felt every day by the members of the minority communities who live here. The Kosovo, which the international community (at least most of its members) wanted to see independent, is a multi-ethnic Kosovo. Keeping this balance alive and functioning is key to the success of this project and your Court plays and will play a significant role.

4. International positioning of the Court

I am aware that as the ultimate interpreter of the Constitution you can sometimes feel alone in the face of expectations and even pressure from others. The situation of judges is rarely easy. Having largely responded to your invitation to celebrate the 15th anniversary of the Constitution, all of us, presidents and members of other Constitutional Courts, wanted to show you, our solidarity.

The conference program after this solemn ceremony will be an opportunity for exchanges on topics that concern us all. We will talk about the strengthening of democracy and the rule of law through constitutional control, about interactions with supranational courts and control of the constitutionality of acts. I think that these presentations will highlight how, through sometimes different solutions, we are working in the same direction.

15 years ago, many international instances encouraged the new Republic of Kosovo. Your Court has now earned its place and the respect that goes with it within our court community. You participate in building shared understanding and interpretations not only by fully integrating relevant case law of other courts, but also by making your own case law easily accessible. I especially appreciate the fact that you do it in French on your website. And I am convinced that your Court has its place within the Association of Francophone Constitutional Courts.

Madam President, dear colleagues,

“Constitution”, given its etymology, is what “holds us together”. At the end of this speech, I want to recall, obviously like you, the community of values for which we act and which we protect. I recall our common demand for independence, impartiality and respect for the law. I recall the necessary dialogue between national and supranational judges in particular to match the evolution of constitutional requirements and respect for the rules. Finally, I remember the solidarity and brotherhood of the constitutional courts.

Madam President,

Therefore, I believe that I can act as a spokesperson for all the courts present here, expressing our gratitude for joining us here and congratulating you on the task already accomplished.

Laurent Fabius
President of the Constitutional Council of the Republic of France

Discours d'ouverture de M. Laurent Fabius, Président du Conseil Constitutionnel de la République française

Madame la Présidente de la Cour constitutionnelle,
Madame la vice Première Ministre,
Madame la Ministre de la Justice,
Messieurs les Ministres,
Mesdames et Messieurs les Membres de l'Assemblée du Kosovo,
Messieurs les Présidents des institutions judicaires indépendantes,
Monsieur Sedjiu, ancien Président de la République,
Madame Jahjaga, ancienne Présidente de la République,

Messieurs les Maires,

Mesdames et Messieurs les Présidentes et Présidents des Cours constitutionnelles invitées,

Mesdames et Messieurs les Ambassadrices et Ambassadeurs et Représentants des organisations internationales,

Mesdames et Messieurs, chers collègues et amis.

Je vous remercie chaleureusement de m'avoir invité aux manifestations marquant la 14e année judiciaire de la Cour et les 15 ans de votre Constitution.

En me proposant d'y prendre la parole dans la cérémonie d'ouverture, je ressens que vous adressez un signe d'amitié non seulement au Conseil constitutionnel français mais aussi aux institutions de mon pays et, oserai-je dire, à la France. J'y vois l'écho de la fraternité entre la France et le Kosovo, qui s'est manifestée de bien des manières depuis 1999, y compris dans le domaine de la justice et de la construction de l'Etat de droit.

Comme chacune et chacun ici, j'apprécie le chemin parcouru, les réalisations en matière d'Etat de droit en peu de temps et vous nous trouverez à vos côtés pour faire face aux difficultés qui restent encore à résoudre. Car il reste, chacun en est conscient, de nombreuses difficultés à résoudre. La période actuelle est dangereuse. Il faut utiliser ce mot sans fausse pudeur. Le droit et l'Etat de droit doivent prévaloir. Mon pays est également passé, dans son histoire, par des périodes de dangers. Notre Constitution actuelle est d'ailleurs issue de l'une d'entre elle.

1. Contrôle constitutionnel et souveraineté populaire: l'exemple de la France

S'agissant précisément de l'expérience française, je manquerai de temps pour décrire ici de manière complète le chemin du Conseil constitutionnel depuis sa création en 1958.

Je veux cependant souligner que ce chemin considérable a été jalonné de décisions qui ont façonné notre jurisprudence avec force mais aussi dans une recherche d'équilibre.

L'un des jalons principaux de l'affirmation du Conseil constitutionnel en véritable Cour constitutionnelle est la décision du 16 juillet 1971 dite « liberté d'association » par laquelle le Conseil a affirmé qu'il lui revient de contrôler la conformité des lois avec l'ensemble des éléments figurant dans le catalogue des droits fondamentaux auquel se réfère la Constitution française, c'est-à-dire la fameuse Déclaration des droits de l'homme et du citoyen de 1789, le Préambule de la Constitution de 1946 et la Charte de l'environnement de 2004.

Le contrôle de la conformité des lois à nos règles constitutionnelles s'est ensuite déployé constamment, notamment depuis la création par le Constituant lui-même en 2008 de la Question Prioritaire de Constitutionnalité que j'aime à appeler la « question citoyenne ». Celle-ci a constitué un progrès démocratique puisqu'elle permet à chaque justiciable partie à un procès de saisir le Conseil constitutionnel via le filtre de la des plus hautes instances de la justice civile et pénale ou de la justice administrative pour contester la conformité de toute loi, quelle que soit sa date d'adoption, aux droits et libertés que la Constitution garantit. C'est un grand succès.

L'affirmation du Conseil constitutionnel comme Cour constitutionnelle se lit aussi à travers la jurisprudence qu'il a forgée et les « grandes » décisions qu'il a rendues. En contrôlant les lois dont il a été saisi, le Conseil constitutionnel a veillé au respect de divers principes : égalité, laïcité, liberté d'expression, liberté de conscience, droit de grève, droit de propriété, respect de la vie privée, inviolabilité du domicile, droit de mener une vie familiale normale, présomption d'innocence, et récemment fraternité, protection de l'environnement et des générations futures – ainsi que plusieurs autres principes constitutionnels.

Dans notre contrôle de la conformité de la loi aux exigences constitutionnelles, nous ne perdons jamais de vue que le constituant est susceptible de faire évoluer le corpus de ces exigences, mais nous savons aussi que son intervention doit elle-même être conçue dans le respect des règles inscrites dans la Constitution, sauf à la priver de sa force.

L'état de droit peut bien sûr évoluer, mais l'Etat de droit, lui, doit être absolument préservé.

Il en est de même pour la manière dont le Conseil constitutionnel conçoit l'articulation entre le droit national et le droit de l'Union européenne. De ce point de vue, notre contrôle contribue à une protection augmentée de l'Etat de droit qui traduit, non pas une concurrence, mais une complémentarité entre les offices constitutionnel conformément aux termes du Traité sur l'Union européenne. J'ajoute que le Conseil constitutionnel, s'il n'est pas juge de la conformité de la loi nationale à la Convention européenne de sauvegarde des droits de l'homme, est également très attaché au dialogue qu'il conduit avec la Cour européenne des droits de l'homme, sous la forme notamment du dialogue de nos jurisprudences, dans une optique partagée de protection de l'Etat de droit.

2. Les valeurs partagées avec la Constitution du Kosovo

A l'issue de cette brève évocation des lignes de force du contrôle constitutionnel pratiqué en France, je souhaiterais souligner les convergences entre les droits et libertés protégées par les constitutions de nos deux pays et de beaucoup de ceux qui sont présents dans cette cérémonie.

La Constitution kosovare, dont vous garantissez le respect dans la lettre et dans l'esprit, a bénéficié des expériences positives et négatives d'autres pays. Ses rédacteurs ont aussi eu à prendre en compte les circonstances qui ont conduit de la guerre de 1999 à l'indépendance de 2008. S'agissant en particulier des valeurs sur lesquelles elle repose, elle est particulièrement moderne. Je suis notamment frappé par l'inclusion dans la Constitution de textes internationaux auxquels la république du Kosovo n'est pas encore partie.

La Constitution du Kosovo intègre ainsi dans son article 22 les grands textes des Nations unies, en particulier le Pacte sur les droits civils et politiques et la Convention européenne des droits de l'Homme ainsi que ses protocoles. Elle donne à ces textes une valeur supérieure à la loi dans la hiérarchie des normes et leur reconnait une applicabilité directe. L'Assemblée du Kosovo a également souhaité accompagner les progrès normatifs en donnant la même valeur à des textes internationaux adoptés postérieurement à 2008.

Je vois dans cette disposition, qui permet d'appliquer un texte auquel le Kosovo ne peut encore adhérer, l'ambition louable d'offrir la meilleure protection des droits à vos citoyens. J'y vois aussi l'aspiration légitime de pouvoir adhérer à ces instruments internationaux. La France soutient ce souhait. En parallèle elle œuvre activement, depuis de nombreuses années, en vue de la normalisation des relations avec la Serbie qui, malgré les difficultés, est la voie à suivre pour que la République du Kosovo puisse trouver toute la place qui lui revient dans la communauté internationale.

Ces textes, la France les a elle-même signés, elle les a d'ailleurs souvent inspirés. Ils forment un socle que nous avons en commun, qui nous arriment ensemble dans un projet démocratique et humaniste.

Je souhaite relever notamment un point commun entre nos valeurs qui fondent les droits et les libertés garantis par nos Constitutions respectives : celui de la laïcité et de la neutralité de l'Etat en matière de convictions religieuses. Ce principe de laïcité est inscrit dès le premier alinéa du premier article de notre Constitution. Il dispose que « la France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens, sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances (…) ».

Dans les faits, ce principe de laïcité est ancien. La séparation remonte en effet à 1905. Dans une décision du 21 février 2013, le Conseil constitutionnel a fait du principe de laïcité l'un des droits que la Constitution garantit au sens de l'article 61§1 de la Constitution. Cette décision a une portée pratique : les composantes de la laïcité, c'est à dire le respect de toutes les croyances, l'égalité de tous les citoyens sans distinction de religion et la garantie des cultes, sont désormais autant de droits suscep-

tibles d'être actionnés par les justiciables. La laïcité n'est plus seulement un principe pour organiser les rapports des cultes avec les pouvoirs publics, elle est devenue la source ou le fondement de droits individuels. Sans doute pourrions-nous avoir un dialogue fructueux sur ce sujet et sur les questions d'application qu'il peut soulever.

Il est un autre domaine dans lequel nous pourrions avoir matière à échanger car nous cheminons dans la même direction, c'est celui, délicat, du droit au mariage pour les couples de même sexe. Lors de son adoption, la Constitution du Kosovo était sur ce sujet en avance par rapport aux dispositions existant en France au même moment. En reconnaissant le droit au mariage sans le limiter aux couples de sexe différent, le Kosovo a posé un jalon important sur un chemin que nous-mêmes avions déjà emprunté – nous avions établi en 1999 le droit pour les couples de même sexe d'entrer dans un partenariat civil reconnu par la loi. Nous vous avons, si je puis dire, rattrapé sur ce chemin d'égalité et de dignité en adoptant en 2013 une loi qui ouvre à tous le droit au mariage. Ces deux lois, celle de 1999 et celle de 2013 n'ont pas été adoptées facilement. Des débats parfois virulents ont eu lieu et le Conseil constitutionnel a été saisi. Il a jugé que le choix du législateur n'était contraire à aucun principe constitutionnel. J'évoque ce sujet avec précaution car je sais que votre Parlement devrait être saisi d'un texte portant réforme du code civil, que ce texte pourrait comprendre des dispositions sur ce sujet et qu'il reviendrait à la Cour constitutionnelle d'apprécier la conformité de cette future loi avec la Constitution. Je me borne donc à faire mention de notre expérience ou encore de la jurisprudence de la Cour européenne des droits de l'Homme. Je souligne néanmoins – car ceci doit être médité – le contraste entre la vigueur, pour ne pas dire la fureur, des débats qui ont eu lieu en 2013 en France, et la sérénité retrouvée depuis l'adoption de la loi. Pourquoi cette sérénité ? Probablement parce que chacun a désormais compris que cette loi a apporté un droit nouveau à certains sans enlever aucun droit à tous.

3. Les cours constitutionnelles, garantes de l'Etat de droit

Madame le Présidente, mesdames, messieurs, « Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution » : voilà ce que posait avec clarté et force la Déclaration des droits de l'homme et du citoyen du 26 août 1789. Permettez-moi d'évoquer un de ces aspects, celui de l'indépendance de la justice.

Madame la Présidente, l'organisation de la justice dans les institutions de la République du Kosovo fait de votre cour l'équivalente de trois de nos institutions françaises : le Conseil constitutionnel, le Conseil d'Etat, organe suprême de la justice administrative et la Cour de cassation. J'imagine la charge de travail et surtout le poids des responsabilités qui sont les vôtres.

Au-delà des spécificités d'organisation de chaque pays, l'indépendance de la justice est au cœur de la jurisprudence de la Cour européenne des droits de l'Homme qui accorde la plus grande vigilance à la protection statutaire et fonctionnelle du pouvoir judiciaire face aux risques d'ingérence du pouvoir exécutif. Les garanties formelles et le bon déroulement des procédures de nomination des juges et des procureurs sont au cœur de l'Etat de droit et par conséquent du bon fonctionnement des insti-

tutions. La sélection attentive des juges comme la désignation en temps voulu des autorités responsables du bon fonctionnement de la justice méritent une attention toujours renouvelée.

Les institutions européennes, la Commission de Venise à laquelle je rends hommage, plus généralement celles du Conseil de l'Europe, que le Kosovo souhaite rejoindre, sont là pour vous aider.

La séparation des pouvoirs sur laquelle vous avez insisté Madame la Présidente est évidemment essentielle. Elle repose notamment sur le respect de la chose jugée. Il appartient, principalement à l'exécutif, de faire en sorte que les décisions de justice soient effectivement appliquées, qu'il s'agisse de décisions de première instance et, bien entendu, des décisions de la Cour constitutionnelle. C'est un principe constitutif de l'Etat de droit, c'est aussi l'assurance d'une sécurité juridique sans laquelle aucune économie ne peut durablement se développer, aucune société ne peut vraiment s'épanouir et aucune démocratie ne peut mériter son nom.

Le respect de la chose jugée, c'est aussi l'assurance de l'effectivité des garanties et protections que fournissent les textes constitutionnels ou législatifs. Le Kosovo garantit dans les textes un haut degré de protection aux minorités ou plutôt aux communautés et à leurs membres, à qui un chapitre entier de votre Constitution est consacré. Cette protection doit être constatée et ressentie chaque jour par les membres des communautés minoritaires qui vivent ici. Le Kosovo que la communauté internationale (du moins la majorité de ses membres) a souhaité voir indépendant est un Kosovo multiethnique. Maintenir vivant et fonctionnel cet équilibre est une clé de la réussite de ce projet et votre Cour joue et jouera un rôle considérable.

4. Le positionnement international de la Cour

Je n'ignore pas qu'être l'interprète ultime de la Constitution suppose quelques moments de solitude face aux attentes, aux critiques, voire aux pressions des uns et des autres. La situation des juges est rarement facile. En répondant nombreux à votre invitation pour célébrer les 15 ans de la Constitution, nous tous, Présidents et membres des autres Cours constitutionnelles, nous avons souhaité vous témoigner notre solidarité.

Le programme du colloque à l'issue de cette cérémonie solennelle sera l'occasion d'échanges sur des sujets qui nous concernent tous. Seront évoqués le renforcement de la démocratie et de l'Etat de droit par le contrôle constitutionnel, les interactions avec les cours supranationales, le contrôle de la constitutionnalité des actes. Je pense que ces travaux mettront en lumière combien, par des solutions parfois différentes, nous œuvrons dans le même sens.

De nombreuses instances internationales se sont penchées sur le berceau de la jeune République du Kosovo il y a 15 ans. Désormais votre Cour a gagné sa place et le respect qui l'accompagne au sein de notre communauté de juridictions. Vous participez à la construction de compréhensions et d'interprétations communes non seulement en intégrant pleinement les jurisprudences pertinentes d'autres Cours, mais aussi en rendant aisément accessible votre propre jurisprudence. Je suis particulièrement sensible à ce que vous le fassiez en français sur votre site. Et je suis persuadé que votre

Cour a toute sa place au sein de l'Association des cours constitutionnelles francophones.

Madame la Présidente, chers collègues,

Une « Constitution », compte tenu de son étymologie, c'est ce qui « nous tient ensemble ». Au terme de ce propos, je retiens, sans doute comme vous, la communauté de valeurs qui nous anime et que nous défendons. Je retiens notre commune exigence de séparation des pouvoirs, d'indépendance, d'impartialité et de respect du droit. Je retiens le nécessaire dialogue des juges nationaux et supra-nationaux afin notamment de concilier l'évolution des exigences constitutionnelles et le respect des règles. Je retiens enfin la solidarité et la confraternité des cours constitutionnelles.

Madame la Présidente, je crois donc pouvoir me faire le porte-parole de toutes les cours ici présentes en vous exprimant notre gratitude de nous avoir réunis ici et en vous félicitant pour la tâche déjà accomplie.

Laurent Fabius

Président du Conseil Constitutionnel de la République française


14
VITI I KATËRMBËDHJETË
GJYQËSOR
SOLEMN OPENING CEREMONY

KONFERENCA NDËRKOMBËTARE

"Kontributi i Gjykatave Kushtetuese në mbrojtjen dhe forcimin e vlerave themelore të demokracisë, sundimit të ligjit dhe të drejtave dhe lirive themelore të njeriut"

Prishtinë, 23 tetor 2023

MEĐUNARODNA KONFERENCIJA

"Doprinos ustavnih sudova u zaštiti i jačanju osnovnih vrednosti demokratije, vladavine prava i osnovnih ljudskih prava i sloboda"

Priština, 23. Oktobra 2023. godine

INTERNATIONAL CONFERENCE

"The Contribution of Constitutional Courts in Protecting and Strengthening Fundamental Values of Democracy, Rule of Law, and Fundamental Human Rights and Freedoms"

Prishtina, 23 October 2023

CONFÉRENCE INTERNATIONALE

"La contribution des Cours Constitutionnelles à la protection et au renforcement des valeurs fondamentales de la démocratie, de l'état de droit et des droits et libertés fondamentaux de l'homme"

Prishtina, 23 octobre 2023

KONFERENCA NDËRKOMBËTARE

"Kontributi i Gjykatave Kushtetuese në mbrojtjen dhe forcimin e vlerave themelore të demokracisë, sundimit të ligjit dhe të drejtave dhe lirive themelore të njeriut"

Salla "Beethoven" , Hoteli "Emerald", Prishtinë
24 tetor 2023

AGJENDA

08:30 - 09:00	Regjistrimi
09:00 - 09:15	Fjala përshëndetëse dhe hyrëse nga znj. Gresa Caka-Nimani, Kryetare e Gjykatës Kushtetuese të Republikës së Kosovës
SESIONI I	"*Roli i Gjykatave Kushtetuese në forcimin e vlerave të demokracisë dhe sundimit të ligjit përmes kontrollit abstrakt të kushtetutshmërisë së normave*"
Moderatore:	znj. Selvete Gërxhaliu-Krasniqi, gjyqtare e Gjykatës Kushtetuese të Republikës së Kosovës
09:15 - 09:25	z. Zühtü Arslan, Kryetar i Gjykatës Kushtetuese të Republikës së Turqisë "*Vlerësimi abstrakt i kushtetutshmërisë në Turqi: Zhvillimet e fundit*""
09:25 - 09:35	znj. Holta Zaçaj, Kryetare e Gjykatës Kushtetuese të Republikës së Shqipërisë "*Roli i Gjykatës Kushtetuese si ligjvënës negativ*"
09:35 - 09:45	z Aldis Laviņš, Kryetar i Gjykatës Kushtetuese të Letonisë "*Roli i gjykatave kushtetuese në harmonizimin e zbatimit të së drejtës së BE-së dhe asaj ndërkombëtare me identitetin kushtetues*"
09:45 - 09:55	z. Georg Lienbacher, Gjyqtar i Gjykatës Kushtetuese të Austrisë "*Roli i Gjykatave Kushtetuese në forcimin e vlerave të demokracisë dhe sundimit të ligjit nëpërmjet kontrollit abstrakt të kushtetutshmërisë së normave*"
09:55 - 10:05	z. José Figueiredo Dias, Gjyqtar i Gjykatës Kushtetuese të Portugalisë "*Roli i Gjykatave Kushtetuese në forcimin e vlerave të demokracisë dhe sundimit të ligjit përmes kontrollit abstrakt të kushtetutshmërisë së normave – pasqyrë e përgjithshme nga sistemi portugez*"
10:05 - 10:15	znj. Marie Baker, Gjyqtare e Gjykatës Supreme të Irlandës "*Gjykatat Supreme si gardiane të Kushtetutës*"

10:15 - 10:25	z. Tom Ginsburg, Profesor i së Drejtës Kushtetuese Krahasuese në Shkollën Juridike të Çikagos "*Kontrolli abstrakt i normave dhe ligjbërja gjyqësore: Efekti në reputacionin gjyqësor*"
10:25 - 10:45	Sesioni I: Diskutim i hapur
10:45 - 11:00	Pushimi i kafes
SESIONI II	"*Roli i Gjykatave Supranacionale në Vendimmarrjen e Gjykatave Kushtetuese: Ndërveprimi me Gjykatën Evropiane për të Drejtat e Njeriut, Gjykatën e Drejtësisë së Bashkimit Evropian, Gjykatën Afrikane për të Drejtat e Njeriut dhe Popujve dhe Komisionin e Venecias*"
Moderatore:	znj. Remzije Istrefi-Peci, gjyqtare në Gjykatën Kushtetuese të Republikës së Kosovës
11:00 - 11:10	z. Pierre Nihoul, Kryetar i Gjykatës Kushtetuese të Belgjikës "*Marrëdhënia ndërmjet Kushtetutës së Belgjikës dhe së Drejtës Ndërkombëtare dhe Evropiane*"
11:10 - 11:20	znj. Anna Austin, Juristkonsulte e Gjykatës Evropiane për të Drejtat e Njeriut "*Parimi i subsidiaritetit dhe GJEDNJ: Duke i shërbyer si Diversitetit ashtu edhe Konvergjencës*"
11:20 - 11:30	znj. Grainne McMorrow, Përfaqësuese e Komisionit të Venecias "*Roli i Komisionit të Venecias në mbështetjen e demokracisë dhe promovimit të zhvillimit të Gjykatave Kushtetuese ndërkombëtarisht*"
11:30 - 11:40	z. Mirsad Ceman, Nënkryetar i Gjykatës Kushtetuese të Bosnjës dhe Hercegovinës *"Ndikimi i praktikës gjyqësore së Gjykatës Evropiane për të Drejtat e Njeriut në praktikën gjyqësore të gjykatave vendore në Bosnje dhe Hercegovinë"*
11:40 - 11:50	z. Atanas Semov, gjyqtar i Gjykatës Kushtetuese të Bullgarisë "*Dialogu në mes të gjykatave kushtetuese vendore dhe Gjykatës së Drejtësisë të Bashkimit Evropian si gjykatë kushtetuese e BE-së*"
11:50 - 12:00	z. Louis Aucoin, Këshilltar i Jashtëm për Sundimin e Ligjit, Zhvillimin Kushtetues dhe Drejtësinë Tranzicionale (Këshilltar i Qeverisë së Shteteve të Bashkuara gjatë hartimit të Kushtetutës së Republikës së Kosovës) *"Perspektiva Krahasuese për Krijimin e Kushtetutës: Kosova dhe më gjerë"*
12:00 - 12:20	Sesioni II: Diskutim i hapur
12:30 - 14:30	Drekë në Hotelin "Emerald"

SESIONI III	*"Roli i Gjykatave Kushtetuese në Mbrojtjen e të Drejtave dhe Lirive Themelore të Njeriut përmes Kontrollit Individual të Kushtetutshmërisë së Akteve të Autoriteteve Publike"*
Moderator:	z. Nexhmi Rexhepi, gjyqtar i Gjykatës Kushtetuese të Republikës së Kosovës
14:30 - 14:40	znj. Dineke de Groot, Kryetare e Gjykatës Supreme të Holandës "*Roli i Gjykatave Kushtetuese në Mbrojtjen e të Drejtave dhe Lirive Themelore të Njeriut përmes Kontrollit Individual të Kushtetutshmërisë së Akteve të Autoriteteve Publike. Një perspektivë nga nën-niveli i detit deri te Bjeshkët e Nemuna*"
14:40 - 14:50	z. Villu Kove, Kryetar i Gjykatës Supreme të Estonisë "*Mundësitë e kufizuara për kontrollin kushtetues individual në sistemin e vlerësimit të kushtetutshmërisë së Estonisë*"
14:50 - 15:00	z. Tomas Davulis, Gjyqtar i Gjykatës Kushtetuese të Lituanisë *"Ndikimi i praktikës gjyqësore të GJED në Jurisprudencën e Gjykatës Kushtetuese të Republikës së Lituanisë"*
15:00 - 15:10	z. Claudio Monteiro, Gjyqtar i Gjykatës Supreme Administrative të Portugalisë "*Respektimi dhe kufijtë e kontrollit kushtetues*"
15:10 - 15:20	z. Mato Arlović, Gjyqtar i Gjykatës Kushtetuese të Kroacisë "*Gjykata Kushtetuese në mbrojtjen e të drejtave dhe lirive të pakicave kombëtare*"
15:20 - 15:30	z. Osman Kadriu, gjyqtar i Gjykatës Kushtetuese të Republikës së Maqedonisë së Veriut *"Sundimi i ligjit dhe demokracia"*
15:30 - 15:40	znj. Christie Warren, Profesoreshë e Praktikës të së Drejtës Ndërkombëtare dhe Krahasuese (Këshilltare e Qeverisë së Shteteve të Bashkuara gjatë hartimit të Kushtetutës së Republikës së Kosovës) "*Gjykata Kushtetuese e Kosovës në Këndvështrim Krahasues*"
15:40 - 15:50	z. Diego Solana, Këshilltar Ndërkombëtar i Fondacionit për të Drejtën Botërore dhe koordinator i Programit të Kongresit Botëror të Drejtësisë *"Roli i Gjykatës Kushtetuese në mbrojtjen e të drejtave dhe lirive përmes masave kufizuese gjatë pandemisë"*
15:50 - 16:10	Sesioni III: Diskutim i hapur
16:10 - 16:20	Fjala përmbyllëse e Konferencës

MEĐUNARODNA KONFERENCIJA

"Doprinos ustavnih sudova u zaštiti i jačanju osnovnih vrednosti demokratije, vladavine prava i osnovnih ljudskih prava i sloboda"

Sala "Beethoven", hotel "Emerald", Priština
24. oktobar 2023.

DNEVNI RED

08:30 - 09:00	Registracija
09:00 - 09:15	Dobrodošlica i uvodna reč gđe Grese Caka-Nimani, predsednica Ustavnog suda Republike Kosovo
SESIJA I	"*Uloga ustavnih sudova u jačanju vrednosti demokratije i vladavine prava kroz apstraktnu kontrolu ustavnosti normi*"
Voditelj:	Gđa Selvete Gërxhaliu-Krasniqi, sudija Ustavnog suda Republike Kosovo
09:15 - 09:25	G. Zühtü Arslan, predsednik Ustavnog suda Republike Turske *„Apstraktni pregled ustavnosti u Turskoj: nedavna dešavanja"*
09:25 - 09:35	Gđa Holta Zaçaj, predsednica Ustavnog suda Republike Albanije *„Uloga Ustavnog suda kao negativnog zakonodavca"*
09:35 - 09:45	G. Aldis Lavinš, predsednik Ustavnog suda Letonije *„Uloga ustavnih sudova u usklađivanju primene prava EU i međunarodnog prava sa ustavnim identitetom"*
09:45 - 09:55	Prof. Georg Lienbacher, sudija Ustavnog suda Austrije *„Uloga ustavnih sudova u jačanju vrednosti demokratije i vladavine prava kroz apstraktnu kontrolu ustavnosti normi"*
09:55 - 10:05	G. José Figueiredo Dias, sudija Ustavnog suda Portugalije *„Uloga ustavnih sudova u jačanju vrednosti demokratije i vladavine prava kroz apstraktnu kontrolu ustavnosti normi – pregled portugalskog sistema"*
10:05 - 10:15	Gđa. Marie Baker, sudija Vrhovnog suda Irske *„Vrhovni sudovi kao čuvari Ustava"*
10:15 - 10:25	G. Tom Ginsburg, profesor uporednog ustavnog prava na Pravnom fakultetu u Čikagu *„Kontrola apstraktnih normi i sudsko zakonodavstvo: uticaj na ugled sudija"*
10:25 - 10:45	Sesija I: Otvorena diskusija
10:45 - 11:00	Pauza za kafu

SESIJA II	"*Uloga nadnacionalnih sudova u odlučivanju ustavnih sudova: interakcija sa Evropskim sudom za ljudska prava, Sudom pravde Evropske unije, Afričkim sudom za ljudska i narodna prava i Venecijanskom komisijom*"
Voditelj:	Gđa Remzije Istrefi-Peci, sudija Ustavnog suda Republike Kosovo
11:00 - 11:10	G. Pierre Nihoul, predsednik Ustavnog suda Belgije „*Odnos između belgijskog ustava i međunarodnog i evropskog prava*"
11:10 - 11:20	Gđa Anna Austin, pravni konsultant Evropskog suda za ljudska prava „*Načelo supsidijarnosti i ESLJP: Služenje i raznolikosti i konvergenciji*"
11:20 - 11:30	Gđa Grainne McMorrov, predstavnica Venecijanske komisije „*Uloga Venecijanske komisije u podršci demokratiji i promovisanju evolucije i razvoja ustavnih sudova na međunarodnom nivou*"
11:30 - 11:40	G. Mirsad Ćeman, potpredsednik Ustavnog suda Bosne i Hercegovine „*Uticaj sudske prakse Evropskog suda za ljudska prava na praksu domaćih sudova u Bosni i Hercegovini*"
11:40 - 11:50	G. Atanas Semov, sudija Ustavnog suda Bugarske „*Dijalog između lokalnih ustavnih sudova i Suda pravde Evropske unije kao stavnog suda EU*"
11:50 - 12:00	G. Louis Aucoin, strani savetnik za vladavinu prava, ustavni razvoj i tranzicionu pravdu (savetnik Vlade Sjedinjenih Država tokom izrade Ustava Republike Kosovo) „Komparativne perspektive ustavotvorstva: Kosovo i dalje"
12:00 - 12:20	Sesija II: Otvorena diskusija
12:30 - 14:30	Ručak u hotelu "Emerald"
SESIJA III	"*Uloga ustavnih sudova u zaštiti osnovnih ljudskih prava i sloboda kroz individualnu kontrolu ustavnosti akata javnih organa*"
Voditelj:	G. Nexhmi Rexhepi, sudija Ustavnog suda Republike Kosovo
14:30 - 14:40	Gđa Dineke de Groot, predsednica Vrhovnog suda Holandije „*Uloga ustavnih sudova u zaštiti osnovnih ljudskih prava i sloboda kroz individualnu kontrolu ustavnosti akata javnih organa. Perspektiva od Ispod nivoa mora do Prokletih planina*"
14:40 - 14:50	G. Villu Kove, predsednik Vrhovnog suda Estonije „*Ograničene mogućnosti za individualnu ustavnu kontrolu u estonskom sistemu ustavnog razmatranja*"
14:50 - 15:00	G. Tomas Davulis, sudija Ustavnog suda Litvanije „*Uticaj sudske prakse SPEU na sudsku praksu Ustavnog suda Republike Litvanije*"
15:00 - 15:10	G. Claudio Monteiro, sudija Vrhovnog upravnog suda Portugalije „*Poštovanje i granice ustavne kontrole*"

15:10 - 15:20	G. Mato Arlović, sudija Ustavnog suda Hrvatske *„Ustavni sud za zaštitu prava i sloboda nacionalnih manjina”*
15:20 - 15:30	G. Osman Kadriu, sudija Ustavnog suda Republike Severne Makedonije *„Vladavina prava i demokratija“*
15:30 - 15:40	Gđa Christie Warren, profesor prakse međunarodnog i uporednog prava (savetnik Vlade Sjedinjenih Država tokom izrade Ustava Republike Kosovo) “*Ustavni sud Kosova u uporednoj perspektivi*”
15:40 - 15:50	G. Diego Solana, međunarodni savetnik Svetske pravne fondacije i koordinator programa Svetskog pravnog kongresa „Uloga Ustavnog suda u zaštiti prava i sloboda kroz restriktivne mere tokom pandemije“
15:50 - 16:10	Sesija III: Otvorena diskusija
16:10 - 16:20	Završna razmatranja konferencije

INTERNATIONAL CONFERENCE

"The Contribution of Constitutional Courts in Protecting and Strengthening Fundamental Values of Democracy, Rule of Law, and Fundamental Human Rights and Freedoms"

"Beethoven" Hall, Hotel "Emerald", Prishtina
24 October 2023

AGENDA

08:30 - 09:00	Registration
09:00 - 09:15	Welcome and Opening Remarks by Ms. Gresa Caka-Nimani, President of the Constitutional Court of the Republic of Kosovo
SESSION I	"*The Role of Constitutional Courts in Strengthening the Values of Democracy and Rule of Law through Abstract Control of Constitutionality of Norms*"
Moderator:	Ms. Selvete Gërxhaliu-Krasniqi, Judge of the Constitutional Court of the Republic of Kosovo
09:15 - 09:25	Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Türkiye "*Abstract Review of Constitutionality in Türkiye: Recent Developments*"
09:25 - 09:35	Ms. Holta Zaçaj, President of the Constitutional Court of the Republic of Albania "*The Role of the Constitutional Court as a Negative Lawmaker*"
09:35 - 09:45	Mr. Aldis Laviņš, President of the Constitutional Court of Latvia "*The Role of Constitutional Courts in Reconciling the Application of EU and International Law with the Constitutional Identity*"
09:45 - 09:55	Mr. Georg Lienbacher, Judge of the Constitutional Court of Austria "*The Role of Constitutional Courts in Strengthening the Values of Democracy and the Rule of Law through Abstract Control of Constitutionality of Norms*"
09:55 - 10:05	Mr. José Figueiredo Dias, Judge of the Constitutional Court of Portugal "*The Role of Constitutional Courts in Strengthening the Values of Democracy and Rule of Law through Abstract Control of Constitutionality of Norms – An overview of the Portuguese System*"
10:05 - 10:15	Ms. Marie Baker, Judge of the Constitutional Court of Ireland "*The Supreme Court as Guardians of the Constitution*"
10:15 – 10:25	Mr. Tom Ginsburg, Professor of Comparative Constitutional Law at Chicago Law School *"Abstract Norm Control and Judicial Lawmaking: The Effect on Judicial Reputation"*
10:25 - 10:45	Session I: Open discussion
10:45 - 11:00	Coffee break

SESSION II	"*The Role of Supranational Courts in the Decision-Making of Constitutional Courts: the Interaction with the European Court of Human Rights, Court of Justice of the European Union, the African Court on Human and Peoples' Rights and the Venice Commission*"
Moderator:	Ms. Remzije Istrefi-Peci, Judge at the Constitutional Court of the Republic of Kosovo
11:00 - 11:10	Mr. Pierre Nihoul, President of the Constitutional Court of Belgium "*The Relationship between the Belgian Constitution and International and European Law*"
11:10 - 11:20	Ms. Anna Austin, Juristconsult of the European Court of Human Rights "*The Principle of Subsidiarity and the ECHR: Serving both Diversity and Convergence*"
11:20 - 11:30	Ms. Grainne McMorrow, Venice Commission Representative *"The Role of the Venice Commission in supporting democracy and in promoting the evolution and development of Constitutional Courts internationally"*
11:30 - 11:40	Mr. Mirsad Ćeman, Vice-President of the Constitutional Court of Bosnia and Hercegovina "*The Influence of the Case-law of the European Court of Human Rights on the Case- law of Domestic Courts in Bosnia and Herzegovina*"
11:40 - 11:50	Mr. Atanas Semov, Judge of the Constitutional Court of Bulgaria "*Dialogue between domestic constitutional courts and the Court of Justice of the European Union as the Constitutional Court of the EU*"
11:50 - 12:00	Mr. Louis Aucoin, Foreign Advisor on Rule of Law, Constitutional Development and Transitional Justice (United States Government Advisor throughout the drafting of the Constitution of the Republic of Kosovo) *"Comparative Perspectives on Constitution Making: Kosovo and Beyond"*
12:00 - 12:20	Session II: Open discussion
12:30 - 14:30	Lunch at Hotel "Emerald"
SESSION III	*"The Role of Constitutional Courts in Protecting Fundamental Human Rights and Freedoms through Individual Control of Constitutionality of Acts of Public Authorities"*
Moderator:	Mr. Nexhmi Rexhepi, Judge of the Constitutional Court of the Republic of Kosovo
14:30 - 14:40	Ms. Dineke de Groot, President of the Supreme Court of the Netherlands "*The Role of Constitutional Courts in Protecting Fundamental Human Rights and Freedoms through Individual Control of Constitutionality of Acts of Public Authorities. A Perspective from Below Sea Level to the Accursed Mountains*"
14:40 - 14:50	Mr. Villu Kove, President of the Supreme Court of Estonia "*Limited Possibilities for Individual Constitutional Control in Estonian Constitutional Review System*"

14:50 - 15:00	Mr. Tomas Davulis, Judge of the Constitutional Court of Lithuania "*Impact of the Case-law of CJEU in the Jurisprudence of the Constitutional Court of the Republic of Lithuania"*
15:00 - 15:10	Mr. Claudio Monteiro, Judge of the Supreme Administrative Court of Portugal "*Deference and the limits of constitutional scrutiny*"
15:10 - 15:20	Mr. Mato Arlović, Judge of the Constitutional Court of Croatia "*The Constitutional Court in the Protection of Rights and Freedoms of National Minorities"*
15:20 - 15:30	Mr. Osman Kadriu, Judge of the Constitutional Court of the Republic of North Macedonia *"The Rule of Law and Democracy"*
15:30 - 15:40	Ms. Christie Warren, Professor of the Practice of International and Comparative Law (United States Government Advisor throughout the drafting of the Constitution of the Republic of Kosovo) "*The Constitutional Court of Kosovo in Comparative Perspective"*
15:40 - 15:50	Mr. Diego Solana, International Advisor of the World Law Foundation and coordinator of the Program of the World Law Congress "*The role of Constitutional Courts in the protection of human rights and liberties through restrictive measures during the pandemic"*
15:50 - 16:10	Session III: Open discussion
16:10 - 16:20	Conference Concluding Remarks

CONFÉRENCE INTERNATIONALE

"La contribution des Cours Constitutionnelles à la protection et au renforcement des valeurs fondamentales de la démocratie, de l'état de droit et des droits et libertés fondamentaux de l'homme"

Salle "Beethoven", Hôtel "Emerald", Prishtina
24 octobre 2023

ORDRE DU JOUR

08:30 - 09:00	Inscription
09:00 - 09:15	Allocution de bienvenue de Mme Gresa Caka-Nimani, Présidente de la Cour Constitutionnelle de la République du Kosovo
SESSION I	"*Le rôle des Cours Constitutionnelles dans le renforcement des valeurs de la démocratie et de l'état de droit par le contrôle abstrait de la constitutionnalité des normes*"
Modératrice:	Mme. Selvete Gërxhaliu-Krasniqi, Juge à la Cour constitutionnelle de la République du Kosovo
09:15 - 09:25	M. Zühtü Arslan, Président de la Cour Constitutionnelle de la République de Turquie "*Résumé de la constitutionnalité en Turquie : Développements récents*"
09:25 - 09:35	Mme. Holta Zaçaj, Présidente de la Cour Constitutionnelle de la République d'Albanie "*Le rôle de la Cour constitutionnelle en tant que législateur négatif*"
09:35 - 09:45	M. Aldis Laviņš, Président de la Cour Constitutionnelle de Lettonie "*Le rôle des cours constitutionnelles pour concilier l'application du droit européen et international avec l'identité constitutionnelle* "
09:45 - 09:55	M. Georg Lienbacher, Juge à la Cour Constitutionnelle d'Autriche "*Le rôle des Cours constitutionnelles dans le renforcement des valeurs de la démocratie et de l'État de droit à travers le contrôle abstrait de la constitutionnalité des normes* "
09:55 - 10:05	M. José Figueiredo Dias, Juge à la Cour Constitutionnelle du Portugal "*Le rôle des cours constitutionnelles dans le renforcement des valeurs de la démocratie et de l'État de droit par le contrôle abstrait de la constitutionnalité des normes – Aperçu du système portugais*"
10:05 - 10:15	Mme. Marie Baker, Juge à la Cour Suprême d'Irlande "*Les Cours suprêmes, gardiennes de la Constitution*"
10:15 - 10:25	M. Tom Ginsburg, Professeur de droit constitutionnel comparé à la Chicago Law School "*Contrôle abstrait des normes et législation judiciaire : l'effet sur la réputation judiciaire*"

10:25 - 10:45	Session I: Discussion ouverte
10:45 - 11:00	Pause café
SESSION II	"*Le rôle des Juridictions Supranationales dans le processus décisionnel des Cours Constitutionnelles : Interaction avec la Cour Européenne des Droits de l'Homme, la Cour de Justice de l'Union Européenne, la Cour Africaine des Droits de l'Homme et des Peuples et la Commission de Venise*"
Modératrice:	Mme. Remzije Istrefi-Peci, Juge à la Cour constitutionnelle de la République du Kosovo
11:00 - 11:10	M. Pierre Nihoul, Président de la Cour constitutionnelle de Belgique "*La relation entre la Constitution belge et le droit international et européen*"
11:10 - 11:20	Mme. Anna Austin, Juriste consultante de la Cour Européenne des Droits de l'Homme "*Le principe de subsidiarité et la CEDH : au service de la diversité et de la convergence* "
11:20 - 11:30	Mme. Grainne McMorrow, Représentante de la Commission de Venise *"Le rôle de la Commission de Venise dans le soutien à la démocratie et dans la promotion de l'évolution et du développement des cours constitutionnelles à l'échelle internationale* "
11:30 - 11:40	M. Mirsad Ceman, Vice-président de la Cour Constitutionnelle de Bosnie-Herzégovine "*L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la jurisprudence des tribunaux internes de Bosnie-Herzégovine*"
11:40 - 11:50	M. Atanas Semov, juge à la Cour Constitutionnelle de Bulgarie "*Dialogue entre les cours constitutionnelles locales et la Cour de justice de l'Union européenne en tant que cour constitutionnelle de l'UE*"
11:50 - 12:00	M. Louis Aucoin, Conseiller externe pour l'État de Droit, le Développement Constitutionnel et la Justice Transitionnelle (Conseiller du gouvernement des États-Unis lors de la rédaction de la Constitution de la République du Kosovo) "*Perspectives comparatives sur l'élaboration de la Constitution : le Kosovo et au-delà* "
12:00 - 12:20	Session II: Discussion ouverte
12:30 - 14:30	Déjeuner à l' Hôtel "Emerald"
SESSION III	*"Le rôle des Cours Constitutionnelles dans la Protection des Droits et Libertés Fondamentaux de l'Homme par le Contrôle Individuel de la Constitutionnalité des Actes des Autorités Publiques* "
Modérateur:	M. Nexhmi Rexhepi, Juge à la Cour constitutionnelle de la République du Kosovo

14:30 - 14:40	Mme. Dineke de Groot, Présidente de la Cour Suprême des Pays-Bas "*Le rôle des Cours Constitutionnelles dans la Protection des Droits et Libertés Fondamentaux de l'Homme à travers le Contrôle Individuel de la Constitutionnalité des Actes des Autorités Publiques. Une perspective du niveau sous-marin jusqu'aux Montagnes Maudites*"
14:40 - 14:50	M. Villu Kove, Président de la Cour Suprême d'Estonie "*Possibilités limitées de contrôle constitutionnel individuel dans le système estonien d'appréciation de la constitutionnalité*"
14:50 - 15:00	M. Tomas Davulis, Juge à la Cour constitutionnelle de Lituanie "*Impact de la jurisprudence de la CJUE sur la jurisprudence de la Cour constitutionnelle de la République de Lituanie*"
15:00 - 15:10	M. Claudio Monteiro, Juge à la Cour Administrative Suprême du Portugal "*Déférence et limites du contrôle constitutionnel* "
15:10 - 15:20	M. Mato Arlović, Juge à la Cour Constitutionnelle de Croatie "*La Cour constitutionnelle dans la protection des droits et libertés des minorités nationales* "
15:20 - 15:30	M. Osman Kadriu, Juge à la Cour constitutionnelle de la République de Macédoine du Nord *"L'État de droit et la démocratie* "
15:30 - 15:40	Mme. Christie Warren, Professeure de Pratique du Droit International et Comparé (Conseillère du Gouvernement des États-Unis lors de la rédaction de la Constitution de la République du Kosovo) "*La Cour Constitutionnelle du Kosovo dans une perspective comparée*"
15:40 - 15:50	M. Diego Solana, Conseiller international de la World Law Foundation et coordinateur du programme du World Law Congress "*Le rôle de la Cour Constitutionnelle dans la protection des droits et libertés par des mesures restrictives pendant la pandémie*"
15:50 - 16:10	Session III: Discussion ouverte
16:10 - 16:30	Remarques finales de la conference

Fjala përshëndetëse dhe hyrëse nga znj. Gresa Caka-Nimani, *Kryetare e Gjykatës Kushtetuese të Republikës së Kosovës*

Dobrodošlica i uvodna reč gđe Grese Caka-Nimani, *predsednica Ustavnog suda Republike Kosovo*

Welcome and Opening Remarks by Ms. Gresa Caka-Nimani, *President of the Constitutional Court of the Republic of Kosovo*

Allocution de bienvenue de Mme Gresa Caka-Nimani, *Présidente de la Cour Constitutionnelle de la République du Kosovo*

Fjala përshëndetëse dhe hyrëse nga znj. Gresa Caka-Nimani, Kryetare e Gjykatës Kushtetuese të Republikës së Kosovës

Të nderuar delegacione të Gjykatave Kushtetuese e Supreme nga mbarë Bota;
Të nderuar udhëheqës e përfaqësues të institucioneve të Republikës së Kosovës;
Të nderuar Ambasadorë e përfaqësues të institucioneve ndërkombëtare;
Gjyqtarë, prokurorë, avokatë, dekanë e profesor universitar e anëtarë të shoqërisë civile
Të nderuar pjesëmarrës;

Zonja e Zotërinjë,

Mirë se erdhët në Konferencën Ndërkombëtare të organizuar me rastin e shënimit të katërmbëdhjetë vjetorit të themelimit të Gjykatës Kushtetuese të Republikës së Kosovës.

Në shënimin e këtij përvjetori – Gjykata ka zgjedhur që konferencën e sotme ndërkombëtare të fokusoj në rolin e Gjykatave Kushtetuese në mbrojtjen dhe fuqizimin e vlerave themelore të demokracisë, sundimit të ligjit dhe të drejtave dhe lirive themelore. Kjo është bërë për dy qëllime.

Së pari, për të nënvizuar rëndësinë e bashkëpunimit të Gjykatave Kushtetuese dhe rolin thelbësor të Gjykatave Supranacionale, përfshirë Gjykatën Evropiane për të Drejtat e Njeriut - në mbështetje të drejtësisë kushtetuese në demokracitë me traditë më pak të konsoliduar, përfshirë rëndësinë e krijimit të një sistemi uniform të mbrojtjes së vlerave dhe të drejtave universale në kontinentit evropian.

Gjykata jonë Kushtetuese - më e reja në këtë kontinent – reflekton shembull të mirë të këtij bashkëpunimi.

Në këtë kontekst, kujtoj që rrugëtimi i ndërtimit gradual të drejtësisë kushtetuese në Kosovë, nuk ka qenë pa sfida. Të njëjtat duhet të trajtohen në kontekstin historiko-politik të shtet-bërjes dhe shtet-ndërtimit të Kosovës, përfshirë në kontekst të ushtrimit të funksionit kushtetues të interpretimit të një Kushtetute të re, nga një Gjykatë Kushtetuese që nuk kishte përparësinë dhe/ose lehtësinë e pasurisë së traditës paraprake të drejtësisë kushtetuese.

Viti 2008 shënon një kthesë historike për Republikën e Kosovës – miratimin e një rendi të ri kushtetues që dallon thelbësisht nga tri rendet paraprake kushtetuese. Prandaj, ndërtimi i drejtësisë kushtetuese në Republikën e Kosovës, nuk ka pasur referencë në traditën kushtetuese të së kaluarës, por aspiratën e të ardhmes - në bashkëpunim të thellë me Gjykatat Kushtetuese, Gjykatën Evropiane për të Drejtat e Njeriut dhe Komisionin e Venecias, duke reflektuar kështu, në vendimmarrjen e saj, emëruesin e përbashkët të vlerave që ngërthen drejtësia kushtetuese evropiane dhe praktika gjyqësore në interpretimin e Konventës Evropiane për të Drejtat e Njeriut.

Në qasje e tillë që ngërthen praktika gjyqësore e Gjykatës tonë nënvizon rëndësinë e partneritetit në mes Gjykatave Kushtetuese. Për më tepër, është argument i mjaftueshëm që Gjykata Kushtetuese e Kosovës e meriton vendin në mes Gjykatave Kushtetuese anëtare të Konferencës Evropiane dhe Asociacionit Frankofon të Gjykatave Kushtetuese. Tentativat e parreshtura të Gjykatës tonë për tu anëtarësuar në këto dy forume të Gjykatave Kushtetuese simotra, uroj të kurorëzohen suksesshëm përgjatë vitit 2024 - edhe me mbështetjen e Gjykatave Kushtetuese të pranishme sot këtu.

Qëllimi i deklaruar i tyre drejt avancimit të bashkëpunimit në kontekst të drejtësisë kushtetuese, humb kuptimin nëse në forumet përkatëse vendimmarrëse, mbizotërojnë argumentet e pakicës lidhur me identitetin shtetëror të Kosovës dhe të cilat do të duhej të ishin përmbyllur përfundimisht në vitin 2010 - me Opinionin e Gjykatës Ndërkombëtare të Drejtësisë, lidhur me përputhshmërinë me të drejtën ndërkombëtare të shpalljes së pavarësisë së Kosovës.

Dhe kjo më shpien në qëllimin e dytë të kësaj konference - që vë theks në rolin që kanë Gjykatat Kushtetuese në mbrojtjen dhe avancimin e vlerave të demokracisë liberale... si sistemi i vetëm që siguron që liria individuale është e kuptimplotë .... si sistemi i vetëm përmes të cilit sigurohet dhe mirëmbahet paqja.

Në një rend botërorë të karakterizuar nga sovranitete të kushtëzuara dhe të trazuar tashmë prej zhvillimeve të shumta, përfshirë ato që ndërlidhen me (i) luftimin e pandemive; (ii) përshtatjen me rritjen e hovshme të përdorimit të teknologjisë informative e intelegjencës artificale; (iii) modelet populiste të qeverisjes në rritje; e (iv) deri te agresioni i pashembullt në Ukrainë – trashëgimia e përbashkët evropiane mund të mbrohet dhe kultivohet vetëm përmes përkushtimit për solidaritet dhe bashkëpunim të thellë ndërshtetëror.

Gjykatat Kushtetuese - si guardian Kushtetutash - zënë vend qendror në adresimin e sfidave të këtij shekulli. Shkëmbimi i përvojave na mundëson që të avancojmë traditën e drejtësisë kushtetuese, duke kundër-balancuar çdo forcë e dukuri që rrezikon të cenojë vlerat tona të përbashkëta – lirinë, paqen dhe demokracinë.

Marrë parasysh sfidat me të cilat ballafaqohet drejtësia kushtetuese dhe ato fusha të së drejtës, e të cilat përbëjnë thelbin e mbajtjes së ekuilibrit të duhur në mes vendimmarrjes së autoriteteve publike dhe ndikimit respektiv në të drejta dhe liri themelore, kemi zgjedhur që përgjatë kësaj konference, të fokusohemi në ushtrimin e kontrollin abstrakt dhe konkret të kushtetutshmërisë, përfshirë përmes bashkëpunimit me gjykatat me karakter supranacional, të organizuar në tri panele, e që do të udhëhiqen nga gjyqtarët e Gjykatës Kushtetuese, përkatësisht gjyqtarët Selvete Gërxhaliu-Krasniqi, Remzije Istrefi-Peci dhe Nexhmi Rexhepi – duke pasur mundësinë të shkëmbejmë përvoja në shërbim të avancimit të praktikave tona dhe thellimit të sinergjive në kontekst të drejtësisë kushtetuese.

Të nderuar miq,

Në këtë sallë sot, janë të pranishme disa nga mendjet më të ndritura të drejtësisë kushtetuese në botë. Hapësira gjeografike që pjesëmarrësit sot reflektojnë, na mundëson që të krijojmë një hartë gjithëpërfshirëse të të arriturave, sfidave dhe inovacioneve të Gjykatave Kushtetuese nga mbarë bota.

Solidariteti dhe partneriteti në mes Gjykatave Kushtetuese është frymëzues. I njëjti gjithashtu lartëson Gjykatën tonë. Për më tepër na mundëson që në kryeqytetin e bukur të Prishtinës - të lundrojmë së bashku nëpër mrekullitë që ngërthen drejtësia kushtetuese.

Duke shprehur edhe një herë mirënjohjen e thellë për prezencën tuaj e me pasionin e kureshtjen e pareshtur për të dëgjuar diskutimet e sotme, hap konferencën dhe punimet e saj.

Faleminderit për vëmendjen!

Dobrodošlica i uvodna reč gđe Grese Caka-Nimani, predsednica Ustavnog suda Republike Kosovo

Uvažene delegacije ustavnih i vrhovnih sudova iz celog sveta;
Uvaženi rukovodioci i predstavnici institucija Republike Kosovo;
Uvaženi ambasadori i predstavnici međunarodnih institucija;
Sudije, tužioci, advokati, dekani i univerzitetski profesori i članovi civilnog društva;
Poštovani učesnici,

Dame i gospodo,

Dobrodošli na Međunarodnu konferenciju organizovanu povodom obeležavanja četrnaestogodišnjice osnivanja Ustavnog suda Republike Kosovo.

Obeležavajući ovu godišnjicu, Sud se odlučio da današnju međunarodnu konferenciju usredsredi na ulogu ustavnih sudova u zaštiti i jačanju osnovnih vrednosti demokratije, vladavine prava i osnovnih prava i sloboda. To je učinjeno iz dva razloga.

Prvo, kako bi se istakla važnost saradnje ustavnih sudova i suštinska uloga nadnacionalnih sudova, uključujući i Evropski sud za ljudska prava, u podršci ustavnoj pravdi u demokratijama sa manje konsolidovanom tradicijom, uključujući i važnost uspostavljanja jedinstvenog sistema zaštite univerzalnih vrednosti i prava na evropskom kontinentu.

Naš Ustavni sud - kao najmlađi na ovom kontinentu - predstavlja dobar primer te saradnje.

U tom kontekstu, pamtim da put postepene izgradnje ustavnog pravosuđa na Kosovu nije tekao bez izazova. Ove izazove treba tumačiti u istorijsko-političkom kontekstu osnivanja i izgradnje države Kosovo, uključujući i u kontekstu vršenja ustavne funkcije tumačenja novog Ustava od strane Ustavnog suda koji nije imao pogodnost i/ili olakšicu bogatstva prethodne tradicije ustavnog pravosuđa.

- **2008. godina označava istorijsku prekretnicu za Republiku Kosovo - usvajanje novog ustavnog poretka koji se suštinski razlikuje od prethodna tri ustavna poretka. To znači da izgradnja ustavnog pravosuđa u Republici Kosovo nije imala kao referencu ustavnu tradiciju iz prošlosti, već stremljenje budućnosti - u dubokoj saradnji sa ustavnim sudovima, Evropskim sudom za ljudska prava i Venecijanskom komisijom, čime, u svom odlučivanju, odražava zajednički imenitelj vrednosti sadržanih u evropskom ustavnom pravosuđu i sudskoj praksi u tumačenju Evropske konvencije o ljudskim pravima.**

Ovakav pristup sadržan u sudskoj praksi našeg Suda ističe važnost partnerstva između ustavnih sudova. Povrh svega, dovoljan je argument da Ustavni sud Kosova zaslužuje svoje mesto među ustavnim sudovima koji su članovi Evropske KONFERENCIJE i Udruženja ustavnih sudova frankofonije. Nadam se da će neprestani pokušaji našeg Suda da se učlani u ova dva foruma sestrinskih ustavnih sudova, 2024. godine biti uspešno krunisani - i uz podršku ustavnih sudova koji su ovde danas prisutni.

Njihov deklarisani cilj u pogledu unapređenja saradnje u kontekstu ustavnog pravosuđa, gubi smisao ukoliko u relevantnim forumima koji odlučuju, preovladavaju argumenti manjine po pitanju državnog identiteta Kosova, koji su morali da budu konačno zaključeni 2010. godine - mišljenjem Međunarodnog suda pravde o usklađenosti proglašenja nezavisnosti Kosova sa međunarodnim pravom.

A ovo me vodi do drugog cilja ove konferencije - koji stavlja naglasak na ulogu koju imaju ustavni sudovi u zaštiti i unapređenju vrednosti liberalne demokratije ... kao jedinog sistema koji osigurava da individualna sloboda bude smislena ... kao jedinog sistema kojim se osigurava i održava mir.

U svetskom poretku koji karakterišu uslovne suverenosti i koji je već poremećen brojnim dešavanjima, uključujući i ona koja su povezana sa (i) borbom protiv pandemija; (ii) prilagođavanjem naglom porastu korišćenja informacionih tehnologija i veštačke inteligencije; (iii) populističkim modelima vladanja koji su u usponu; i (iv) neviđenom agresijom na Ukrajinu - zajedničko evropsko nasleđe se može zaštititi i negovati samo kroz posvećenost dubokoj međudržavnoj solidarnosti i saradnji.

Ustavni sudovi - kao čuvari ustava - zauzimaju centralno mesto u suočavanju sa izazovima ovog veka. Razmena iskustava nam omogućava da unapredimo tradiciju ustavnog pravosuđa, stvarajući protivtežu svakoj sili i pojavi koja preti da potkopa naše zajedničke vrednosti – slobodu, mir i demokratiju.

Imajući u vidu izazove sa kojima se suočava ustavno pravosuđe i one oblasti prava koje čine suštinu održavanja pravilne ravnoteže između odlučivanja javnih organa vlasti i odgovarajućeg uticaja na osnovna prava i slobode, izabrali smo da se tokom ove konferencije usredsredimo na vršenje apstraktne i konkretne kontrole ustavnosti, uključujući i kroz saradnju sa sudovima nadnacionalnog karaktera, organizovani u tri panela koja će voditi sudije Ustavnog suda, odnosno sudije Selvete Gërxhaliu-Krasniqi, Remzije Istrefi-Peci i Nexhmi Rexhepi – imajući priliku da razmenimo iskustva u službi unapređenja naših praksi i produbljivanja sinergija u kontekstu ustavnog pravosuđa.

Uvaženi prijatelji,

U ovoj su sali danas prisutni neki od najsvetlijih umova ustavnog pravosuđa u svetu. Geografski prostor koji učesnici danas reflektuju omogućava nam da napravimo sveobuhvatnu mapu dostignuća, izazova i inovacija ustavnih sudova iz celog sveta.

Solidarnost i partnerstvo među ustavnim sudovima su inspirativni. Isto tako i nadahnjuju naš Sud. Povrh svega, omogućavaju nam da u našoj lepoj prestonici, Prištini, zajedno krstarimo kroz magiju koju nosi ustavno pravosuđe.

Izražavajući još jednom svoju duboku zahvalnost na vašem prisustvu, sa neutaživim žarom i radoznalošću da saslušam današnje diskusije, otvaram konferenciju i njen rad.

Hvala na pažnji!

Welcome and Opening Remarks by Ms. Gresa Caka-Nimani, President of the Constitutional Court of the Republic of Kosovo

Honorable delegations of the Constitutional and Supreme Courts from around the World;
Dear leaders and representatives of the institutions of the Republic of Kosovo;
Honorable Ambassadors and representatives of international institutions;
Judges, prosecutors, lawyers, deans and professors of universities and members of the civil society;
Dear participants;

Ladies and Gentlemen,

Welcome to the International Conference organized on the occasion of marking the fourteenth anniversary of the establishment of the Constitutional Court of the Republic of Kosovo.

In marking this anniversary - the Court has chosen for today's international conference to focus on the role of the Constitutional Courts in protecting and strengthening the fundamental values of democracy, the rule of law and fundamental rights and freedoms. This was done for two purposes.

First, to underline the importance of the cooperation of Constitutional Courts and the essential role of Supranational Courts, including the European Court of Human Rights - in supporting constitutional justice in democracies with a less consolidated tradition, including the importance of creating a uniform system of the protection of universal values and rights on the European continent.

Our Constitutional Court - the youngest on this continent - reflects a good example of this cooperation.

In this context - I would remind that the journey of gradual building of constitutional justice in Kosovo, has not been without challenges. These challenges should be treated in the historical-political context of the state-making and state-building of Kosovo, including in the context of exercising the constitutional function of interpreting a new Constitution by a Constitutional Court that did not have the advantage and/or ease of the richness of the prior tradition of constitutional justice.

- **The year 2008 marks a historical turning point for the Republic of Kosovo - the adoption of a new constitutional order that is fundamentally different from the three previous constitutional orders. Therefore, the building of constitutional justice in the Republic of Kosovo had no reference to the constitutional tradition of the past, but the aspiration of the future - in close cooperation with the Constitutional Courts, the European Court of Human Rights and the Venice Commission, thus reflecting in its decision-making, the common denominator of the values entailed by the European constitutional justice and case-law in the interpretation of the European Convention on Human Rights.**

Such an approach held in the case law of our Court underlines the importance of partnership between the Constitutional Courts. Moreover, it is a sufficient argument that the Constitutional Court of Kosovo deserves its place among the Constitutional Courts members of the European Conference and the Association of Francophone Constitutional Courts. The relentless efforts of our Court to become member of these two forums of sister Constitutional Courts, I wish to be crowned with success during 2024 and with the support of the Constitutional Courts present here today.

Their stated goal towards the advancement of cooperation in the context of the constitutional justice, loses its meaning if in the relevant decision-making forums the arguments of the minority regarding the state identity of Kosovo prevail and which would have been concluded finally in 2010 - with the Opinion of the International Court of Justice regarding the compatibility with international law of Kosovo's declaration of independence.

And this leads me to the second purpose of this conference - which emphasizes the role that the Constitutional Courts have in protecting and advancing the values of liberal democracy... as the only system that ensures that individual freedom is meaningful ...as the only system through which peace is secured and maintained.

In a world order characterized by conditional sovereignties and already troubled by numerous developments, including those related to (i) the fight against pandemics; (ii) adaptation to the rapid increase in the use of information technology and artificial intelligence; (iii) populist models of governance on the rise; and (iv) to the unprecedented aggression in Ukraine - the common European heritage can only be protected and cultivated through a commitment to interstate solidarity and deep cooperation.

Constitutional Courts - as guardians of Constitutions - occupy a central place in addressing the challenges of this century. Exchanging experiences enables us to advance the tradition of constitutional justice - counterbalancing any force and occurrence that threatens to undermine our common values - freedom, peace and democracy.

In view of the challenges faced by constitutional justice and those areas of law that constitute the essence of maintaining the right balance between the decision-making of public authorities and the respective influence on fundamental rights and freedoms, we have chosen that throughout this conference, we focus on the exercise of abstract and concrete control of constitutionality, including through cooperation with supranational courts, organized in three panels, which will be presided over by judges of the Constitutional Court, namely judges Selvete Gërxaliu-Krasniqi, Remzije Istrefi - Peci and Nexhmi Rexhepi - having the opportunity to exchange experiences in the service of advancing our practices and deepening the synergies in the context of constitutional justice.

Dear friends,

In this room today we have here present some of the brightest minds of constitutional justice in the world. The geographical space that the participants today reflect enables us to create a comprehensive map of the achievements, challenges and innovations of the Constitutional Courts from around the world.

Solidarity and partnership between the Constitutional Courts is inspiring. The latter also elevates our Court. Moreover, it enables us that in the beautiful capital of Prishtina - to navigate together through the wonders that the constitutional justice holds.

Expressing once more the deep gratitude for your presence and with unrelenting passion and curiosity to listen to today's discussions, I hereby open the conference and its proceedings.

Thank you for your attention!

Allocution de bienvenue de Mme Gresa Caka-Nimani, Présidente de la Cour Constitutionnelle de la République du Kosovo

Chères délégations des Cours Constitutionnelles et Suprêmes du monde entier ;
Chers dirigeants et représentants des institutions de la République du Kosovo ;
Chers Ambassadeurs et représentants des institutions internationales ;
Juges, procureurs, avocats, doyens et professeurs universitaires et membres de la société civile

Chers participants,

Mesdames et Messieurs,

Bienvenue à la Conférence Internationale organisée à l'occasion du quatorzième anniversaire de la création de la Cour Constitutionnelle de la République du Kosovo.

À l›occasion de cet anniversaire, la Cour a choisi de concentrer la conférence internationale d›aujourd›hui sur le rôle des Cours Constitutionnelles dans la protection et la promotion des valeurs fondamentales de la démocratie, de l›État de droit et des droits et libertés fondamentaux. Et ceci à deux fins.

Tout d'abord pour souligner l'importance de la coopération des Cours Constitutionnelles et le rôle essentiel des Cours Supranationales, telles que la Cour Européenne des Droits de l'Homme - dans le soutien de la justice constitutionnelle dans les démocraties ayant une tradition moins consolidée, ainsi que l'importance de créer un système uniforme de protection des valeurs et des droits universels sur le continent européen.

Notre Cour Constitutionnelle – la plus jeune sur notre continent – reflète un bon exemple de cette coopération.

Dans ce contexte, je rappelle que la construction progressive de la justice constitutionnelle au Kosovo ne s'est pas faite sans difficultés. On devrait abordé ces faits dans le contexte historique et politique de la création et de l' édification de l'État du Kosovo, ainsi que dans le contexte de l'exercice de la fonction constitutionnelle d'interprétation d'une nouvelle Constitution, par une Cour Constitutionnelle qui n'avait pas l'avantage et/ou la facilité de tirer profit de la richesse d'une tradition antérieure de justice constitutionnelle.

L'année 2008 marque un tournant historique pour la République du Kosovo – l'adoption d'un nouvel ordre constitutionnel fondamentalement différent des trois ordres constitutionnels précédents. Par conséquent, la création de la justice constitutionnelle dans la République du Kosovo n'a fait aucune référence à la tradition constitutionnelle du passé mais s'est tournée vers l'avenir - en étroite coopération avec les Cours Constitutionnelles, la Cour Européenne des Droits de l'Homme et la Commission de Venise, reflétant ainsi, dans ses décisions, le dénominateur commun des valeurs que comprennent la justice constitutionnelle européenne et la pratique judiciaire dans l'interprétation de la Convention Européenne des Droits de l'Homme.

Une telle approche incluse dans la pratique judiciaire de notre Cour souligne l'importance du partenariat entre les Cours Constitutionnelles. De plus, c'est aussi un argument suffisant pour que la Cour Constitutionnelle du Kosovo ait sa place méritée parmi les Cours Constitutionnelles membres de la Conférence Européenne et de l'Association Francophone des Cours Constitutionnelles. Je souhaite que les tentatives répétées de notre Cour pour rejoindre ces deux forums de Cours Constitutionnelles soient couronnées de succès en 2024 - avec également le soutien des Cours Constitutionnelles présentes ici aujourd'hui.

Leur but clair de faire progresser la coopération dans le contexte de la justice constitutionnelle perd son sens si dans les instances décisionnelles pertinentes les arguments de la minorité concernant l'identité étatique du Kosovo et qui auraient dû être définitivement clos en 2010 - avec l' Avis de la Cour Internationale de Justice concernant la compatibilité de la Déclaration d'indépendance du Kosovo avec le Droit international - l'emportent.

Et cela me conduit au deuxième objectif de cette conférence - qui met l'accent sur le rôle que jouent les Cours Constitutionnelles dans la protection et la promotion des valeurs de la démocratie libérale ...comme seul système qui garantit que la liberté individuelle ait un sens ... comme seul système qui permet de garantir et de maintenir la paix.

Dans un ordre mondial caractérisé par des souverainetés conditionnelles et déjà troublé par de nombreux développements, dont ceux liés (i) à la lutte contre les pandémies ; (ii) à l'adaptation à l'augmentation rapide de l'utilisation des technologies de l'information et de l'intelligence artificielle, (iii) à la montée en puissance des modèles de gouvernement populistes ; (iv) à l'agression sans précédent en Ukraine - le patrimoine européen commun ne peut être protégé et conservé que par un engagement en faveur d'une solidarité et d'une coopération interétatiques profondes.

Les Cours Constitutionnelles – en tant que gardiennes des Constitutions – occupent une place centrale pour relever les défis de ce siècle. L'échange d'expériences nous permet de faire progresser la tradition de la justice constitutionnelle, en contrebalançant toute force et tout phénomène qui menace de porter atteinte à nos valeurs communes - la liberté, la paix et la démocratie.

Compte tenu des défis auxquels sont confrontés la justice constitutionnelle et les domaines de la justice, et qui constituent l'essence du maintien d'un juste équilibre entre la prise de décision des autorités publiques et leur impact respectif sur les droits et libertés fondamentaux, nous avons choisi de nous concentrer tout au long de ce colloque sur l'exercice d'un contrôle abstrait et concret de la constitutionnalité, notamment par la coopération avec les tribunaux à caractère supranational, organisé en trois panels qui seront dirigés par des juges de la Cour Constitutionnelle, à savoir les juges Selvete Gërxhaliu-Krasniqi, Remzije Istrefi-Peci et Nexhmi Rexhepi - avec l'opportunité d'échanger des expériences au service du développement de nos pratiques et de l'approfondissement des synergies dans le contexte de la justice constitutionnelle.

Chers amis,

Aujourd'hui, dans cette salle, sont présents certains des esprits les plus brillants de la justice constitutionnelle mondiale. L'espace géographique que reflètent les participants aujourd'hui nous permet de créer un aperçu général des réalisations, des défis et des innovations des Cours Constitutionnelles du monde entier.

La solidarité et le partenariat entre les Cours constitutionnelles nous inspirent. Cela exalte également notre Cour. De plus, cela nous permet de naviguer ensemble dans la belle capitale de Prishtina - à travers les merveilles que consacre la justice constitutionnelle.

Pour conclure, avec une profonde gratitude pour votre présence, curieuse d' écouter avec passion les discussions d'aujourd'hui, je déclare ouverts la conférence et ses travaux.

Merci pour votre attention!

Contribution by Mr. Zühtü Arslan, President of the Constitutional Court of Türkiye

Constitutional Court of the Republic of Türkiye

CONTRIBUTION BY MR. ZÜHTÜ ARSLAN, PRESIDENT OF THE CONSTITUTIONAL COURT OF TÜRKIYE

Honourable President of the Constitutional Court of Kosovo,

Distinguished Presidents and Justices,

Ladies and Gentlemen,

It is a great pleasure to be here and to address such eminent participants. I would like to thank the President Gresa Caka-Nimani for kindly inviting us to this well-organised international conference.

I would also like to congratulate the 14th anniversary of the Constitutional Court of Kosovo.

In my brief speech I shall talk about the role of the Constitutional Court of Türkiye (the Court) in protecting and strengthening the value of the rule of law through its review of presidential decrees.

First of all, let me start by recalling a simple fact as to the nature of constitutions. They are the basic documents that aim to guarantee, among others, the principle of the rule of law. This constitutional principle is generally defined as "*the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power*".[1]

Article 2 of the Turkish Constitution clearly stipulates that the Republic of Türkiye is a democratic state governed by the rule of law. Therefore, it wouldn't be wrong to say that the rule of

[1] A.V.Dicey, *Introduction to the Study of the Law of the Constitution* (1885), (Indianapolis: Liberty Fund, 1982), p. 120.

law is the distinctive characteristic of the constitutional order.

In this regard, the Constitutional Court has frequently invoked the principle of the rule of law as a yardstick to control the constitutionality of laws and presidential decrees. The Court has regarded the rule of law as "*a principle that is to be taken into consideration in the interpretation and application of all provisions of the Constitution*".[2]

Distinguished Participants,

The Turkish Constitutional Court was established in 1962, and its powers were greatly expanded by the constitutional amendments of 2010 and 2017. The former amendment introduced the individual application, otherwise known as the constitutional complaint mechanism, while the latter amendment replaced the parliamentary system with the presidential government. The Constitutional amendment of 2017 granted the President of the Republic the authority to directly issue "*presidential decrees*" on certain matters related to the executive power.

It is safe to argue that the individual application system generated a paradigm shift in constitutional jurisdiction of Türkiye, which has clear implications for the task of norm review including the constitutionality review of presidential decrees.

With the introduction of the individual application mechanism, the Court has adopted a rights-based legal paradigm which attaches certain priorities to the protection of fundamental rights and freedoms *vis-a-vis* the other social and political interests.

In its several judgments, the Court has declared that the rights-based paradigm should prevail over constitutional jurisdiction. For the Court, the constitutional provisions "*may fully and properly fulfil their functions only when they are interpreted through a rights-based approach.*" Therefore, the public authorities can and indeed must "*interpret constitutional provisions in favour of freedoms*".[3]

On the other hand, constitutional amendments enacted in 2017 granted the Constitutional Court the power to review presidential decrees. With this competence, the Court has become the "*negative rule maker*" in the field of executive in a similar vein to its role as "*the negative legislator*" with respect to the laws passed by the Parliament.

Over the past three years, the Constitutional Court has established the framework and the method for the judicial review of presidential decrees. Unlike the laws, the subject matters to be regulated through presidential decrees are delimited by the Constitution. These limitations, which are imposed on the competence *ratione materiae*, are laid down in the first four

[2] *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 50; *Cihangir Akyol* [Plenary], no. 2021/33759, 23 February 2023, § 46).

[3] *Ömer Faruk Gergerlioğlu* [Plenary], no. 2019/10634, 1 July 2021, § 50; and *Ali Kuş* [Plenary], no. 2017/27822, 10 February 2022, § 50

sentences of paragraph 17 of Article 104 of the Constitution.

Again, unlike the laws, presidential decrees are subject to review by the Court in two separate stages. At the first stage, the Court reviews the competence *ratione materiae* of the presidential decree in question. If the Court finds no violation of limitation clauses, it examines whether the content or substance of the presidential decree is compatible with the Constitution.[4]

Ladies and Gentlemen,

Let me briefly address four constitutional limitations imposed on presidential decrees. First of all, the President may issue presidential decrees *on the matters regarding executive power*. In other words, the matters falling outside the realm of the executive power shall not be regulated by the President. The Court, for instance, annulled presidential decrees that amended the laws passed by the Parliament, simply because amendment of a statutory provision entailed the exercise of legislative power.[5]

Secondly, the Constitution creates a kind of *"forbidden zone"* for presidential decrees. Accordingly, the constitutional rights and liberties, such as the right to property, the right to privacy, and the protection of personal data, fall within the *"forbidden zone"* that cannot be regulated by presidential decrees. In this regard, the Court reviewed the constitutionality of a provision which granted the Financial Crimes Investigation Board (MASAK) *"the power to request every kind of information and document"*. The incumbent provision was declared unconstitutional on the grounds that it interfered with the right to protect personal data safeguarded by Article 20 of the Constitution.[6]

Thirdly, the President may not issue presidential decrees on the matters which are *prescribed in the Constitution to be regulated exclusively by law*. To illustrate, the Court annulled a number of presidential decrees concerning the appointment, qualifications and personal rights of the public officials, which must be regulated by law in accordance with Article 128 of the Constitution.[7]

Finally, the fourth sentence of the paragraph 17 provides that no presidential decree may be issued concerning the *matters which have been explicitly regulated by law*. This entails that the Constitutional Court shall declare any provision of a presidential decree as unconstitutional, if its subject matter is already regulated by an act of Parliament.[8]

The second stage is for the Constitutional Court to review the constitutionality of the contents of presidential decrees. In its substantial judicial

[4] See the Court's decision, no. E. 2019/31, K.2020/5, 23 January 2020, §§ 8-13.

[5] See the Court's decision, no. E.2018/155, K.2020/27, 11 June 2020, § 23.

[6] See the Court's decision, no. E.2019/96, K. 2022/17, 24 February 2022, § 74.

[7] See the Court's decision, no. E.2022/36, K.2023/84, 4 May 2023, § 28

[8] See the Court's decision, no. E.2021/99, K.2022/119, 13 October 2022, §§ 21-22; no. E.2020/89, K.2023/85, 4 May 2023, §§ 13-14.

review, the Court has predominantly invoked Article 2 of the Constitution and referred to its well-established definition of the rule of law. According to the Court, the rule of law requires a state that respects human rights, ensures the supremacy of the law on all state organs, deems itself bound by the Constitution and the laws and is subject to judicial review.[9]

The Court has underlined two important elements of the rule, namely the principles of legal certainty and of the legal security. The principle of legal certainty requires that the legal regulations must be absolutely clear, comprehensible and applicable to both individuals and public authorities. This clarity is necessary to avoid arbitrary state actions.[10]

Likewise, the principle of legal security requires public authorities to act in a foreseeable manner. It prevents the state from enacting inconsistent and contradictory legal provisions. The Constitutional Court annulled the presidential decrees that were contrary to the principles of legal certainty and security.[11]

To sum up, the Constitutional Court upholds the rule of law through constitutional review of presidential decrees. The Court primarily controls the limitations imposed on the competence of the President to issue decrees, and then substantially examines whether they are in compliance with the requirements of the rule of law.

Dear Participants,

In concluding my remarks, I must note that by upholding the rule of law the Constitutional Court has significantly contributed to furthering the public confidence towards law and judiciary as well as strengthening the legitimacy of public institutions.

These are, in fact, the main functions that are expected from the constitutional courts. Indeed, the "Bali Declaration" adopted last year at the 5th Congress of the World Conference on Constitutional Justice made it clear that *"by guaranteeing the respect for the rule of law, the constitutional court furthers the trust individuals place in the virtues of the law and the courts". It also emphasised that by "ensuring that state actors respect the Constitution, the constitutional court helps to strengthen the legitimacy of institutions".*[12]

We all know that a well-ordered constitutional democracy is inconceivable without public confidence in law and courts as well as a strong legitimacy of the state institutions. Therefore, the constitutional courts, with their task of maintaining the rule of law, have become almost indispensable for today's constitutional democracies.

Let me end my speech by wishing that our courts will continue to effectively protect the basic constitutional values, most notably human rights, democracy and the rule of law.

Thank you for your attention.

[9] See the Court's decision, no.E.2019/31, K.2020/5, 23 January 2020, § 37; and also, no. E.2022/113, K.2023/112, 22 June 2023, § 27.

[10] See the Court's decision, E.2022/113, K.2023/112, 22 June 2023, § 28; and also, no. E.2020/29, K.2022/155, 13 December 2022, § 38.

[11] See, for instance, the Court's decision, no. E.2019/111, K.2023/63, 05 April 2023, § 151.

[12] For the text of "Bali Declaration" see 2022_10_06_WCCJ5_Bali_Communique-E.pdf (mkri.id). Retrieved on 18th October 2023.

Fjala e znj. Holta Zaçaj, Kryetare e Gjykatës Kushtetuese të Republikës së Shqipërisë[1]

GJYKATA KUSHTETUESE DHE POZICIONI I SAJ SI LIGJVËNËS NEGATIV

Të nderuar kolegë e të ftuar,

Më lejoni fillimisht që edhe në emër të Gjykatës Kushtetuese të Shqipërisë të përgëzoj Kryetaren dhe Gjyqtaret e Gjykatës Kushtetuese të Kosovës për këtë organizim të shkëlqyer, si dhe të shpreh kënaqësinë dhe vlerësimin për marrëdhëniet e shkëlqyera dhe bashkëpunimin e veçante mes dy gjykatave tona.

Roli i Gjykatave Kushtetuese

Roli më i rëndësishëm dhe i përbashkët i Gjykatave Kushtetuese është zhvilluar në lidhje me legjislacionin, gjatë kontrollit abstrakt të pajtueshmërisë së tij me normat dhe parimet kushtetuese. Pushteti për të eliminuar nga rendi juridik dispozitat ligjore që nuk janë të pajtueshme me Kushtetutën përcakton edhe pozicionin e kësaj gjykate si ligjvënës negativ (në kuptimin kelsenian) duke i njohur ligjvënësit pozitiv (Parlamentit) detyrat e tjera që kanë të bëjnë me vënien në zbatim të parimeve kushtetuese, duke pajtuar legjislacionin me to e duke vepruar në përputhje me vendimin e Gjykatës.

Megjithatë, edhe për shkak të rolit në rritje të gjykatave kushtetuese jo vetëm si garante të supremacisë së Kushtetutës, por si interpretueset përfundimtare të normës kushtetues përmes vendimeve që kanë efekte detyruese për gjykatat e zakonshme, institucionet publike dhe individët, është fakt se binomi *jokushtetutshmëri-pavlefshmëri/nulitet* që konfirmoi veprimtarinë fillestare si "ligjvënës negativ" është kapërcyer. Gjatë kësaj periudhe kompetencat e gjykatave kushtetuese janë zgjeruar në mënyrë progresive, duke marrë një rol më aktiv në interpretimin e

[1] *Contribution as originally delivered in Albanian.*

Kushtetutës, dhe të vetë ligjeve të miratuara në bazë dhe zbatim të kësaj të fundit, në mënyrë që jo vetëm t`i shfuqizojë ose moszbatojë ato kur janë jokushtetuese, por me qëllimin e mbrojtjes së veprimtarisë së ligjvënësit dhe të akteve normative të miratuara prej tij, t`i interpretojë ato, nëse është e mundur, duke i dhënë kuptimin që është në harmoni me Kushtetutën.

Ligjvënësi si interpretues i normës kushtetuese

Bazuar në parimin e prezumimit të kushtetutshmërisë së ligjit, në jurisprudencën e saj Gjykata ka mbajtur qëndrimin ne jurisprudencën e saj se ajo nuk ka autoritet të kontrollojë synimet dhe drejtësinë e zgjidhjeve të aplikuara nga ana e ligjvënësit. Kjo do të thotë se, lidhur me jokushtetutshmërinë e pretenduar duhet të parashtrohen argumente bindëse për t'i dhënë mundësi asaj që të vlerësojë nëse zgjidhjet ligjore të aplikuara shkelin normat dhe vlerat kushtetuese. Kuvendi, si organi më i lartë përfaqësues dhe mbartës i sovranitetit të popullit, është padyshim organi qendror dhe më i rëndësishëm i pushtetit shtetëror dhe në ushtrimin e këtij funksioni ai shfaqet edhe si interpretues i normës kushtetuese pasi në kuadër të zbatimit të politikave të caktuara në procesin e hartimit dhe miratimit të ligjeve duhet të ketë parasysh se ato nuk duhet të vijnë në kundërshtim me dispozitat e Kushtetutës.[2]

Gjykata në rolin kontrollues duke ruajtur funksionin si ligjvënës negativ

Gjykata Kushtetuese, në mënyrë të vazhdueshme, ka theksuar në jurisprudencën e saj pozicionin si ligjvënës negativ.

P.sh në çështjen me objekt interpretimin e shprehjes "*akte e sjellje që diskreditojnë rëndë pozitën dhe figurën*" në disa nene të Kushtetutës, Gjykata është shprehur se për interpretimin e këtyre normave ajo nuk merr përsipër të kryejë rolin e legjislatorit pozitiv, duke parashikuar një për një të gjitha rastet që mund të përfshihen në këto shkaqe kushtetuese, sepse do të ishte e pamundur një gjë e tillë ndërkohë që Kushtetuta, ligjet, apo edhe vendimet gjyqësore nuk mund të kodifikojnë me saktësi akte e sjellje të tilla. Në kushtet kur në Kushtetutë, apo edhe në ligjet e tjera elementet thelbësore të një procedure nuk gjejnë rregullim të hollësishëm, ato nuk mund të plotësohen nëpërmjet vendimit të saj interpretues, pasi interpretimi si funksion dhe si metodë, ka vend për një normë ekzistuese kur ka paqartësi në kuptimin e saj dhe jo për të plotësuar boshllëkun, sepse përndryshe Gjykata Kushtetuese do të vihej në pozicionin e gabuar të krijuesit të normës juridike, funksion i cili i përket organit ligjvënës.[3]

Në vitin 2010, Presidenti i Republikës, në përmbushje të kompetencës për emërimin e gjyqtarëve i dërgoi Kuvendit dekretet për plotësimin e disa vendeve vakante. Kuvendi, duke pretenduar paqartësi për çështje si kriteret që duhet të plotësojnë kandidaturat, iu

[2] Vendimi nr. 29, datë 31.05.2010.

[3] Vendimi nr. 75, datë 19.04.2002.

drejtua juridiksionit kushtetues me kërkesë për interpretimin e disa normave kushtetuese. Gjykata në këtë rast ritheksoi rolin e saj si ligjvënës negativ, duke vlerësuar se Presidenti dhe Kuvendi, gjatë ushtrimit të kompetencave të tyre kushtetuese janë interpretuesit e parë të normës kushtetuese, çka do të thotë se u takon atyre dhe jo Gjykatës Kushtetuese përcaktimi i kritereve që duhet të plotësojë një kandidaturë, pasi *a contrario*, kjo Gjykatë do të ndërhynte në ushtrimin e kompetencave kushtetuese të secilit prej këtyre organeve, duke cenuar parimin e ndarjes dhe balancimit të pushteteve.[4]

Zhvillimi dhe ridimensionimi i rolit të Gjykatës përmes interpretimit pajtues

Megjithatë Gjykatat Kushtetuese me kohën i janë larguar modelit kelzenian duke zhvilluar mjete dhe instrumente juridike kushtetuese që shkojnë përtej modelit të ligjvënësit negativ dhe i lejojnë Gjykatës, në një masë të konsiderueshme, të vendosë rregulla që mbyllin drejtpërsëdrejti boshllëqet e krijuara nga vendimet e saj për shfuqizimin e dispozitave ligjore.

Ideja për ta ruajtur ligjin i ka krijuar mundësinë Gjykatës Kushtetuese të shmangë shfuqizimin e tij për të mos krijuar boshllëqe ligjore, duke përzgjedhur një interpretim që i jep ligjit një kuptim të pajtueshëm me Kushtetutën. Kjo ka çuar gjykatat kushtetuese të vlerësojnë se kur një ligj mund të interpretohet në përputhje me Kushtetutën, duhen bërë të gjitha përpjekjet për të ruajtur vlefshmërinë e tij dhe duke zgjedhur këtë mënyrë interpretimi me qëllim që të rrëzojë çdo qëndrim tjetër që mund të çojë në deklarimin jokushtetues të ligjit.

E ndikuar nga zhvillimet jurisprudenciale të gjykatave kushtetuese të vendeve të tjera evropiane, Gjykata jonë Kushtetuese gjatë viteve të fundit ka aplikuar gjerësisht metodën e interpretimit pajtues të ligjit të kundërshtuar me Kushtetutën, duke vlerësuar se ky interpretim është i mundur kur një ligj apo dispozitë ligjore mund të interpretohet në më shumë se një mënyrë, njëra nga të cilat është në pajtim me Kushtetutën.[5]:

> **Gjykate është shprehur p.sh se *"Metoda e interpretimit pajtues kërkon efektet kushtetuese të rezultateve të ndryshme dhe përzgjedh rezultatin që është në pajtim me vlerat kushtetuese. Bazuar në këtë metodë interpretimi, Gjykata ka arritur në përfundimin se një ligj i kundërshtuar është kushtetues, me kusht që normat e tij të interpretohen në atë mënyrë siç ka bërë Gjykata në vendimin e saj".***[6]

Në vlerësimin e Gjykatës *" një rregullim i pasaktë i normës ligjore, që i lë shteg zbatuesit t'i japë asaj kuptime të ndryshme dhe që sjell pasoja, nuk shkon në përputhje me qëllimin,*

[4] Vendimi nr. 24, datë 09.06.2011.

[5] Po aty.

[6] Vendimet nr. 29, dat***ë 31.05.2010; nr.*** 30, datë 17.06.2010; nr. 33, datë 24.06.2010; nr. 5 datë 16.02.2012; nr.2, datë 18.01.2017; nr. 34 datë 10.04.2017.

stabilitetin, besueshmërinë dhe efektivitetin që synon vetë norma".[7]

Gjykata si konstatuese e ometimit dhe jo si plotësuese e tij

Një rol të rëndësishëm ka Gjykata Kushtetuese si në drejtim të ometimit legjislativ/normativ, që shkaktohet nga mungesa fillestare e parashikimit legjislativ, ashtu edhe atij juridik, ose të shkaktuar për shkak të shfuqizimit të ligjit nga Gjykata ose vetë ligjvënësi.

Gjykata Kushtetuese, në disa raste, edhe kur ka vendosur të shfuqizojë dispozitën ligjore/pjesë të saj, në përfundim ka theksuar edhe se ky shfuqizim nuk krijon boshllëk ligjor, ndaj nuk lind nevoja që organi ligjvënës të bëjë ndonjë plotësim.[8] Po kështu, një mjet tjetër që përdor Gjykata është shtyrja në kohë e efekteve të vendimit, edhe pse kjo lejon vazhdimin e efekteve juridike të ligjit ekzistues, për t`i dhënë kohë ligjvënësit që të reagojë dhe për të evituar cenimin e të drejtave kushtetuese për shkak të boshllëkut ligjor[9].

Në lidhje me boshllëkun e shkaktuar nga mungesa e veprimit të ligjvënësit, ligji organik i gjykatës[10] në përputhje me nenin 132 të Kushtetutës, parashikon se kur gjatë shqyrtimit të çështjes konstatohet se ka boshllëk ligjor nga i cili kanë ardhur pasoja negative në të drejtat dhe liritë themelore të individit, Gjykata, veç të tjerash, vendos detyrimin e ligjvënësit për të plotësuar kuadrin ligjor brenda një afati të caktuar. Në këtë rast kompetencë e Gjykatës nuk është formulimi pozitiv i normës që mungon, por vetëm konstatimi se ometimi ekziston dhe ka pasoja kushtetuese, pra se mosveprimi i vetë ligjvënësit që e ka shkaktuar atë është jokushtetues.

Në çështjen e vënë në lëvizje nga një organizatë, për konstatimin e cenimit të së drejtës kushtetuese të votës së emigrantëve në zgjedhjet e përgjithshme të vitit 2021, Gjykata konstatoi se për shkak të mosmiratimit të akteve nënligjore nga KQZ-ja, ditën e zgjedhjeve u kufizua e drejta aktive e votës për shqiptarët me banim jashtë territorit të Shqipërisë. Për rrjedhojë, e drejta kushtetuese e votës e kësaj kategorie për shkak të boshllëkut ligjor mbeti thjesht një parashikim deklarativ, i pazbatueshëm efektivisht në praktikë, duke mbetur në thelbin e saj iluzive.[11]

Shembull tjetër vjen në rastin e ligjit për procesin e trajtimit të pronave[12], një histori kjo që ë ka shoqëruar Shqipërinë që prej ndryshimit të regjimit, dhe ku janë prodhuar një sërë aktesh ligjore që kanë pësuar ndryshime të vazhdueshme në kohë si pasojë edhe e ndërhyrjes së Gjykatës Kushtetuese ashtu edhe të GJED-NJ-së, Gjykata konstatoi kufizimin e së drejtës së pronës private edhe për shkak të mungesës së rregullimit ligjor për situatën e ndryshimit që ka pësuar zëri kadastral i pronës ndër vite. Nga ky boshllëk ligjor kanë ardhur pasoja negative në të drejtën e pronës, duke i mohuar kompensimin e drejtë kësaj kategorie subjektesh.

[7] Vendimi nr. 43, datë 26.06.2015.

[8] Vendimi nr. 15, datë 17.04.2003.

[9] Vendimet nr. 1, date 12.01.2011; nr. 3, datë 05.02.1010; nr. 12, datë 14.04.2010.

[10] Neni 76, pika 5, i ligjit nr. 8577, datë 10.02.2000 "Për organizimin dhe funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë".

[11] Vendimi nr. 38, datë 09.12.2022.

[12] Vendimi nr. 4, datë 15.02.2021.

Për rrjedhojë, në të dyja këto raste, Gjykata i la kohë ligjvënësit për të miratuar rregullat e reja ligjore në përputhje me vendimin e saj.

Në konkluzion duhet thënë se kur ushtron kontroll kushtetutshmërie Gjykata nuk kufizohet domosdoshmërish tek norma ligjore ekzistuese, por ajo mund të ushtrojë ndikim juridik në krijimin dhe në përmbajtjen e normave ligjore të ardhshme. Megjithatë ushtrimi kësaj veprimtarie kërkon veprimin dhe zgjidhjen nga organi kompetent përmes miratimit, nëse është nevoja e strategjive për të adresuar çështjet që ka evidentuar Gjykata Kushtetuese.

Edhe pse këto teknika të ndërhyrjes nuk synojnë të ndërhyjnë në prerogativat e ligjvënësit, instrumentet në dispozicion të gjykatave kushtetuese dhe zgjedhja për ta karakterizuar Kushtetutën si një dokument të parimeve dhe vlerave që hap një gamë të gjerë mundësish në mbrojtjen e të drejtave të lirive themelore duket sikur e ka superuar konceptin e gjykatës kushtetuese si ligjvënës negativ.

Faleminderit!

Contribution by Mr. Aldis Laviņš, President of the Constitutional Court of the Republic of Latvia

THE ROLE OF CONSTITUTIONAL COURTS IN RECONCILING THE APPLICATION OF EUROPEAN UNION AND INTERNATIONAL LAW WITH THE CONSTITUTIONAL IDENTITY

Distinguished Colleagues!

On behalf of the Latvian Constitutional Court, I am honoured to congratulate your highly respected Court on anniversary of the establishment!

I would like to start my short presentation by empathising that at the end of last year, Kosovo submitted an application for the European Union membership. This is a very inspiring milestone for us, because the Constitutional Court of Latvia is strongly supporting the path of Kosovo to the European Union. We are committed to intensify our mutual dialogue to foster integration of the legal system of Kosovo in a united European legal space.

Therefore, today, in the session on the role of Constitutional Courts in strengthening the values of democracy and rule of law, I would like to focus on how to protect these values in practice, being a part of a united European family. The subjects of abstract constitutional control submit an application to the Constitutional Court to safeguard public interests, and that is why courts often examine so-called "values cases" within the framework of such a mechanism.

It is well known that European Union is based on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. In a similar way, the European Court of Human Rights has referred to "values of

equality, diversity and pluralism" that underly the Convention system. It appears safe to say, that the values underlying both European systems – the European Union and the Council of Europe – are similar, if not identical.

At the same time the European Court of Human Rights accepts national particularities and allows for margin of appreciation in complying with the Convention rights, and the European Union even protects national identities in Article 4(2) of the Treaty on European Union. As the Priest at St. Teresa's Cathedral said yesterday, "If roots are denied, we are no one". That's why European common values also emphasize the importance of Member State's origins and heritage in shaping their identity.

It is self-evident that there should not exist a conflict between the shared European values and profound constitutional identities of Member States. In the last decade, there have been extensive discussions in Latvia about the core of the Constitution. Thus, it is recognized in Latvia that there are general constitutional values, such as the rule of law, protection of the national language, protection of the fundamental rights among others. These values allow the Republic of Latvia to exist as a nation. Thus, not everything provided under the Constitution would automatically or instantly become the national constitutional identity. I will not elaborate on this issue due to time limit, instead I will provide you with a recent example how to reconcile constitutional identities of Member States with the shared European values!

In a recent preliminary procedure (so-called *Cilēvičs e.a.* case) the Latvian Constitutional court asked the European Court of Justice, whether the protection of the State language, which in Latvia is understood as a manifestation of national identity, may justify restriction on the freedom of establishment within the European Union Member States. The case concerned a very strict limitation upon the higher education institutions to offer courses of study in foreign languages. In the application, submitted by twenty members of the Parliament, it was held that the contested provisions restrict the fundamental rights to private property – as they entail restrictions on the freedom of establishment of citizens and companies originating from Member States of the European Union. Contested provisions make it more difficult for certain undertakings established abroad to relocate to Latvia or to open some other place of business in Latvia. Applicants correctly point out, in so far as educational courses have to be provided (almost exclusively) in Latvian, many foreign higher education institutions will be unable to use a (probably significant) part of their administrative and teaching staff in Latvia.

The Court of Justice ruled, that European Union law must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection

of its national identity, and provided that it is necessary and proportionate to the protection of the pursued aim of national identity.

Thus, the Court of Justice in principle confirmed that the protection of the national language may be based on a system of protection which is different from that adopted by other Member States. Taking this into account, the Constitutional Court concluded that the benefit of Latvian society from the restriction of the fundamental rights of foreign entrepreneur outweighs the adverse consequences that private higher education institutions incur due to the restriction of their fundamental right, namely, the right to conduct commercial activity.

Thus, we are allowed to be assured that in their absolute majority the value cases allow to conciliate the national constitutional identity with the supra-national obligations.

Dear Colleagues!

Constitutional identities and shared European values are the “immutable cores” of the three legal systems, which unite us in protecting Democracy and Rule of Law, not divide us!

Contribution by Mr. Georg Lienbacher, Judge of the Constitutional Court of Austria

vfgh
Verfassungsgerichtshof Österreich

THE ROLE OF CONSTITUTIONAL COURTS IN STRENGTHENING THE VALUES OF DEMOCRACY AND RULE OF LAW THROUGH ABSTRACT CONTROL OF CONSTITUTIONALITY OF NORMS

I. The current events and disputes in various countries in Europe and around the world are calling to our attention the fundamental pillars of our society with the utmost clarity. What is the position of the citizen in the polity and political community? And in which way has the power of state to be limited in respect of the individual? We have answered these questions by stating that freedom of the individual is in principle unlimited, while power of the state may only be excersised on basis of legal provisions that have come about in a democratically legitimised process. Therefore, any state intervention can ultimately be linked back to the will of the people as manifested in the law, which is conveyed in the law by the directly democratically legitimised parliament.

The free democratic constitutional state therefore consists of a democratically legitimised legal system, fundamental rights and freedoms, and a system of institutions for legal protection, primarily in the form of independent and impartial courts, which ensure compliance with the legal system both in the relationship between the state and its citizens and in the relationship between citizens themselves.

The democratic state under the rule of law is perfected in the constitutional state, which guarantees and safeguards the supremacy of the constitution and thus secures and stabilises the entire structure of the constitutional state.

Every state action must find its basis in the constitution and has to be in conformity with it. In particular this also means, that laws and statutes are reviewed on the basis of the constitution and, in case of contradicition, are annulled by a (Constitutional) Court. This is the only way to ensure a legal system free of contradictions, which will ultimately be accepted by the people.

II. The effectiveness and potency of the constitution depends on its enforcement. The acceptance of the constitution and thus the acceptance of the entire legal system is also related to its enforcement. In modern democratic constitutional states, enforcement of the constitution is ensured by specialised Constitutional Courts. It is the (supreme) "guardian of the constitution".

The concept of constitutional review by a specialized court was significantly developed by *Hans Kelsen* and first implemented by the Austrian Constitutional Court in 1920. In terms of the rule of law, *Kelsen* started from the fundamental consideration that constitutional disputes, i.e. disputes over the interpretation and application of the Constitution, are not only political but also legal conflicts. As legal conflicts, they can and must be decided by an independent and impartial court. Back then the idea that this also covered parliamentary acts, i.e. laws and statutes that were repealed by the Consitutional Court if they were unconstitutional, was revolutionary. This competence to anull laws and statutes in particular was monoplised at the onstitutional Court.

In this way, however, a Constitutional Court indirectly becomes a player in the political field and, passively, inevitably and unavoidably, a political actor, not because it acts politically itself, but because it effects political activity through its constitutional decisions. It is therefore a "borderline organ" between law and politics. The Constitutional Court must question the constitutionality of political concepts that have been passed into law. In the event of contradiction, it must repeal the laws and statutes.

The decisions of a Constitutional Court affect public life society and the structure of the state more directly and lastingly than the decisions of other courts, because they have general effects, above all in the proceedings for reviewing laws, statutes and ordinances, which often even have direct consequences for all people or affect the interaction of state bodies. For this reason, decisions of Constitutional Courts, especially those that abolish statutory laws, are often of eminent political importance, even if they "merely" involve the resolution of (constitutional) legal issues. This has become very clear in the recent decisions of the Austrian Constitutional Court on pandemic control measures, assisted suicide, the wearing of the Islamic headscarf or same sex marriage as examples. In addition, decisions relating to state organisation have this character. If I may again mention an Austrian example, the annulment of the 2016 federal presidential election caused a strong interest and stir.

III. As independent and impartial courts, Constitutional Courts resolve constitutional questions referred to them by interpreting and applying constitutional law. Although their de-

cisions may have major political impact, their activities remain jurisdiction. A law or statute that violates the constitution must be abolished by the Constitutional Courts as unconstitutional, regardless of considerations of political expediency. The supremacy of the Constitution is guaranteed and thus enforced.

On an abstract level, this seems trivial; in practice it remains a challenge. The constitution is more open to interpretation than any other legal provisions. As an example, I cite a sentence from the Austrian Federal Constitution: "All citizens are equal under the law." What has the jurisprudence of the Austrian Constitutional Court made of this? In its decision on assisted suicide, the Constitutional Court derived the fundamental right to free self-determination from the principle of equality in conjunction with the right to private life (Art. 8 ECHR) and the right to life (Art. 2 ECHR). This right to free self-determination includes both the right to decide how to live and the right to die with dignity. A prohibition under criminal law of any assistance in suicide, irrespective of specific circumstances, contradicts this right to free self-determination. The statutory provision in question was therefore repealed.

In its decision on the Islamic headscarf ban in elementary schools, the Austrian Constitutional Court derived the requirement of religious and ideological neutrality of the state from the principle of equality in conjunction with freedom of religion (Art. 9 ECHR). A legal rule that singels out a certain religious or ideological conviction by specifically privileging or discriminating against it, requires an objective justification with regards to the requirement of religious and ideological neutrality. No justification in respect of these principles could be identified for the ban on Islamic headscarves for schoolgirls at elementary school. The law was repealed.

The two decisions serve as an example of how the decisions of Constitutional Courts have on the one hand far-reaching political implications. On the other hand, Constitutional Courts are constantly forced to develop considerable legal or, better, constitutional innovation when applying constitutional standards of review. The fact that the Austrian constitutional system contains a fundamental right to free self-determination and a requirement of religious and ideological neutrality was, at least until these exemplary decisions, not commonly known among legal circles.

Generally speaking, Constitutional Courts are faced with the question of whether they should be more restrained in their jurisprudence, i.e. whether they should emphasize "judicial self-restraint", or whether they should practice "judicial activism". In the European Constitutional Court network, the answer to this question is to some extent taken out of the hands of the Constitutional Courts. Not least because of the "living instrument" approach of the ECtHR (European Court of Human Rights) in applying the ECHR (European Convention of Human Rights), the member states of the Council of Europe and thus many of the Constitutional Courts represented here today are called upon to understand and interpret fundamental rights in the light of current social conditions in a law developing manner.

IV. With the examples mentioned, I want to emphasise and underline that Constitutional Courts and thus judges of the Constitutional Court bear a very special responsibility for the polity and society.

The ideal judge of the Constitutional Court fulfills his or her responsible and challenging task of clarifying constitutional issues by maintaining a distance from party-political social or personal interests and by deciding without prejudice on the basis of the constitution. In abstract, this seems completely uncontroversial, but in practice it can be difficult. As judges of the Constitutional Court, we must try every day again to live up to this ideal. But that is not enough! We must also make it visible to the outside world that we are fulfilling this ideal. The great difficulty is not only to show the professional world that we are a court that decides in accordance with applicable (constitutional) law, we also have to explain this to the society. We are not to be categorised as political actors; we are judges who must decide constitutional disputes, irrespective of their political impact. Depending on the success of our efforts to communicate our judicial activities to the general public, acceptance of our activities will grow and we will be understood independently and separately from political activities by other supreme bodies in the state.

Acceptance in society is the greatest asset of Constitutional Courts and thus the greatest asset concerning the control of abstract legislation. Ultimately, this acceptance protects Constitutional Courts from interference by politicians who disagree with decisions of the Constituional Court.

From an Austrian perspective, I can report that we are confronted with constitutional political discussions at regular intervals, especially after attention-getting decisions. In these discussions, people sometimes consider how to "tame" the Constitutional Court. These discussions proceed comparatively innocuously. More recently, in response to politically unpleasant decisions, there has been a debate about publishing dissenting oppinions. Politicians intended to obtain knowledge of voting behaviour and the decision making process within the court, in order to break through the secrecy of deliberations and votes and to eliminate the uniform appearance of the Constitutional Court to the outside world. Yes, there have even been considerations to publish the voting behavior of the single judges. All this would significantly impair and fundamentally change the culture of deliberation that has existed for 103 years and thus would make the work of the Constitutional Court more difficult. This also endangers the constitutional control of abstract legislation since this is particularly central in such discussions.

In the past, as is so often the case after such political considerations, the public debate has shown, that society's acceptance of the Constitutional Court is very high. The political proposals have been heavily criticised in public. The propsed amendments were not well received and have only recently been dismissed. However, with a view to other European Constitutional Courts, such discussions do not always proceed in such an innocuous manner. We must note that the free democratic state under the rule of law is now being challenged in particular by restructuring of Constitutional Courts and by restrictions on competences in certain countries,

to an extent that we would have never thought possible in Europe.

V. It is not just a matter of constitutional jurisdiction, but of very fundamental issues:

If, in context of preliminary ruling proceedings at the ECJ, it has to be clarified as a preliminary question whether a national court has the status of a court at all, serious legal issues in regard of the rule of law are evident. Additionally, these issues jeopardises the control of abstract legislation. By trying to classify this in legal terms, we are dealing with a fundamental right, the right to the legal judge as down by law. On an European Union level, this right is derived from Article 47 section 2 of the CFR, the right to a tribunal previously established by law, and Article 6 section 1 of the ECHR. Of course, this also applies to all member states of the Council of Europe on basis of the ECtHR.

The ECJ and the ECtHR assume a violation of these provisions, when there is a flagrant violation of legal provisions governing the courts and if this violation fundamentally impairs the protective purpose of the right to a tribunal estabilshed by law. This is the case, when there is any appearance of arbitrariness or if there are circumstances that give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the court. Above all, the appearance that other state authorities exert undue influence on the composition and jurisdiction of the court violates Article 47 of the charter.

The before mentioned provisions of the CFR and the ECHR are violated by a court's decision, if there were flagrant errors in the appointment procedure of the deciding judges. As soon as the irregularity is of such gravity that it creates a real risk that other branches of the State could exercise undue discretion undermining the integrity of the outcome of the appointment process, such a violence will be assumed. Thus, the ECtHR has found a violation of the right to the judicial body by a decision of the Polish Constitutional Court. This decision involved a member who had been unlawfully appointed.

However, the fundamental requirements for judicial independence, which are derived directly from Art. 47 CFR and Art. 6 ECHR as well as from Art. 19 TEU, do not only focus on the appointment process. It is also decisive whether domestic law complies with EU law. To the extent that such an error affects the national appointment procedure, it also affects the specific decision, which thus becomes unlawful. This applies in particular to the procedure of abstract judicial review of statutes and laws. This protects aspects of the rule of law such as the independence of the judiciary and, above all, of constitutional jurisdiction, which always seem to come under particular pressure in current threats to the rule of law. This also gives special legitimacy to the repeal of law in the procedure of abstract judicial review of statutes and laws.

In Austria, these guarantees are known as an independent fundamental right to the lawful judge, which was introduced during the monarchy in 1867 to combat illiberal monarchical tendencies in the state system. In 1920, it was incorporated into the Federal Constitution.

VI. Given the many discussions on legal policy and also the increasing threats to constitutional jurisdiction, let me conclude with a thought that is important to me.

Constitutional Courts can contribute a lot to protect themselves from threats to the rule of law and thus to preserve their function for the free democratic rule of law and in particular for the abstract judicial review of statutes and laws. Firstly, I would like to return to the issue of acceptance. Broad acceptance in society is probably the largest capital of the Constitutional Courts against political interests to impair and restrict their work. Constitutional Courts must also acquire this capital. At the top of the list stands consistent and consequent jurisprudence that does not appear to be influenced by opinions among the population or political forces. We have to make it visible to the outside world that we are committed only to the constitution and that other influences will bounce off. This also means explaining the case law in a generally understandable way, at least in those cases that cause public stir or that cause particular political excitement. In Austria, for example, we have started to accompany such cases with press releases after the parties have been notified. In these press releases the result of the decision and the reasoning is explained in generally understandable language. Especially in the case of legislative repeals, this plays a significant role. This also has the effect of preventing the press from reporting incorrectly as of a result of not understanding the decision. We have learned that publishing all decisions anonymously is not enough to create transparency and understandability. More generally, we also have to explain to society what we do, how we are organised and how we make decisions.

In Austria, we also have introduced open house days and opened the Constitutional Court for interested members of the public. We try to give tours of the court to groups that show interest and explain what our job is. With the media presence in important cases and the thus visible places where the decisions are announced, the interest in being able to see the premises that are visible in the media in reality has increased significantly. We use this interest to provide as much information about us as possible. The visitors are interested!

In addition to such activities at a national level, I believe that it is highly necessary for Constitutional Courts to support each other and to cooperate in a supportive manner, especially when threats to the rule of law arise. Informal meetings on multilateral level, such as those that exist in certain areas, e.g. the six-member meeting between the ECtHR, the ECJ, the BVerfG (German Constotutional Court), the VfGH (Austrian Constitutional Court), the Liechtenstein StGH (Constitutional Court of Liechtenstein) and Swiss Federal Court every two years, which allow a trustful exchange. However, there are also formal associations on European and international level that offer a range of possibilities. From Austria's point of view, bilateral contacts in particular have become very important. We conduct such in large numbers. We have to use them to support each other and expand the possibilites. Last but not least, the legal protection mechanism of European Union law for Constitutional Courts of states belonging to the EU is also of major importance.

VII. I am not only a constitutional judge, but also a legal researcher. As a researcher, one is required throughout one's life to question everything critically. I ask you to forgive me for

not being able to put aside this critical attitude at this conference as well.

It is of high importance to me to support the idea of the constitutional jurisdiction and especially the abstract judicial review of statutes and laws of the Consitutinoal Courts. By doing so I want to contribute to the stability of the Constitutional Courts and thus also of the Kosovar Consititutional Court and a free democratic constitutional state as a whole. All the more I would like to thank you for the invitation and wish especially the Kosovar Constitutional Court that its contribution to the support and in the development of a free democratic constitutional state, especially in regard to the abstract judicial review of statutes and laws, is indispensable and remains indispensable.

Contrbituion by Mr. José Figueiredo Dias, Judge at the Constitutional Tribunal of Portugal

THE ROLE OF CONSTITUTIONAL COURTS IN STRENGTHENING THE VALUES OF DEMOCRACY AND THE RULE OF LAW THROUGH ABSTRACT CONTROL OF THE CONSTITUTIONALITY OF NORMS - AN OVERVIEW OF THE PORTUGUESE SYSTEM

My presentation is an overview of the Portuguese system from the perspective of the specific theme of our session. It is divided into five parts, focusing especially on the last one.

Part I. The Constitution of the Portuguese Republic of 1976

Portugal, unlike Kosovo, is an old country. It dates back to 1143, when our first king, D. Afonso Henriques, and Afonso VII of Leon and Castile (now Spain) signed the Treaty of Zamora, although papal recognition only arrived in 1179, with the bull *Manifestis Probatum*. However, although we are an old country, our current Constitution is quite recent, at least compared to those of many European countries.

After a 48-year dictatorship, a revolution established a democratic regime in Portugal on 25th April 1974 (the "Revolution of Carnations", as it is still called). One year later, following the first free elections in our country, a constituent assembly was elected with the mandate to draft a new democratic constitution, which came into force a year later, in 1976.

Part II. The Portuguese Constitutional Court

The first constitutional amendment took place six years later. At the time, there was the Council of the Revolution, a military institution, in which a body called the Constitutional Commission acted as the supreme judicial body in matters of constitutional review. The Constitutional Commission was extinguished with this amendment and the Constitutional Court was created, becoming responsible in the last instance for reviewing the constitutionality of laws in Portugal. The Court began its activity in April 1983, having celebrated this year its fortieth anniversary.

Part III. The democratic principle and the rule of law

I would now like to emphasize the democratic principle and the rule of law as part of the basic principles, or fundamental axes, of the Portuguese Constitution. There is an intrinsic and express constitutional connection between these two principles: the Constitution refers to a "democratic rule of law".

The democratic principle is referred multiple times in the Constitution, in which it is stated, for example, that the Portuguese Republic is based on "the will of the people" (Article 1); that "[t]he Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation" (Article 2); that sovereignty "lies with the people" (Article 3); and that it is the fundamental task of the State to guarantee "respect for the principles of a democratic state based on the rule of law" (Article 9).

Among the constituent elements of the democratic principle in the Portuguese Constitution are the principle of the sovereignty of the people, the principle of representation, the principle of separation of powers, the principle of suffrage, and the principle of proportional representation.

The rule of law is referred in Article 2 and Article 9(b), which state that Portugal is a democratic state based on the rule of law. There are three material assumptions inherent to the principle: legality, constitutionality, and fundamental rights and freedoms, which are a cornerstone of the Portuguese Constitution.

Some of the sub-principles that make the rule of law possible are:

- the principle of the constitutional state, which implies the need for constitutional review (Articles 277 and following);
- the principle of the independence of the courts and access to the law and the courts;
- the principle of legality of administration (i.e. the subjection of the Administration to the law);
- the principle of protection of legitimate expectations;
- the principle of legal security;
- the principle of proportionality;
- procedural guarantees, especially in criminal proceedings (Article 32).

Part IV. Constitutional review in the Portuguese Constitution

Since the Constitution is the basic law of the country, the entire legal order must be in accordance with it (a corollary of the Constitution as the Basic Law of a country). Thus, it is necessary to ensure that the Constitution is respected by lower-ranking legal provisions.

In this framework, the Constitutional Court appears as the main actor of constitutional justice, with powers to decide, without the possibility of appeal, on questions of constitutionality.

There are four types of constitutional review laid down in the Constitution: anticipatory abstract review; successive abstract review; concrete review; and unconstitutionality by omission. Only the second one interests us for the purposes of this panel, so I will only talk about successive abstract review.

Part V. Abstract review of the constitutionality of norms in the Portuguese Constitution

In the last but most important part, I will very briefly address **7 aspects** of this type of constitutional review:

1. **One caveat**: I will limit myself to discussing what we call "positive unconstitutionality". In Portugal, we also have unconstitutionality by omission, which is a very original modality in terms of comparative law, but of little practical relevance. The Constitutional Court, in this case, verifies the non-compliance with the Constitution resulting from the lack of adoption of necessary legislative measures by the competent legislative bodies.

2. **Competent body**: successive abstract review is a concentrated review, which means it is reserved to the Constitutional Court. All Portuguese courts are competent to carry out concrete review regarding any questions of constitutionality raised in a specific case, with the possibility of appeal to the Constitutional Court, but only the Constitutional Court has the authority to deem a norm unconstitutional with general binding force.

3. **Initiative / standing**: abstract constitutional review may only be requested by certain public entities, and it is not open to most citizens. These entities are the President of the Republic, the Speaker of Parliament, the Prime Minister, the Ombudsperson, the Attorney General, one tenth of the Members of Parliament, and regional authorities (regarding legal provisions that affect the Autonomous Regions).

4. **Object**: successive abstract review is independent of any specific dispute pending a court decision. It scrutinizes legal provisions in force, whose formation process has already been completed, including their official publication.

All legal provisions are covered, notably constitutional review laws, legislative acts (including laws of Parliament, Government decrees and legislative decrees of the autonomous regions), international conventions, legal provisions issued by international organizations of which Portugal is a member, normative resolutions of Parliament, and regulations of the Administration. Political acts, administrative acts, and judicial acts and judicial decisions are excluded.

5. **Effects of a declaration of unconstitutionality**: a declaration of unconstitutionality has generally binding force and entails the retroactive invalidation of the legal norm. This means that the legal norm does not produce any effects from the beginning and cannot continue to be applied by any court or authority.

The general binding force of the declaration of unconstitutionality means that the declaration is binding on all constitutional bodies, courts and administrative authorities; we say it has the force of law, meaning that the judgment has normative value, to the extent that it eliminates the rule from the legal system.

6. **Inexistence of unconstitutionality** (denial of the request for a declaration of unconstitutionality): the Constitutional Court never judges a legal provision constitutional. Rather, in a negative decision, there is a judgment of non-unconstitutionality. These decisions do not, however, have general binding effects.

7. **The importance of the request principle**: the Constitutional Court always acts at the request of entities with legal standing and not on the initiative of any of its Justices. The request delimits the scope of the Court's jurisdiction to the provisions in question. However, Justices are not limited by the cause of action, and may deem the provision unconstitutional on different grounds.

I will finish by underlying the importance of successive abstract review in the Court's activity, not only statistically, but especially in terms of its public repercussion and effects.

Contribution by Ms. Marie Baker[1], Judge of the Supreme Court of Ireland

THE SUPREME COURT *of* IRELAND
CÚIRT UACHTARACH NA HÉIREANN

THE IRISH SUPREME COURT AS GUARDIAN OF THE CONSTITUTION: RESTRAINT, LEGITIMACY, AND COURAGE

In 2024, the Irish Supreme Court will celebrate its centenary marking its status as one of the great old ladies of Supreme Courts. Indeed, we also see ourselves as one of the great old ladies of constitutional courts in Europe. The Irish Constitution (or Bunreacht na hÉireann) was adopted in 1937 but the first constitution of the independent Irish State was adopted in 1922. This predated the establishment of the Supreme Court but the basic structure of the Court is fundamentally the same as that envisioned 102 years ago when our first Constitution was adopted. (See Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Royal Irish Academy 2012)). [1]

The framers of our Constitution, perhaps obviously given the date of its adoption, did not have the benefit the drafters of the Kosovan Constitution had, with the insight and guidance of, for example, the Venice Commission or the European Court of Human Rights. We largely derived the principles that underlie our Constitution from two broad traditions; republicanism rooted in the Ancient Greek concept of the Republic and the threads of liberalism flowing from the Enlightenment. (See generally Tom Hickey and Eoin Carolan, *The political theory of the Irish Constitution: Republicanism and the basic law* (Manchester University Press 2015) and Eoin Daly, 'Republican themes in the Irish constitutional tradition' (2016) 41(2) Études Irlandaises 163). This is apparent from the text which stresses popular sovereignty, the democratic nature of the State, the dignity of the individual, fundamental freedoms, and the power to strike down legislation for *inter alia* exceeding the threshold of permissible inter-

[1] Judge of the Irish Supreme Court. This is an amended draft of the paper originally presented orally at the conference marking the 14th Judicial Year of the Constitutional Court of the Republic of Kosovo.

ference with these fundamental freedoms. It protects, as you would imagine, a right to life, property, freedom of expression, bodily integrity, and enshrines an equality guarantee.

Naturally, all courts in the Irish legal system are bound to act in accordance with the Constitution and within the confines of the judicial role for which it provides. However, there is a fundamental difference between the roles of the Superior Courts, namely the High Court, Court of Appeal, and unsurprisingly the Supreme Court) and that of the lower courts of local and limited jurisdiction. The Superior Courts alone have the power to interpret the Constitution, to decide whether legislation is compliant with the Constitution and therefore whether the legislation must be declared repugnant and struck down. This judicial review power is expressly provided for in Article 34.1.2° of the Constitution.

We did have what was described as quite an active Supreme Court over the years but more recently we have shown to a large extent a degree of restraint. This has mirrored the transition of the Supreme Court from a general to a selective appellate court hearing cases only on issues of general public importance and/or in the interests of justice. Our jurisdiction has a unique feature, which may seem quite mundane in jurisdictions with dedicated constitutional courts, in that Article 26 of the Constitution allows the President to refer a Bill to the Supreme Court prior to signing it into law where the President is satisfied a constitutional question is raised by the legislation. It is an infrequently utilised power, and there have been only 15 references since the adoption of the 1937 Constitution. We received such a reference just over a week ago, which marks the first since 2005. It is also uniquely stressful as this procedure requires that a final judgment be handed down in 60 days from the date of the reference. It comes to our Court with some drama, alongside significant political and legal importance, as the draft legislation which has been passed by both houses of parliament is delivered to us by motorbike. Ironically, the legislation now in question is for the appointment of judges. This is a somewhat awkward position for us particularly as the defence of the proposed reforms is to remove the appearance that political preferences might play a role in judicial appointments. It is also particularly high-profile due to the anticipated legal issues particularly the expectation that we will be asked to pronounce the meaning of the separation of powers between the legislature and executive of the State.[2]

This casts a spotlight on our practice of restraint and reminds us of one of our greatest challenges as a Court, building and maintaining our legitimacy. We may be the old lady of constitutional courts, but we are aware of the cold winds blowing around us. It is undoubtedly the case that the people of Ireland hold the Constitution in high regard. This is reflected, not only in its frequent invocation before the courts, but further in its symbolic display at political protests. There is a broad consensus of respect for the courts, but this is regularly tested and there is, as in most of Europe, a growing discontent with the perceived status quo, the influence on public opinion by misinformation, and broader trends with which we are all too familiar. We are acutely aware of the requirement to maintain our legitimacy, and we have done this over the last number of years particularly through a conversation surrounding constitutional interpretation focusing on rights which form part of our constitutional law which can be said to be either express or derived from the Constitution itself.

[2] For final judgment see Re Article 26 of the Constitution and the Judicial Appointments Commission Bill 2022 [2023] IESC 34 (Summary).

In the 1980s, the Supreme Court was described as activist and understood to be inspired by the United States Supreme Court under the leadership of Chief Justice Earl Warren (1953 – 1969). In that era, the Court delivered a series of decisions seen as expansionary and quite bold. The outcomes of the interpretative process surrounding the text of the Constitution often took the public by surprise and have been the subject of fierce continued debate by academics. There was a sense that the judges of the Court, when asked if a particular right could be inferred from the constitutional text or broader Irish constitutional order, would consider if the subject of a proposed right merited protection before turning to produce analysis which defended their conclusion. This critique certainly does not hold today, we are conscious of difficulties the interpretative process can play for us and now firmly ground our analysis within the constitutional text (See Chief Justice Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin University Law Journal 191, and for an outside perspective Tom Hickey, 'How to Adjudicate a Rights Case in Irish Constitutional Law' (2023) 5 Irish Supreme Court Review). Through careful consideration of the text, its principles, its values, and the structure of the constitutional order it envisages, we have moved from the idea of implying rights towards that of deriving rights. While international instruments are useful, this move to ground our practice centrally on the constitutional text has been an asset to the Court, particularly considering the building of legitimacy (See James Rooney, 'International Law as a Source of Unenumerated Rights: Lessons from the Natural Law' (2019) 42 Dublin University Law Journal 141).

This came to its height when Friends of the Irish Environment challenged the Climate Mitigation Plan 2017 adopted by the Irish government (*Friends of the Irish Environment v Government of Ireland* [2020] IESC 49). They pursued two primary arguments, (1) that the Plan failed to adequately vindicate rights guaranteed by the Constitution and the European Convention of Human Rights and (2) that the Plan was *ultra vires* the Climate Action and Low Carbon Development Act 2015. The Plan was struck down but on analysis of the legislative framework under which it was adopted, as it was held not to be sufficiently specific to meet the requirements of the Act or substantiate the methods through which the State would transition to a low carbon and climate resilient economy by 2050. In the course of the judgment, we expressed the view that we did not think that there existed in Irish law a constitutional right to a clean environment, but that the right to life, health, and property may allow some ideas of environmental protection to emerge from the Constitution. This was a highly restrained approach, and ultimately the correct approach as recourse to the Constitution was not required for the resolution of the dispute. Similarly, we were asked a number of years ago to legitimise the right of a woman with multiple sclerosis to be assisted in her suicide (*Fleming v Ireland* [2013] IESC 19). We rejected this on the basis that it is not possible to derive a right to assisted suicide from the existing Constitution, partly because of the right to life but more importantly because without a structured legislative framework within which assisted suicide could happen, it would be wrong for the Court to declare a general right. Restraint is evidently a core feature of the functioning of our Court and one which, alongside our commitment to the provision of the reasons and reasoning of the Court in extensive written judgments, has been central to the maintenance of our legitimacy.

Finally, we are concerned to show that our Court ultimately has courage. That courage matters when it comes to making decisions that appear to cut against the preferences of government. A

recent example concerns the constitutionality of the Comprehensive Trade and Economic Agreement (*Costello v Ireland* [2022] IESC 44). We said it breached the constitutional identity of the Irish courts if a foreign arbitration body could decide on the meaning of Irish law and that its ratification in its current form was unacceptable. Notwithstanding its dissatisfaction with this, government accepted and respected the decision. A further recent judgment which was certainly unpopular with government concerned the composition of our second house of parliament, the Seanad, which is not elected on universal suffrage but rather by institutional, vocational, and university panels (*Heneghan v Minister for Housing* [2023] IESC 7). 43 years ago, the Irish people indicated in a referendum that the composition of the electorate for the election of the university panels should be changed and yet nothing followed this. Many bodies were established to consider how a new form of university panel would evolve, many discussions were had, but still nothing happened. The Court declared unconstitutional the legislation underlying the current Senate representation. We were then asked by the Attorney General to grant a five year stay on that declaration, which would have meant the end of the current parliament and that any legislative change would happen in the term of a new legislature. This would have passed the admittedly prickly problem to the next administration and was rejected, although a stay was placed on the declaration of unconstitutionality (*Heneghan v Minister for Housing* [2023] IESC 18). We recognised on one hand that it would be wrong for us to allow an unconstitutional statute to exist on the statute book. We further recognised that if we struck it down immediately without some stay, there would be no possibility of ever fixing the problem as we would not have a legislature capable of passing legislation in accordance with the Constitution. During that judgment, the Chief Justice gave a short comment on which it is fitting to close:

> ***It would be a mistake to think that, in any human system of judging, that there are not many factors which are capable of affecting judges who cannot reach their decisions in the abstract. However, it would be an error of even greater proportions to assume that these considerations control courts' decision-making. It would be wrong to refrain from making a finding of constitutionality because the result would be inconvenient or worse, and equally incorrect, to find something unconstitutional, which was not. In truth, courts should attempt to address all cases on their merits, and the only relevant consideration is whether the test to be adopted and applied, make that already difficult task easier, or more difficult.***

This shows the difficulties that courts, particularly younger courts like the Constitutional Court of Kosovo, will come up against when faced with pressure and criticism. The indispensable need for courage cannot be understated. The respect we have garnered and maintained as a Court from the public and government flows from this courage particularly against a backdrop of restraint and continued regard for legitimacy. I have witnessed an abundance of such courage in my time in Kosovo and been reminded that we cannot forget it.

Contribution by Mr. Tom Ginsburg, Professor of Comparative Constitutional Law at Chicago University Law School

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

JUDICIAL REPUTATION

(*drawn from Nuno Garoupa and Tom Ginsburg, Judicial Reputation (University of Chicago Press, 2015) and used with permission*)

I. INTRODUCTION

Reputation is crucial in many arenas, and judging is no exception. A judge with a good reputation will enjoy the esteem of his friends and colleagues and may have chances for advancement to higher courts. A judiciary that operates effectively will earn respect within its own political system and internationally, and may become a model for other countries, providing opportunities for travel and exchange for judges. A judiciary with a poor reputation, in contrast, will find itself starved of both resources and respect.

Despite the sense that reputation is important, we know very little about how judicial reputation is produced. We understand that some judges and judiciaries are viewed as successful and others are not, but we do not really have any theories about how reputation is developed and sustained. In this excerpt we provide a theory of judicial reputation, and provide evidence of the institutional consequences from a range of legal systems.

Reputation is the stock of judgments about performance, which is produced by those who have accurate information. Judicial reputation plays two important roles. First, it conveys information to the uninformed general public about the quality of the judiciary (more generally, about the legal system) as perceived by the relevant audiences. Second, reputation fosters esteem for the profession and for the individual judge, both self-esteem and esteem in the eyes of others. A judiciary with high esteem is likely to be able to garner more material resources and to be more insulated from other political actors who might expropriate such resources.

The reputation of the judiciary, individually or as a whole, determines its status in any given society and its ability to compete effectively for resources within the government. We do not specify a universal reputation function for judges, and recognize that judges in different systems will seek reputations for different qualities—such as predictability, wisdom, and efficiency—that might not be valued in other systems. Whatever the definition of judicial quality in a particular legal system, reputation emerges as a relevant factor and plays an important role.

We argue that reputation can be divided into individual and collective components. Individual reputation provides information about individual performance whereas collective reputation provides information about the quality of the judiciary in general. At the same time, each member of an institution cares about his individual reputation, but also about the reputation of the group as a whole. Collective reputation determines the status of the judiciary, but individual reputation influences the judge's relative perception vis-à-vis their fellow judges.

The bifurcated nature of reputation between individual and group components creates interesting institutional challenges, which we analyze below using the concept of "team production."[1] If judicial performance were purely the result of individual effort and the quality of the judiciary could be easily disaggregated into its individual components, individual reputation should prevail as the most important mechanism to provide information. But crucially, it is often difficult to monitor or differentiate the separate individual contributions to the production of justice or judicial decisions; we do not know what each individual judge contributed to a collective decision. Because of this we also need information about the aggregate performance of the judiciary; the whole is more than the sum of individual contributions. Consequently, an important task of institutional design is to incentivize the optimal balance of investments into the different components of reputation, to match the needs of any given society.

We also argue that different legal systems configure institutions in different ways in order to address the problem of information and reputation. The classical understandings of the common law and civil law judiciaries can be seen as sets of linked institutions that are mutually reinforcing in addressing the problems of information and reputation. We describe these institutions from the perspective of information and reputation, and explain how they inter-relate. Judiciaries that emphasize collective reputation utilize institutions to limit publicly available information about the performance of the individual judge. Those that emphasize individual reputation, on the other hand, facilitate the disclosure of such information. In both cases the disclosure or non-disclosure of private information about individual performance reinforces the kind of reputation that prevails in the judicial system.

[1] The foundational papers on team production include Alchian AA and Demsetz H 1972 'Production, Information Costs and Economic Organization' 62 *American Economic Review* 777; Holmstrom B 1982 Moral Hazard in Teams 13 *Bell Journal of Economics* 324; Aoki M 1994 'The Contingent Governance of Teams: Analysis of Institutional Complementarities 35 *International Economic Review* 657; Rajan RG and Zingales L 1998 'Power in the Theory of the Firm' 113 *Quarterly Journal of Economics* 387.

II. PRODUCING REPUTATION

Reputation can be divided into two components, individual and collective. Individual reputation is related to the name recognition of each judge. Collective reputation is linked to the perceived role of the judiciary in any given society.[2] Each and every judge is affected by individual and by collective reputation and consequently cares about both. Nevertheless, depending on incentives and the institutional framework, judges might be more concerned with one or the other in different societies.

Individual reputation-building is fundamentally an activity that each judge must accomplish on his or her own, while collective reputation-building is the product of team-work. Furthermore, it is not always the case that effort allocated to individual reputation building enhances collective reputation and vice-versa. In fact, in some circumstances these two goals may conflict. For example, individual reputation might encourage each judge to differentiate herself from other judges; excessive differentiation across the bench might seriously undermine collective reputation. High variance in the performance of individual judges can hurt the reputation of the judiciary as a whole.

In our view, judges allocate effort between building individual and collective reputations in response to the institutional environment. This means that a judge might have to decide between advancing his or her own preferences (hence building individual reputation) or conforming with the general preferences of his or her colleagues (hence promoting a collective reputation for consensus). In many circumstances, a particular action can enhance both individual and collective reputation at the same time. But in other circumstances, by investing more in building individual reputation, a judge contributes less to building collective reputation. This presents each judge with a choice as to which type of reputation to invest in. Choices are influenced by incentives, which in turn are established by different actors. These actors can be considered principals on whose behalf the judiciary works.

Collective reputation is essentially determined by external mechanisms. It reflects the views of society or public opinion in general toward the judiciary, but also the interests of the relevant particular constituencies with special power over the courts. These constituencies might include the bar, other branches of government, political parties and others, depending on the institutional environment of courts. Collective reputation shapes the social and political influence of the judiciary as a whole, and consequently has monetary and non-monetary implications for the welfare of the judges. For example, collective reputation may impact the overall judicial budget, salaries, pensions, and other perks available to the judiciary, as well the level of social prestige and overall working conditions in the courts. In other words, collective

[2] Collective reputation has been discussed in the sociological and business literature on organizations. See Tom J. Brown, et al., *Identity, Intended Image, Construed Image and Reputation: An Interdisciplinary Framework and Suggested Terminology,* Journal of the Academy of Marketing Science 34: 99-109 (2006); Peter A. Dacin and Tom J. Brown, *Corporate Identity and Corporate Associations: A Framework for Future Research*, Corporate Reputation Review 5:254-63 (2002); Susanne Scott andn Vicki R. Lane, *A Stakeholder Approach to Organizational Identity,* Academy of Management Review 25:43-62 (2000); Violina Rindova, *The Image Cascade and the Formation of Corporate Reputations,* Corporate Reputation Review 1: 188-94 (1997).

reputation determines the size of the pie to be divided among individual judges.

Individual reputation is established by external mechanisms (such as academic commentators, the bar and political actors) but also by internal mechanisms (such as peer evaluation by other judges). Individual reputation, as established by these internal mechanisms, determines the share each judge gets of the pie while the outside appraisal by relevant external constituencies determines potential supplementary payoffs obtained individually. The balance between external and internal mechanisms shapes individual reputation building.[3]

A legal system that relies exclusively on collective judicial reputation will produce incentives for individual judges to expend less effort than they could. A legal system that only relies on individual reputation promotes information about individual judges but treats collective reputation as a mere aggregation of individual reputations. This is a legal system that incentivizes judges to work hard, but they may reduce the appropriate investment in the non-separable component of judicial production. Consider seriatim opinions, used in the British House of Lords before the creation of the United Kingdom Supreme Court, and also used on the U.S. Supreme Court before John Marshall. Each judge would speak in sequence, and observers would have to pay close attention to figure out the outcome of the case. The collective jurisprudence suffered, even if each judge was able to cultivate his or her individual reputation freely. (British judges report greater collective effort after the establishment of the Supreme Court.)[4]

III. COMPARATIVE INSTITUTIONAL ANALYSIS

In every legal system, both individual and collective judicial reputation is important. However the relative degree of importance varies not only across legal families, but even within the same legal family. If we look at the U.S. federal judiciary, for example, individual reputation seems to matter a great deal. The Supreme Court is identified with the name of the Chief Justice (such as Warren, Rehnquist or Roberts) and the great judges of the past are heroes. Newspapers frequently discuss how individual justices vote in particular cases and quote from dissents. Federal judges give talks to the public and write books advancing their views on important issues, and the appointment mechanism includes Senate confirmation hearings in which individual candidates to the federal courts have to expose their views. Academics study the judicial contribution of individual justices in detail,[5] and they are the subjects of

[3] For the general public, see for example Caldeira GA 1986 'Neither the Purse nor the Sword: Confidence in the Supreme Court' 80 *American Political Science Review* 1210 and Caldeira GA and Gibson JL 1992 'The Etiology of Public Support for the Supreme Court' 36 *American Journal of Political Science* 635; for administrative bodies and government audiences, see W. N. Eskridge WN 1993 'The Judicial Review Game' 88 *Northwestern University Law Review* 382; Eskridge WN and Ferejohn JA 1992 'The Article I, Section 7 Game' 80 *Georgetown Law Journal* 523; and Ferejohn JA and Weingast BR 1992 'A Positive Theory of Statutory Interpretation' 12 *International Review of Law and Economics* 263; for the larger law school audience, see Schauer above note 7. For an interesting example see Marites Dañguilan Vitug, Shadow of Doubt: Probing the Supreme Court 19 (Newsbreak Public Trust Media Group 2010) (describing Philippine Supreme Court justices viewing themselves as both individual operators and a collectivity.)

[4] Elaine Mak, Judicial Decision-making in a Globalized World (2013).

[5] See, e.g., Posner RA 1993 *Cardozo: A Study in Reputation* University Of Chicago Press.

popular biographies.[6] This pattern of serious assessment of individual performance is not found in the United Kingdom. Most judges of the Supreme Court are not well known, and tend only to appear in the public discussion when they engage in extrajudicial tasks such as leading commissions of inquiry.

In this sense, the United Kingdom judiciary is more akin to those of France, Japan and Germany, where most people have no idea of the identity of the Chief Justice, much less the other justices of the Supreme Court.[7] Newspapers in these countries very rarely report on dissenting views; justices usually avoid exposure and contact with public opinion in general; and very few judges get to be known by the public in general.[8] If justice is blind, judges are anonymous. In these legal systems, information about individual performance seems to be intentionally underplayed, if not systematically hidden from the general public.[9]

In short, in some legal systems collective reputation prevails over individual reputation whereas in other legal systems the reverse occurs; some legal systems pursue individual performance whereas others prefer to limit information about individual performance and rely more on collective assessment.[10] This section discusses some of the different institutional structures that condition the development of judicial reputation. We do not provide a theory of why these institutional structures exist, but rather focus in this chapter on the contribution of institutional structure to disclosure of information and reputation building. For example, we do not discuss the rationale for the existence of an appeal system, but rather examine how the different designs of an appeal system generate information on individual or collective performance, contributing to the different forms of reputation.

A. *Career vs. Recognition Judiciary*

One way of contrasting different types of judicial structures is to distinguish the "career" from "recognition" judiciaries.[11] The career system involves judges entering a judicial bu-

[6] See, e.g., Foskett K 2005 *Judging Thomas: The Life and Times of Clarence Thomas* William Morrow.

[7] Richard Posner, Law and Legal Theory in England and America (Oxford University Press, 1998).

[8] For example, Sophie Boyron identifies a major concern in France with the "esprit de corps" of the judiciary, a professional culture driven by early socialization in the *Grande École*, then reinforced by collective decision-making with a profound distrust for the individual judge and further enhanced by judicial trade unions that effectively impose judicial collective bargaining. She also argues that in France judicial accountability is collective. See Boyron S 2006 'The Independence of the Judiciary: A Question of Identity' in Canivet G, Andenas M and Fairgrieve D eds 2006 *Independence, Accountability and the Judiciary*. Another comparativist, Basil Markesinis, argues that French judges are trained to keep their ideas to themselves, see Markesinis BS 1994 'A Matter of Style' 10 ***The Law Quarterly Review*** 607. In her book, Eva Steiner proposes that the French judiciary is educated and trained as a unit to adhere to a collegial form promoted by French courts, see Steiner E 2002 ***French Legal Method*** Oxford University Press.

[9] See, among others, van Caenegem RC 2002 ***European Law in the Past and the Future: Unity and Diversity over Two Millennia*** Cambridge University Press (arguing that, while in Britain the bench is paramount and the judges have a highly personal role, in the Continent courts are faceless and the judges are described as fungible persons) and Van Caenegem RC 1987 ***Judges, Legislators and Professors: Chapters in European Legal History***, Cambridge University Press (asserting that the legal system is dominated by judges in common and by law professors in civil law). A tendency toward bureaucratization seems to be detected in the United States by Fiss O 1983 'The Bureaucratization of the Judiciary', 92 *Yale Law Journal* 1442.

[10] See Merryman JH and Pérez-Perdomo R 2007 ***The Civil Law Tradition*** 3rd edition (observing the pressure for consensus in civil law jurisdictions due to legal tradition). See also Merryman JH 1988 'How Others do It: The French and the German Judiciaries' 61 *Southern California Law Review* 1865.

[11] Nicholas Georgakapolous N 2000 'Independence in the Career and Recognition Judiciary' 7 *University of Chicago Law School Roundtable* 205.

reaucracy at a young age, and spending an entire career as a judge.[12] The recognition system appoints judges later in life, usually after the candidate has established themselves as an excellent candidate. It involves fewer opportunities for promotion. The appointment is based on the individual reputation of the candidate, as assessed by the relevant constituency, by some mechanism external to the judiciary. For example, in the United States, the President appoints federal judges, with the advice and consent of the Senate, after the candidates have developed a stellar reputation in other spheres. In some American states and in the Supreme Court of Bolivia, judges run in judicial elections in which each candidate has to present a distinctive platform.[13] The external appointment process involving ex ante screening helps to compensate for the absence of a vertical hierarchy in the judiciary, which decreases the incentives to comply with rigid professional norms. The appointment system by external principals dilutes the collective identity of the judiciary but enhances the individual reputation of the judge who has been screened. Thus, in recognition judiciaries, individual reputation as perceived by external audiences is the dominant factor in judicial appointments.

In contrast, a career judiciary is selected and promoted based on internal judicial assessments of individual merit. Relatively little information is available to the public about judges, but the judiciary itself develops and uses internal performance measures to make promotion decisions. Compliance with internal mechanisms makes collective reputation much more important. The credibility of a given judge does not depend on her individual merits but on the reputation of the entire judiciary. Any concerns about judicial appointment or promotion will not tend to be directed at any particular judge, but the entire profession. Consequently, collective reputation building is very important for career judges.[14] Such systems tend to emphasize the anonymity of the law, and the myth that there is a single correct answer for legal questions that in principle is invariant to the individual judge making the decision.

Yet external audiences have gained importance in many civil law countries in recent decades. Some of this development is due to exogenous factors that have changed the general public perception of the judiciary and have provided for new kinds of incentives. Greater media accessibility is a global phenomenon that has effects on many institutions. External audiences may also become more important because factors endogenous to the legal system, such as the introduction of a Constitutional Court very different in function and nature from the traditional judiciary. The interaction between new constitutional courts and the traditional judiciary

[12] For example, the judiciary in the UK has been presented as a career judiciary, where barristers are regarded as a first step into the judiciary, in a system more similar to the Continent than to United States. See for example, Posner R 1996 *Law and Legal Theory in England and the United States* Oxford University Press(discussing the British career judiciary in chapter 1).

[13] On judicial elections, see, e.g., Webster P 1995 'Selection and Retention of Judges: Is There one Best Method?' 23 *Florida State University Law Review* 1; Hanssen FA 2004 'Learning About Judicial Independence: Institutional Change in State Courts' 33 *Journal of Legal Studies* 431 at 462; Epstein L, Knight J and Shvestova O 2002 'Selecting Selection Systems' in Burbank SB and Friedman B eds 2002 *Judicial Independence at the Crossroads: An Interdisciplinary Approach* Sage Publications, Inc at 191–226 (S.

[14] See generally Ramseyer JM and Rasmusen E 2003 *Measuring Judicial Independence,* University Of Chicago Press (focusing on Japan).

and other branches of government has dramatically changed the balance between internal and external audiences in many countries, and we wrestle with this in Chapter Five.

B. *Individual Opinions/Dissents/Voting*

When the Supreme Court of Mexico held a public session announcing its 2008 decision upholding Mexico City's statute legalizing abortion, it attracted significant attention both inside the country and abroad. The Court's 15 justices justified their decision in a complicated set of orally delivered opinions, with the final vote to uphold decided by a single vote. When the final written decision was released some months later in February 2009, the eight justices in the majority issued a majority decision along with seven concurrences; there were also three dissents. Two years later, the Court returned to the abortion issue to consider two new state statutes criminalizing abortion (passed in a backlash to the earlier ruling). The divided court could not come to a majority opinion and so the challenge to the statutes failed, leaving abortion illegal in some states, but a flurry of separate opinions accompanied the short procedural notice announcing the failure. Commentators have criticized the divided jurisprudence as incoherent.[15]

The availability of information on the particular judges—whether in the form of individual opinions, the possibility of dissent by judges, or the availability of judicial votes in a transparent and verifiable way that is visible to laymen—has two important consequences. First, it helps each judge to establish an individual reputation.[16] As Justice Ginsburg wrote in 1990, putting a name on an opinion "serves to hold the individual judge accountable" by putting the judge's reputation on the line.[17] Some judges relish this opportunity: Justice William Rehnquist was known as the "Lone Ranger" during the period in which he was the most conservative member of the Burger Court, because he wrote so many dissenting opinions.[18] Eventually judges may come to create informal coalitions with like-minded judges, allowing outsiders to assign labels to specific judges as liberal, conservative, originalist or activist. Second, individual opinions and dissent help undercut the idea of a homogeneous, uniform, bureaucratic, judiciary. Both aspects favor individual over collective reputation building.[19] This is enhanced when the judiciary is faced with big public policy decisions that are controversial or at the center of intense debate across a society, such as those involving abortion, gay marriage, segregation, or the welfare state.[20] Dissents in such cases may play the special function of al-

[15] Francisca Pou Giménez, Constitutional Change and the Supreme Court Institutional Architecture: Decisional Indeterminacy as an Obstacle to Legitimacy, paper presented at CIDE Conference, Mexico City, March 11, 2013.

[16] See evidence by Taha AE 2004 'Publish or Paris? Evidence of How Judges Allocate their Time' 6 *American Law and Economics Review* 1.

[17] Ruth Bader Ginsburg, Remarks on Writing Separately, 65 *Wash. L.Rev.* 133, 139 (1990)

[18] Mark Graber, *A New Introduction to American Constitutionalism* 91 (New York: Oxford University Press, 2013).

[19] See discussion about the quality of opinion writing by Nugent DC 1994 'Judicial Bias' 42 *Cleveland State Law Review* 4 and Miller GP 2004 'Bad Judges' 83 *Texas Law Review* 431.

[20] For the US, see the evidence provided by Sunstein CR, Schkade D, Ellman LM, and Sawicki A 2006 *Are Judges Political? An Empirical Analysis of the Federal Judiciary* Brookings Institution Press (discussing these issues in chapter 5). See generally, Stack KR 1996 'Note: The Practice of Dissent in the Supreme Court' 105 *Yale Law Journal* 2235 and George TE 1998 'Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeal' 58 *Ohio State Law Journal* 1635.

lowing the judiciary to signal to the losers that there is hope for the future.

When individual opinions cannot be recorded and dissent is not allowed, the judiciary is seen as a homogeneous body, faceless and bureaucratic, in which discussion and diversity are replaced with compromise and uniformity.[21] The content of decisions hurts or enhances the reputation of the judiciary as a whole and not that of a particular judge. Peer pressure may be more important since decisions must be reached by consensus, resulting eventually in complex language to disguise divergences in the bench and further reducing the ability of the public to scrutinize opinions. Perhaps the paradigm of this approach is that of France, in which public judicial opinions are formulaic and sparse.[22]

Beyond individual opinions, oral proceedings also offer opportunities for the cultivation of individual reputation. Oral proceedings allow judges not only to reveal their legal skills, but also their individual positions and make specific contributions to the decision taken by the court. They can also communicate to the specialist audience of lawyers, distinguishing themselves from their colleagues. And for both written and oral proceedings, judges' language and tone may be important. An authoritative tone signals that the law is determinant. But recent psychological research has shown that a more exploratory tone is likely to be more persuasive to laypeople who disagree with the outcome of a given decision.[23]

Besides tone, complexity is another dimension on which opinions can vary, and might affect judicial reputation. Opinions that are too technical will not be intelligible to ordinary citizens, who will instead have to rely on experts or the media to digest them. One might expect that judges too focused on impressing other judges would write in overly complex language, and thus hurt their reputation with outsiders. But the so-called plain language movement, which seeks to enhance ease of communication, has some advocates in law.[24] For example, in the 1990s, the Supreme Court of Canada tried to write in less technical terms to be understood by the "educated public".[25]

[21] For the French case, see Steiner E 2002 ***French Legal Method*** Oxford University Press. She traces the historical reasons for the inexistence of dissenting opinions and the doctrine supporting such choice. Historically, the absence of dissenting opinions is based on the secrecy rules introduced by Philippe VI (1328-1350) and Charles VII (1422-1461) to protect judges. This rule was abandoned in 1789 but reinstated in 1795. It has now a statutory basis in Art. 448 of the Code of Civil Procedure and Art. 355 of the Code of Criminal Procedure. The doctrinal justification is that dissenting opinions are seen as undermining legitimacy of the court and the stability of law (since may lead to subsequent changes of the case law).

[22] See William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles 38-39 (2007); see also Mitchell Lasser 2004. ***Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy***, who makes the point that by signing a decision, the judges assume individual responsibility, a principle disliked by the French. Such rejection of individual judicial responsibility is embodied by the Law on Judicial Organization from 1790 which restricted the high courts (the *Parlement*) from passing regulations or suspending royal legislation by refusal to record them in the official registry (essentially exercising a veto). However, Professor Lasser argues that American legal scholarship has misunderstood the bifurcated system existent in France. The idea that French judges have no individual responsibility on shaping doctrines and developing law is misplaced. They do, but not publicly. There is a bifurcation of legal reasoning and policy analysis into two argumentative dimensions: the *rapports* by the reporting judge and the *conclusions* of the advocate general, on one side, and the *projets d'arrêt* prepared by the reporting judge, on the other side.

[23] See Dan Simon and Nicholas Scurich, *Lay Judgments of Judicial Decision-Making* (cited above).

[24] Barnes, J. 2006. "The Continuing Debate About "Plain Language" Legislation: A Law Reform Conundrum" *Statute Law Review* 27: 83-132.

[25] Peter McCormick, Supreme at Last: The Evolution of the Supreme Court of Canada 143 (Toronto 2000)

These aspects of institutional design do not map neatly onto the civil-common law distinction. Many constitutional courts in civil law jurisdictions now allow for separate opinions. The Constitutional Court under the 1997 Constitution of Thailand *required* each justice to issue a separate opinion, a fact that no doubt contributed to a non-transparent and sometimes confused jurisprudence. Similarly, the Supreme Court of Mexico has moved toward oral and public proceedings in recent years.

Individual opinions will be associated with a relatively flat organizational structure, in which superior judges have little control over inferiors. Collective opinions will be associated with the suppression of individual reputation and the institution of hierarchical controls to overcome collective action problems in the production of collective reputation.[26] Small wonder, then, that judges who support the institution of dissent have criticized the alternative model as suppressing individual conscience. Justice William Brennan, for example, critiqued Chief Justice Marshall (who strongly pushed for unanimous judicial opinions of the court as a whole) as trying to "shut down the marketplace of ideas."[27]

Of course, even within systems that encourage individual opinions, they may not actually be required. Under Chief Justice John Roberts, the US Supreme Court has issued an increasing number of *per curiam* opinions that do not identify the individual author. Indeed by one account, almost 9% of opinions were issued in this way during the first six years of Roberts' tenure.[28] This may reflect Roberts' oft-stated desire to enhance consensus on the court, though some such opinions actually include dissents. Roberts himself is rarely in dissent, and has argued that it is important to advance "the notion that we are a Court -- not simply an assemblage of individual justices."[29]

Like other Chief Justices, Roberts has also been known to use the power of assigning a majority opinion to himself in important cases, and the assignment power can be an important tool in constructing both individual and collective reputation of the court.[30] Justice John Paul Stevens thought that Chief Justice Warren Burger would assign First Amendment cases to Byron White when the opinion was likely to be criticized in the press, but keep the case for himself when the opinion was likely to be praised. "That practice," he notes "con-

[26] There is actually some evidence that judges believe this to be so. William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles, 122-26

[27] Brennan Jr WJ 1986 'In Defense of Dissents' 37 *Hastings Law Journal* 427 at 438; see also Ginsburg RB 1992 'Speaking in a Judicial Voice' 67 *New York University Law Review* 1185 (1992); Ginsburg RB 1990 'Remarks on Writing Separately' 65 *Washington Law Review* 133.

[28] Ira P. Robbins, 'Hiding Behind the Cloak of Invisibility' *Tulane Law Review* 86: 1197-1242 (2012). Another study of the state of Texas found that 40% of opinions of the Supreme Court over a ten year period were issued per curiam. William Li, et al., "Using Algorithmic Attribution Techniques to Determine Authorship in Unsigned Judicial Opinions," Stanford Technology Law Review 16: 503—(2013). This may suggest that state courts in the United States are a kind of hybrid, along the lines of the examples we discuss in the next chapter.

[29] Jeffrey Rosen, *Roberts' Rules,* The Atlantic Jan. 1, 2007, available at http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ (last checked June 17, 2014); Lee Epstein, William Landes and Richard Posner, The Behavior of Federal Judges 137 (2013).

[30] See generally Linda Greenhouse, *Chief Justice Roberts in His Own Voide: The Chief Justice's Self-Assignment of Majority Opinions*. Judicature 97: 90- __ (2013); Elliot Slotnick, Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger. American Political Science Review 23: 60- (February 1979); Saul Brenner, The Chief Justices' Self Assignment of Majority Opinions in Salient Cases. Social Science Journal 30: 143-__ (1978).

tributed to Byron's reputation in the press as an enemy of the First Amendment."[31]

C. *Publicity*

Publicity is another important element of the institutional structure that will facilitate—or retard the development of reputation. The Mexican Supreme Court took a decision to open up its proceedings to the public, and, as Professor Jeffrey Staton has shown, this decision has served as part of a strategy of cultivating reputation in a new, democratic era. Indeed, the Court launched its own television station in 2006. The Court also has a somewhat unusual practice of announcing its decision orally at a public hearing, but not releasing the written decision for many months thereafter. In the abortion case mentioned earlier, the written decision was not issued for six months. This has led to significant problems as justices try to reconstruct their reasoning, and it has hindered the development of a coherent jurisprudence.[32]

Publicity is helpful for the cultivation of reputation, and can be used strategically by courts. But if the courts do not communicate clearly in an increasingly dense media environment, they will find that publicity may actually harm the reputation of the court as a whole. Furthermore, appearances on television may encourage individual justices to seek to distinguish themselves, leading to a more incoherent jurisprudence and harming collective reputation.

Access to the public comes in many forms. The Mexican Supreme Court has a long tradition of informal meetings with litigants and other interested parties *in camera, even* concerning pending cases. These sessions allow the judges to hear privately about aspects of the cases considered to be important, but also communicate the image of a court that values *private* access. While other courts might view this practice as highly problematic and compromising the appearance of impropriety, they seem to be viewed as a necessary way of transmitting information to the litigants, and thus helping the legitimacy of the court in this particular case.

D. *Appeals*

The appeal system and the nature of the relationship between superior and inferior courts play an important role in shaping incentives to invest in individual versus collective reputation building. A generous appeal system that essentially allows superior courts to review and evaluate the decisions taken by inferior courts induces compliance by junior judges and favor homogeneity and uniformity in decision-making.[33] An appeal system that imposes few constraints on junior judges gives them more discretion and naturally generates more heterogeneity in decision-making, which favors individual reputation. At the same time, an appeal system that permits conflicts of jurisdiction and law across courts, such as the American system which allows for the possibility of circuit splits, disfavors collective reputation and pushes toward investment in individual reputation. An appeal system that effectively internalizes potential conflicts and therefore reduces discrepancies in courts' decisions contributes decisively to collective reputation.

[31] John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (2011) p. 235.

[32] Gimenez, supra n.___

[33] Shavell S 1995 'The Appeals Process as a Means of Error Correction' 24 *Journal of Legal Studies* 379.

A crucial dimension on which appeals systems differ is the question of *de novo* review. In common law jurisdictions, appeals courts generally only hear questions of law, leaving the factual record to be developed at the trial level. This is often explained as originating in the institution of the jury, which finds facts and would have to be reconvened or reproduced to have *de novo* review. In contrast, civil law jurisdictions have *de novo* review of facts at the higher levels. This involves replication, but also allows fuller monitoring of junior instances to ensure quality. Our interpretation is that *de novo* review is a device to ensure collective reputation, while the lack of such review encourages individual judges to develop novel interpretations of law and to use their fact-finding power toward reputational development.

E. *Citations*

The use of citations in decisions reflects the importance of individual opinions, and hence generally contributes to enhancing individual reputation.[34] Citations presuppose that some cases and court decisions are path-breaking, not just because the object of the action is extremely relevant, but because the doctrine and legal interpretation offered by a given judge is worthy of consideration. Controversial decisions attract attention and generate debate even when they are not good law. Obviously this means that individual judges can seek to be identified for a famous case or may come to be associated with a notorious decision. The widespread use of citations in Anglo-American jurisprudence clearly favors individual reputation building, particularly when combined with the institution of individual named opinions. But many systems do not cite extensively to other cases. These systems treat the law as a collective, uniformly determined product.

F. *Case Selection*

The degree to which the judiciary controls the dockets of courts plays an important role in the process of establishing reputation.[35] The control of dockets can operate at what we might call the retail level, that is, in choosing particular cases, and at the wholesale level through standing and justiciability doctrines that narrow or expand the scope of judicial review. When judges cannot, in most cases, effectively influence the cases they hear, collective reputation operates as a type of insurance, since some judges will randomly be assigned cases that are more suited for enhancing individual reputation than others through a mechanism that does not take into account different skill levels across the bench.[36] In other words, collective reputation reduces the potential reputational damage from being assigned cases that are detrimental to a particular judge in terms of preferences or skills. The doctrine of a right to a "lawful judge" originating in the German legal tradition, es-

[34] See Choi S and Gulati M 2007 'Ranking Judges According To Citation Bias (As A Means To Reduce Bias)' 82 *Notre Dame Law Review* 1279; see also Posner R 2000 'An Economic Analysis of the Use of Citations in the Law' 2 *American Law and Economics Review* 381; Landes WM, Lawrence Lessig L and Solimine ME 1998 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges' 27 *Journal of Legal Studies* 271, and Choi S and Gulati M 2004 'A Tournament of Judges?' 92 *California Law Review* 299; Stephen Choi and Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges*, 37 J. Legal Studies 87, 92-93 (2008).

[35] See among others, Tonja Jacobi, 2008 'The Judicial Signaling Game; How Judges Shape their Dockets' 16 ***Supreme Court Economic Review*** 1.

[36] That is, "better" judges do not get "better" cases whatever "better" might mean in this context.

sentially requires random assignment of cases and so achieves this function.

When dockets are effectively controlled by the judiciary itself or a senior jud, case assignment is not longer truly random. Individual reputation becomes an asset in such a system in two complementary ways. First, reputation allows individual judges to become favored (or disfavored) in the distribution of cases to be reviewed by the courts relative to other colleagues. Second, reputation allows further enhancement of individual reputation, by allowing judges to pick cases that are more appropriate for the relevant constituencies. Case selection is a strategic variable in preparing the setting for reputation building.

We note that some courts, especially in South Asia, have occasionally taken cases without even having a formal claim filed before them. The Supreme Court of Pakistan, for example, is allowed to take action under its own initiative to protect fundamental rights under Article 184(3) of the country's constitution. In recent years it has used the so-called *suo moto* power to demand that the government deal with the high murder rate in Karachi, deaths in Lahore caused by substandard medicine, and many other issues. These cases allow the court to interact directly with the public and be seen as a responsive actor in a country that is sorely lacking them.

One interesting example of docket control in the civil law tradition is the institution of the so-called investigating judge. These are career judges who, in some countries, are not involved in deciding or deliberating on cases, but instead supervise the investigation and gathering of evidence. In some countries, individual investigating judges have become very prominent. The Spanish judge Baltasar Garzón, for example, became a kind of international superstar for his indictment of Chilean General Augusto Pinochet in 1999, leading to a very important decision by the British House of Lords on the international immunity of ex-presidents. Garzon had done a stint in electoral politics, and was an example of what David Kosar has called a "superjudge"—someone who has moved from the judiciary to politics and then back.[37] After the Pinochet indictment Garzon also opened cases against the Argentine junta, sought to interview Henry Kissinger in relation to a case, and considered whether to open up a case against George Bush and several members of his administration. Garzón's cultivation of his individual reputation ultimately led to his suspension from the judiciary in 2012, after he opened an inquiry into crimes against humanity during the Spanish civil war that had been explicitly subject to an amnesty in 1977. He was ultimately put on trial for violating Spanish law by using an illegal wiretap in an overly vigorous corruption investigation, and suspended for 11 years.

G. *The Interdependence of Institutional Choices*

The above institutions are conceptually distinct from each other. Crucially, however, they are reinforcing in terms of reputation and provision of information about performance. The common law tendency toward a "recognition" judiciary relies on judges who are selected because their earlier investments in reputation allow ex ante screening for quality and effort. Such judges can be trusted to write high quality individual opinions. In contrast, the "career"

[37] David Kosar, *The Least Accountable Branch,* JSD Dissertation, NYU Law School 2013.

system associated with the civil law hires judges at a young age, and therefore cannot trust them to adequately invest in individual reputation without extensive monitoring. Hence there is an implicit logic to anonymous, collective opinions, and less of a culture of citation. Branding is frowned upon.

The career system also requires many more judges, because monitoring output at the lowest level requires an intermediate supervisory level (itself an autonomous body or a different layer of a more hierarchical judicial system). Appeal is essential to maintain quality and discourage shirking. Appeals are *de novo*, in order to ensure that individual judges do not harm the collective reputation of the judiciary. We thus observe much larger judiciaries to accomplish *de novo* review. This reinforces the notion of team rather than individual production, and reduces the amount of effort required by any single judge to produce reputation.

We also see differences in the discretion over dockets in the two systems. The judges in recognition systems have a variety of devices to exercise docket control, particularly at the senior levels. This allows the judiciary to control its policy-making role. In contrast, career judges are viewed as relatively low level functionaries without individual discretion.

It is interesting to think about the ideology of the common law and civil law as reinforcing these institutional features. It is generally understood that the civil law tradition conceives of "the law" as a unified coherent whole, with pre-existing answers to legal questions that are identifiable through the exercise of legal science.[38] This idea de-emphasizes the role of the individual judge in crafting the law, and in principle different judges are not thought to be able to arrive at different answers to legal questions. In contrast, common law judiciaries tend to see law as more akin to policy. Policy matters are those which in principle reasonable minds can disagree. This is not to suggest that law is infinitely plastic, but rather that for hard legal questions (of the type most likely to be litigated) different judges may come up with different answers. Seeing law as policy means that we need to identify the particular reasoning and to associate it with an individual judge. These different conceptions of the law obviously track the distinction between collective and individual reputation.

[38] Merryman and Pérez-Perdomo above n 34.


14
VITI I KATËRMBËDHJETË
GJYQËSOR
FOURTEENTH JUDICIAL YEAR
ČETRNAESTA PRAVOSUDNA GODINA
QUATORZIÈME ANNÉE JUDICIAIRE
INTERNATIONAL C


The Role of Constitutional Courts in Strengthening the Values of Democracy and Rule of Law through Abstract Control of Constitutionality of Norms
Mr. Georg Lienbacher
Judge
Constitutional Court of Austria
Mr. José Figueiredo Dias
Judge
Constitutional Court of Portugal
Ms. Marie Baker
Judge
Supreme Court of Ireland
Mr. Tom Gins
Professor
Comparative Constitutio
Chicago Law Sc
VITI I KATËRMBËDHJETË


GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT
ONFERENCE


INTERNATIONAL CONFERENCE


The Role of Supranational Courts in the Decision-Making of Constitutional Courts: the Interaction with the European Court of Human Rights, Court of Justice of the European Union, the African Court on Human and Peoples' Rights and the Venice Commission

Contribution de M. Pierre Nihoul, Président de la Cour Constitutionnelle de Belgique[1]

LA RELATION ENTRE LA CONSTITUTION BELGE ET LE DROIT INTERNATIONAL ET

I) La Constitution belge ne contient pas une disposition générale et expresse relative à la relation entre la Constitution et le droit international . Il n'y a qu'une exception à cette règle, à savoir l'article 34 de la Constitution.

Cet article dispose: "L'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public".

Cette disposition a été insérée dans la Constitution en 1970 afin de justifier la participation de la Belgique et le transfert de compétences aux Communautés européennes et à la Convention européenne des droits de l' homme.

II) En ce qui concerne la relation entre le droit international et la loi, la Cour de cassation a comblé cette lacune.

Dans un arrêt du 27 mai 1971 (Franco- Suisse Le Ski), la Cour de cassation a reconnu la primauté d'une norme de droit international qui a des effets directs dans l'ordre juridique interne sur la loi. D'après la Cour de cassation, "la prééminence de la norme de droit international résulte de la nature même du droit international conventionnel". Il s'agissait d'un point de vue moniste dans le prolongement de la jurisprudence de la Cour de justice.

La conséquence de cette jurisprudence est un contrôle diffus : chaque juge ordinaire ou administratif a le devoir d'écarter l'application des dispositions législatives contraires à une norme

[1] *Contribution as originally delivered in French.*

de droit international qui a des effets directs dans l'ordre juridique interne.

III) Par contre, pour le contrôle de constitutionnalité des normes législatives, le Constituant a choisi en 1980 en faveur d'un contrôle centralisé par la Cour constitutionnelle .

Cette Cour, instituée en dehors du pouvoir judiciaire, est exclusivement compétente pour juger la constitutionnalité des normes législatives, statuant soit sur un recours en annulation introduit par le gouvernement ou le parlement de l'Etat fédéral ou d'une entité fédérée ou par toute personne justifiant d'un intérêt, soit sur une question préjudicielle à poser obligatoirement par chaque juge ordinaire ou administratif.

IV) La Cour constitutionnelle est donc investi du pouvoir exclusif du contrôle de constitutionnalité. Par contre, elle n'est pas habilitée à exercer un contrôle direct de la législation au regard du droit international et européen. Le contrôle de conventionnalité lui échappe donc en principe.

Néanmoins, la Cour a développé deux techniques afin de contrôler la législation au regard des normes internationales et européennes. Ce contrôle est qualifié d' « indirect ».

A) La première technique repose sur les articles 10 et 11 de la Constitution qui interdisent toute discrimination, quelle qu'en soit l'origine.

A partir de 1989/1990, la Cour a jugé que le principe constitutionnel d'égalité et de non-discrimination est applicable à l'égard de tous les droits et de toutes les libertés, c'est-à-dire non seulement ceux inscrits dans la Constitution, mais aussi ceux resultant des conventions internationales liant la Belgique et des principes généraux du droit.

Le raisonnement à l'origine de cette doctrine est qu'il y a violation des articles 10 et 11 de la Constitution, et donc discrimination, lorsqu'un droit ou une liberté est retirée à une catégorie de personnes, alors que ce droit ou cette liberté reste valable pour toutes les autres personnes.

Le résultat de cette jurisprudence est que la Cour lit le principe constitutionnel d'égalité et de non-discrimination en combinaison avec les droits et libertés garantis par les traités, en particulier la Convention européenne des droits de l'homme, les Pactes des Nations Unies et la Charte des droits fondamentaux de l'Union européenne.

B) La seconde technique est développée par la Cour après l'extension de ses compétences en 2003, à savoir un contrôle des normes législatives au regard du Titre II de la Constitution relatif à (presque) tous les droits et libertés fondamentaux.

Dans un arrêt de principe (n°136/2004, du 22 juillet 2004), la Cour a constaté que de nombreux droits fondamentaux garantis par le Titre II de la Constitution ont un équivalent dans un traité international liant la Belgique. Dans ce cas, les garanties constitutionnelles et les garanties conventionnelles constituent un ensemble indissociable. Il s'ensuit que, lorsqu'est alleguée la violation d'une disposition du Titre II de la Constitution, la Cour tient compte, dans son examen, des dispositions de droit international ou européen qui garantissent des droits ou libertés analogues.

La Cour ne limite pas ces deux doctrines aux dispositions du droit international ou de l'Union européenne ayant un effet direct. Sont égale-

ment prises en considération les dispositions qui ne sont pas inconditionnelles, claires et précises, les dispositions qui sont conditionnelles et qui laissent aux parties ou aux États membres une grande latitude dans leur application, car elles sont contraignantes pour la Belgique. Bien entendu, les dispositions qui n'ont pas d'effet direct laissent une plus grande marge de manœuvre au législateur et seront plutôt rarement violées.

V) Les deux techniques précitées présentent plusieurs avantages :

1. Elles ont permis à la Cour constitutionnelle de tenir compte de la jurisprudence de la Cour européenne des droits de l'homme et de la Cour de justice dont les arrêts sont abondamment mentionnés et /ou cités.

2. De cette manière, la Cour constitutionnelle a pu donner aux garanties constitutionnelles dont la plupart ne sont pas modifiées depuis 1831, une interpretation évolutive et contemporaine.

3. La certitude que le principe de la primauté de la protection la plus étendue soit respecté, que cette protection figure dans la Constitution ou dans les normes de droit international ou européen.

4. La prévention de conflits entre la jurisprudence constitutionnelle et la jurisprudence supranationale.

VI) Le contentieux de la protection des droits fondamentaux représente plus de 90% des dossiers pendants devant la Cour.

De manière générale, la Cour a tendance à s'inscrire dans une conception universaliste, et donc non relative, des droits de l'homme. Elle utilise toutes les sources internationales des droits de l'homme ratifiées par la Belgique, qu'elles soient européennes ou mondiales. La juridiction de la Cour constitutionnelle est évidemment limitée à la Belgique et aux situations juridiques qui peuvent y être rattachées. Dans ce champ, la Cour interprète et applique les droits de l'homme de manière uniforme, sans particularisme régional et sans faire de distinction en fonction de la nationalité de la personne en cause.

VII) Les deux contrôles mentionnés, à savoir, d'une part, le contrôle centralisé de constitutionnalité des normes législatives par la Cour constitutionnelle et, d'autre part, le contrôle diffus de conventionnalité des normes législatives par chaque juge ordinaire et administratif, a donné lieu à la problématique du " concours des droits fondamentaux" : un juge, devant lequel une partie soulève qu'une disposition législative viole un droit fondamental garanti tant par la Constitution que par une disposition conventionnelle analogue, doit-il poser une question préjudicielle à la Cour constitutionnelle, en application de la jurisprudence de celle-ci, ou peut-il lui-même contrôler la compatibilité de la norme législative avec la disposition conventionnelle, en application de la jurisprudence de la Cour de cassation?

Le législateur spécial a résolu la question en 2009 en accordant une priorité de contrôle à la Cour constitutionnelle : hormis quelques exceptions (de l'acte clair ou de l'acte éclairé), le juge ordinaire ou administratif est tenu de poser une question préjudicielle à la Cour constitutionnelle sur la constitutionnalité de la norme législative, et après une réponse négative à cette question, le juge est compétent pour contrôler la compatibilité de la norme législative avec la disposition conventionnelle.

Le législateur français s'est basé sur cette legislation(belge) pour résoudre le même problème. Cette législation française a donné lieu à l'arrêt célèbre MELKI et ABDELI de la Cour de justice du 22 juin 2010. Dans cet arrêt, la Cour de justice a dit pour droit que la procédure est conforme au droit européen , pour autant que le juge a quo puisse poser une question préjudicielle à la Cour de justice à chaque moment de la procedure et, surtout, qu'il reste compétent pour contrôler la compatibilité de la disposition législative avec le droit européen. On remarque que la Cour de justice a tenté de concilier les compétences des Cours constitutionnelles avec le principe supérieur de l'unité et de la primauté du droit européen.

Bien que la législation belge relative au concours des droits fondamentaux ait été estimée compatible avec l'arrêt précité, l'article concerné - l'article 26, §4, de la loi spéciale sur la Cour constitutionnelle- a été modifié en 2014 pour prévoir notamment expressément la possibilité de questions préjudicielles parallèles à la Cour de justice et à la Cour constitutionnelle.

VIII) Bien que la Cour constitutionnelle belge soit bienveillante envers le droit européen, elle a des doutes sur la jurisprudence de la Cour de justice dans l'arrêt Melloni du 26 février 2013. Dans cet arrêt, la Cour de justice a dit pour droit que l'article 53 de la Charte des droits fondamentaux de l'Union européenne n'autorise pas de manière générale un Etat membre à appliquer le standard de protection des droits fondamentaux garanti par sa Constitution lorsqu'il est plus élevé que celui découle de la Charte et à l'opposer à l'application de dispositions du droit de l'Union. D'après la Cour de justice, un standard national de protection des droits fondamentaux, même plus étendu, ne peut pas compromettre le niveau de protection prévu par la Charte, telle qu'interprétée par la Cour, "ni la primauté, l'unité et l'effectivité du droit de l' Union".

Lors de nos visites à d'autres Cours constitutionnelles, nous avons senti une grande préoccupation et même un mécontentement sur cette jurisprudence. C'est compréhensible à la lumière de leur tâche, la protection des droits fondamentaux garantis par la Constitution.

Parce qu'en règle le niveau de protection offert par les instruments européens est plus élevé que celui garanti par la Constitution belge, la situation qui s'est présentée dans l'arrêt Melloni a peu de chances d'exister en droit belge. Et si la Cour constitutionnelle est confrontée un jour à cette situation, elle posera sans nul doute des questions préjudicielles à la Cour de justice avant de statuer.

IX) Qu'en est-il de ce qu'il est convenu d'appeler « l'exception de l'identité nationale »?

La construction de l'Union européenne et l'intégration toujours plus poussée des législations des différents Etats membres entraîne un phénomène d'universalisation - à l'échelle de l'Union européenne - des standards du contrôle des droits fondamentaux. Face à ce phénomène, plusieurs juridictions constitutionnelles en Europe mobilisent, pour se prémunir contre une atteinte jugée trop importante à la souveraineté nationale et aux valeurs que celle-ci entend protéger, le concept d' « identité nationale ».

La Cour constitutionnelle belge a fait référence à la notion d'identité dans l'arrêt n°62/2016, en considérant que la disposition constitutionnelle qui autorise le transfert de pouvoirs déterminés à des institutions de droit international public et, notamment, aux institutions de l'Union européenne, « n'autorise en aucun cas qu'il soit porté une atteinte discriminatoire à l'identité nationale inhérente aux structures fondamentales, politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit ». Cette incise n'a cependant pas été suivie d'effet concret. On pourrait peut-être y voir un indice de ce que la Cour pourrait, un jour à l'avenir, décider qu'un droit fondamental reconnu par la Constitution belge doit être interprété de manière particulière dans l'ordre constitutionnel belge, ce qui tendrait à rompre le caractère universel du droit en question. Ceci n'est toutefois qu'une supposition et une hypothèse, rien ne permet d'affirmer à l'heure actuelle que la Cour s'engagera dans cette voie.

Par ailleurs, en reprenant mot pour mot la formule prévue par l'article 4 du TFUE, la Cour constitutionnelle belge inscrit cette exception dans le cadre du droit de l'Union européenne. Elle permet également à la Cour de poser dans ce cadre une question préjudicielle à la Cour de justice, ce qui ouvre un dialogue entre juges.

X) Cette dernière attitude suivrait la tendance de la Cour constitutionnelle belge à poser régulièrement des questions préjudicielles à la Cour de justice.

Jusqu'à présent, la Cour constitutionnelle a posé 138 questions préjudicielles dans 40 arrêts de renvoi rendus pour la plupart les quinze dernières années. L'explication de ce grand nombre de questions préjudicielles tient au fait que la Cour constitutionnelle utilise le droit européen comme norme de référence indirecte et à l'occasion de son contrôle, elle est parfois tenue de poser les questions d'interprétation ou de validité soulevées par les parties.

De cette façon, elle prévient aussi des violations du droit européen dans l'ordre juridique interne et des condamnations par la Cour de justice. Une interprétation rendue par la Cour de justice est d'ailleurs contraignante pour tous les Etats membres.

XI .Il est temps de conclure.

Formellement, la Cour constitutionnelle utilise encore apparemment des concepts hiérarchiques en ce qui concerne la relation entre, d'une part, la Constitution et, d'autre part, les traités et le droit européen dérivé. A y regarder de plus près, la Cour tient explicitement compte de la spécificité des traités faisant ainsi preuve d'une prudence extrême dans l'exercice de son contrôle et elle situe le fondement de la "primauté "du droit européen dérivé dans l'article 34 de la Constitution.

La jurisprudence de la Cour constitutionnelle s'inscrit plutôt dans le dialogue des juges. La lecture des droits fondamentaux garantis par la Constitution en combinaison avec des normes internationales et européennes analogues et le dialogue préjudiciel avec la Cour de justice en témoignent. En conciliant ainsi le droit constitutionnel et le droit européen, la Cour constitutionnelle évite des conflits entre les hautes juridictions et favorise la sécurité juridique.

Contribution by Ms. Anna Austin[1], Jurisconsult of the European Court of Human Rights

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

THE ROLE OF SUPRANATIONAL COURTS IN THE DECISION-MAKING OF CONSTITUTIONAL COURTS: INTERACTION WITH THE ECtHR AND THE SUBSIDIARITY PRINCIPLE

The principle of subsidiarity is the most important element defining the respective roles and responsibilities of the Strasbourg Court (ECtHR) and the national superior, including constitutional, courts[2].

This notion was articulated in the case-law as early as the late 1960s[3] 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 recent amendment of the Convention's preamble to reference this notion[4]. One of the priorities for the future is to reinforce the elements of this subsidiary system, it being considered that the future effectiveness, and sustainability, of the Convention system depends, in large part, on the relationship between the Strasbourg Court and the national superior, notably constitutional, jurisdictions.

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

[2] Article 19 of the Convention explains that the Court is established to "ensure the observance of the engagements undertaken by" the States.

[3] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 1968.

[4] With the entry into force of Protocol No. 15 in August 2021

Convention subsidiarity comprises two mirroring obligations: on the one hand, an obligation on States to embed the Convention guarantees and create remedies by which those guarantees can be tested nationally and, on the other, a corresponding obligation on the Court to allow the national authorities to have the fullest opportunity to first consider a Convention complaint and to 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. The message I hope to convey by this short intervention is that reinforcing subsidiarity is not intended to limit or weaken human rights protection, but rather to emphasise the respective roles and responsibilities of national and supranational authorities in that regard.

So what are the principal tools by which this subsidiary mechanism is constructed and operated?

I. Operational/procedural subsidiarity

One of the key manifestations of subsidiarity is in Convention processes and procedures.

A. Obligation on the applicants to exhaust domestic remedies

The first is to be found in the Convention requirement that all applicants exhaust all effective domestic remedies prior to coming to the Court and in the corresponding obligation on States to provide access to such remedies (Articles 13 and 35 of the Convention)[5]. National courts thereby first have the opportunity to determine Convention compatibility[6] and, thereafter, the Court can have the benefit of, and rely upon, the views of the national courts, the latter being in direct and continuous contact with the vital forces of their countries[7].

This is the most indispensable part of the functioning of the subsidiary system of protection. This year's Grand Chamber judgments against the Czech Republic[8] 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.

A word about the effectiveness of constitutional remedies. As a general rule, in a legal system providing constitutional protection for fundamental rights, an individual must test the extent of that protection and allow the constitutional court to develop those rights by way of interpretation[9]. However, the requirement to exhaust the constitutional remedy will depend on the State's legal system, the scope of the constitutional court's jurisdiction and the complaint made[10]. The Court also takes into account

[5] 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)).

[6] *Al-Skeini and Others v. the United Kingdom* [GC], § 99.

[7] For example, *Burden v. the United Kingdom* [GC], § 42.

[8] *Fu Quan, s.r.o. v. the Czech Republic* [GC]; and *Grosam v. the Czech Republic* [GC].

[9] *A, B and C v. Ireland*, § 142, 2010.

[10] *Uzun v. Turkey* (dec.), §§ 42-51 and the references cited therein.

whether the constitutional remedy has evolved in time towards effectiveness[11] and whether such an effective remedy remains so if excessively lengthy[12]. Finally, applicants were absolved from exhausting the constitutional remedy in recent cases against Poland[13] 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[14].

B. The Strasbourg Court's process-based review

Subsidiarity has found further procedural expression in recent years through the greater emphasis placed by the Strasbourg Court, in certain areas of the case-law, on the quality of the national legal framework and decision-making process ("process-based review").

In the first place, where a national court has 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[15].

Secondly, this judicial restraint by the Strasbourg Court extends beyond the national courts: significant weight and leeway is also accorded to a State's view as to the necessity of a legislative provision if it is adopted following an exacting human rights review[16].

Thirdly, the case-law also reflects attempts, where possible and suitable, to provide national courts with what could be considered an "analytical framework" to facilitate the application of Convention case-law in domestic proceedings[17]. Concretely this translates into the articulation of tests, with the relevant criteria and

[11] *Riđić and Others v. Serbia*, §§ 68-74, 2014, as regards the non-enforcement of judgments rendered in respect of socially/State owned companies.

[12] *Story and Others v. Malta*, §§ 82-85, 2015.

[13] *Inter alia*, *Advance Pharma sp. z o.o v. Poland*, § 319, 2022; and *Juszczyszyn v. Poland*, §§ 149-153, 2022.

[14] 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.

[15] 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).

[16] *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.

[17] 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); and 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).

presumptions, to be applied by national courts to ensure a useful Convention analysis.

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[18].

II. Substantive subsidiarity

A. Margin of appreciation

The substantive manifestations of subsidiarity are equally critical and the most crucial is the acknowledgement that the 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 and to measure those elements against, notably, the prevailing European consensus[19].

A useful example of this function - striking a balance between common minimum standards, on the one hand, and the State specific needs and sensitivities, on the other - is the case of *A, B and C v. Ireland* (2010). The relevant constitutional provision at issue acknowledged the equal right to life of the unborn and of the mother.

Two applicants complained under Article 8 that they had no right to choose an abortion for their well-being. While a broad margin of appreciation was, in principle, to be accorded to the Irish State in balancing such competing rights, the margin would normally be significantly narrowed by what was at the time an overwhelming European consensus towards broader access to abortion than available in Ireland at the time. However, in the end it was not found that this clear consensus decisively narrowed the broad margin of appreciation of the State since the question at the heart of the issue (when life began) was undecided (whether from a legal, philosophical, scientific, religious point of view): the margin of appreciation of the State remained broad. The absence of the possibility of abortion for well-being reasons fell therefore within the State's margin of appreciation leading to a finding of no violation as regards those two applicants.

A third applicant in that case argued that her pregnancy constituted a risk to her life. While the constitution accorded her a theoretical right to seek an abortion, there was no legislative framework in place to implement the constitutional provision and, in particular, to determine how that broadly expressed equal constitutional right to life of the mother could be measured or determined as requiring access to a legal abortion in a legally binding manner in a giv-

[18] 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.

[19] 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.

en case. The lack of legislative implementation meant that this applicant's right to protect her life remained a theoretical one. Importantly, the Supreme Court had previously acknowledged that it was not the appropriate forum for this primarily medical determination and that it was inappropriate to require women to take on such complex constitutional litigation when their underlying constitutional right to an abortion, in the case of a qualifying risk to life, was not disputed: it called for legislative implementation of the constitutional provision. It was this position of the Supreme Court, together with the lack of an explanation for the failure to legislate, that allowed the Court to find that there had been a failure to secure to that applicant effective respect for her private life.

This judgment is a useful example, of how the Court uses its subsidiarity tool box (margin of appreciation, consensus, dialoguing with constitutional courts) to find balance in a sensitive context: finding a violation in relation to one applicant (by essentially reflecting the existing demands of the Supreme Court) and, on the more sensitive question of extending access to abortion beyond the Constitutional provision, the ECtHR gave the respondent State space to seek to resolve domestically a matter which had been a highly divisive issue for decades[20].

B. Fourth Instance doctrine

Secondly, this substantive subsidiarity finds everyday expression in its fourth-instance doctrine. It is not the function of the Strasbourg Court to take the place of national courts, reassessing facts and interpreting national law. Its role is rather to ensure that those decisions are not flawed for arbitrariness or otherwise manifestly unreasonable. If it were otherwise the Court would be acting as an additional or "fourth" instance which would be to disregard the limits imposed on its action[21]. A typical example would be an applicant who complains about a wrongful conviction rather than about any procedural defect in the proceedings leading to that outcome, which defect could be such as to lead to a finding that those proceedings are unfair in terms of Article 6 of the Convention.

Moreover, 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 focus is rather on the accessibility and foreseeability of that provision, on the protection it offers against arbitrariness and on the safeguards for which it provides[22]. The Court's role is therefore confined to ascertaining whether the effects of such an interpretation are compatible with the Convention[23].

[20] A referendum in 2018 allowed for terminations in the first 12 weeks of pregnancy and the implementing legislation was passed soon thereafter.

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

[22] *Solska and Rybicka v. Poland*, §§ 112-129, and further references therein.

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

III. Importance of dialogue, the supranational and national courts

A. Dialogue through jurisprudence

The dialogue with which the Strasbourg Court is primarily concerned is the choices it makes in the text and reasoning of its judgments. This form of judicial dialogue can determine how the Court makes the principle of subsidiarity work in practice so as to enable the domestic courts to deal more effectively with Convention issues arising before them. The ultimate goal is, of course, to ensure that issues are dealt with nationally and that applications are not lodged in Strasbourg.

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.

B. Networking and knowledge sharing

Successive Presidents and Judges of this Court have placed considerable value on close dialogue with national superior courts to enhance the shared implementation of the Convention, reinforce the subsidiary nature of the Strasbourg supervisory mechanism and underscore the primary role of national courts. Every year the Court is pleased to welcome numerous visits from courts across the Council of Europe legal space.

In 2015 the Court decided to put structure on this dialogue, creating the *Superior Courts Network* (SCN) to ensure effective and structured exchanges on Convention case law and to provide concrete operational support to superior courts, including tailor-made to their needs. This space has also become a place of informal and *ad hoc* exchanges between national courts, also a favoured means of mutual support and problem-solving. Currently the largest network of superior courts in the world, it boasts 104 member superior courts from 45 States.

The creation of the Court's Knowledge Sharing platform, providing up-to-date case-law analysis on all principal Convention subjects, has been a paradigm change in terms of access to the extensive ECHR case-law within the Court. It was quickly opened on a privileged basis to the superior courts and, subsequently, fully externalized to all external actors. This platform, of itself, goes a long way to supporting the role of key Convention actors in fulfilling their shared responsibility for the implementation of the Convention .

The most recent addition to the SCN projects, the Visiting Professionals Scheme, allows superior courts to visit Strasbourg and to hear from ECtHR staff on matters of *know-how* on subjects chosen by them including on case-processing, document management, knowledge management and the related IT tools. In the six short months since the launch of this Scheme, requests from national courts have been constant[24].

[24] Constitutional Court of Türkiye, Supreme Court of Cyprus, Kuria of Hungary, Supreme Administrative Court of Lithuania, Supreme Court of Ireland, the Superior Council of the Magistracy/High Court of Cassation and Justice/Bucharest Court of Appeal of Romania and, last week, the Supreme Court of Azerbaijan, the Constitutional Court of Latvia and the Supreme Court of Slovenia.

C. Protocol No. 16 to the Convention

The third manner in which the ECtHR dialogues with superior courts is through Protocol No. 16 to the Convention which allows, since it's entry into force in 2018, the "highest courts" of a Contracting State to request an advisory opinion of the Strasbourg Court on a matter concerning "issues of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its Protocols" which have arisen in a pending case before the requesting court. This extension of the Court's advisory jurisdiction is, according to the preamble of Protocol No. 16, to enhance the interaction between the Court and higher national courts with a view to reinforcing the implementation of the ECHR in accordance with the principle of subsidiarity.

So Advisory opinions can thus provide interpretative assistance to Member States, so as to avoid future violations, facilitate the correct interpretation of the Convention within national legal orders and, in this context, enhance judicial dialogue[25].

IV. Conclusion

Optimising subsidiarity, to ensure a shared responsibility for ensuring human rights protection within the Convention system, remains the abiding theme in the Convention system and the focus of the Court's relationship with the national superior, notably constitutional, courts. If historically the relationship with national courts may have been perceived as a hierarchical one, that model is no longer accurate as I hope the above-outline has illustrated.

To return therefore to the mirrored roles and responsibilities referred to at the outset, the subsidiary system means that, for the ECtHR to take a step back in any concrete case, the national authorities have to step in and to step up their human rights scrutiny. The subsidiary principle therefore 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, either at national or supranational level. The principle of subsidiarity operates to calibrate within this process the interrelated roles and responsibilities of both the national superior (constitutional) court and the supranational court.

[25] To date the Court has received eight requests pursuant to Protocol No. 16: six opinions have been delivered, one request was declined and one is pending.

Contribution by Ms. Grainne McMorrow, Representative of the Venice Commission

THE ROLE OF THE VENICE COMMISSION IN SUPPORTING DEMOCRACY AND PROMOTING THE DEVELOPMENT OF CONSTITUTIONAL COURTS INTERNATIONALLY

Good morning, everyone. I must say at the outset, it is indeed a great honor for me to be here this morning deputizing for Madame Claire Bazy -Malourie, the President of the Council of Europe Venice Commission for Democracy Through Law. We are an organisation, which I hope that you all have a familiarity with and perhaps a significant participation in. Can I first say President Gresa Caka Nimani, now grateful I am for this kind invitation to the Venice Commission to attend the 14th anniversary of the establishment of your Constitutional Court, an exemplary court, a beacon of aspiration for many other countries in how you function and operate. And I say that without any reservation, and acknowledge the recognition that the Venice Commission has for the efforts you and your highest Calibre fellow Judges have put into the development of your Constitutional Courts over the last 14 years . It is very important that the establishment of a Constitutional court attracts the first and most significant commitment for any country, emerging or not, because we rely on an effective, functioning Constitutional Court to protect citizens, and trickle down best practice to the lower courts beneath it, in order to have a functioning Judicial system to support Democracy. I'd like to just take a minute of my time albeit I have no idea how I can cover the ground adequately regarding the Venice Commission

and its work over 33 years in the 10 minutes allocated. But can I please firstly acknowledge the really important contribution that the Kosovan members of the Venice Commission, your eminent Professors Qerim Qerimi and Professor Istrefi, and all their predecessors, including former President of the Constitutional Court Arta Rama-Hajrizi, because their contribution to the working of the Venice Commission has been extremely significant and valuable.

The Venice Commission is an advisory body of the Council of Europe on legal and constitutional matters, and its primary role is to provide legal advice to its member States and in particular to assist States wishing to bring their legal and institutional structures in line with the European Convention and legal standards and utilizes its international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides emergency constitutional aid to states in transition.

Now a few, brief summary of facts regarding the Venice Commission. I am sharing for your kind attention also an overhead image that summarizes our work. I encourage you all to explore our website and avail of the resources available there in terms of perhaps useful Opinions on complex areas of law encountered by States. We were founded after a proposal by an Italian Professor Pergola who was then Minister for Community Policy in 1990 in Italy who believed very strongly that sustainable democracies could only be built on a constitutional framework based on the rule of law. He felt that we had a unique resource, a pool of international legal expertise we could call upon to assist countries with their transition to democracy and so his proposal gathered momentum and support, which resulted in the setting up of the Venice Commission. In fact, he took office as the first President of the Venice Commission. So we are now 33 years in existence, and we have issued to date 13 opinions that concern Kosovo on a wide range of issues. We have 61 members now of which, 15 are non - Council of Europe members and we also have four observer countries. We have adopted 1,110 country specific opinions and general reports and we have organized over 100 international conferences. We work very closely with the EU, PACE, European Commission and with the OSCE or ODHIR and other organizations working in this arena. We also provide training in human rights, rule of law, good governance and electoral administration and justice. We are a resource for countries and we are a resource that is available to all of you, and we hope that your participation will enhance how good a resource that can be.

And in that regard, I'd like to just take a moment to pay tribute, to everyone in this room making a contribution to the betterment of our society, to the enhancement and protection of human rights internationally, to protecting Democracy and the Rule of Law, to ensuring that Constitutions deliver essential rights and protections

to all citizens and you deserve great credit for your efforts in that regard. You are here to participate in this important event here in Pristina primarily for that purpose. The achievements in Kosova towards our shared goals are exceptional, whilst recognizing as they do, that there is more to achieve. The Venice Commission for its part acknowledges that it is enormously humbling to be entrusted with the ability to advise a country on a dilemma it faces regarding its legislation or its constitution. We express our gratitude for your trust in us. We always respect the traditions and heritage of each respective country we work with. We do not go blindly there and simply, project rigid opinion. Our process of engagement is that we brief ourselves carefully and examine the history of that country, its circumstances and pressures, its political situation, and then we go on visiting mission to the country concerned, where we meet all stakeholders, including everyone from the President down, to the politicians in Government and in Opposition, to those central to the Administration of Justice , The chief Justice , Judges, Prosecutors , and also those who lead civil society Organisations. We listen and our opinions are based on that process. Who are the members of the Venice Commission? Well, we are a group of lawyers predominantly, but some of our members have been Prime Ministers or Ministers of Justice of their countries. We include amongst our members some of the most eminent international law professors. There are a few like myself who have been practicing lawyers before the courts. We value those who are determined to make a contribution to the betterment of all of societies and something in this reminds me of, if you'll forgive me for quoting a historic Economist and Philosopher, Edmund Burke, when he said that in order for evil to thrive, it is only necessary that people, good people, do nothing, Well, we are not content with doing nothing and collectively we have something to offer each other. It is important to realise that you must never stop learning. There is much to learn from countries in transition, countries at early or different stages in their evolution, who are emerging perhaps from conflict and taking the first steps towards independence. It's very important that we respect both the traditions and history of the countries that we visit. We are asked to provide Legal Opinions on specific issues and as Rapporteurs selected by the Venice Commission, we are usually a group of 3/4 Members or Experts , we then determine how best to approach our opinions with regard to their legislation and their constitutions. We each individually and independently prepare a provisional Opinion on the question asked and then collaborate in finalizing a joint Opinion which is then circulated to Members and the State concerned for discussion before being presented to the Venice Commission Plenary Session where it is voted on. The Venice Commission approaches the questions it is asked to advise on with openness and empathy. We listen. We focus on ways to create avenues for dialogue and positive progression within the country concerned and to deliver the best legal advice on the topic it has been asked to advise upon.

Many of our eminent speakers today have already spoken about the pressures, about the necessity to protect the independence of the judiciary, to protect separation of powers. Politicians live and work in a complex arena, they are the legislators, primarily, but their pressures are very different and the vagaries of political life, the need to be re-elected can potentially com-

promise best endeavours, and the disturbing rise of populism can potentially add pressures to their work. We must stand in our constitutional courts and at the Venice Commission, above and beyond that, in order to protect the integrity of a Constitution that serves all of the people.

I was very touched by the remarks of Professor Ginsburg about how we at the Venice Commission are the least offensive interlocutor and influencer for good , in the context of of all such entities effecting positive change, because we neither wield "the purse nor the sword " and that resonated strongly with me . We have issued to date, 1,110 opinions, which are country specific. We have no mandate to enforce implementation. But pretty much always our opinions are implemented. We function below the radar. We're not a hugely public organization. We tend not to make pronouncements. Ours is a more personal engagement with the individual countries who seek our assistance. Now I will seek guidance from learned moderator because I could go on beyond my time allocation.

Personally, I am passionate about the value of the Venice Commission. I am passionate about the fact that 61 countries nominate two members who attend the Commission and offer their services and expertise, free of charge. This is an unpaid role where we agree to become rapporteurs on opinions for specific countries on specific areas of law, largely constitutional law, where we have expertise, but also on any issues concerning the structure of the courts, elections, human rights, separation of powers, impartiality - values that we all need to share if we are going to live in better societies.

So there you have a very short outline of our Venice Commission work and I hope we can inspire some confidence in your countries if they have not yet sought our assistance. If I can please ask you to consider requesting opinions from us because we are really there to help, without agendas, or bias whatsoever and we would like to assist where possible.

Perhaps I'll leave it there, but please do not hesitate to approach me with any questions you have regarding the Venice Commission, and remember that we are happy to assist in any respect regarding your concerns around legislation or constitutions. Thank you very much.

Doprinos od G. Mirsad Ćeman, potpredsednik Ustavnog suda Bosne i Hercegovine[1]

UTICAJ SUDSKE PRAKSE EVROPSKOG SUDA ZA LJUDSKA PRAVA NA PRAKSU DOMAĆIH SUDOVA U BOSNI I HERCEGOVINI

1. Uvod

Evropska konvencija o zaštiti ljudskih prava i osnovnih sloboda (Evropska konvencija) kao najznačajniji međunarodni ugovor iz oblasti zaštite ljudskih prava i sloboda sastavni je dio unutrašnjeg pravnog poretka Bosne i Hercegovine, direktno je primjenjiva i, shodno Ustavu Bosne i Hercegovine, ima supremaciju nad svim drugim zakonima. Ovaj specifični ustavni status Evropske konvencije postoji od stupanja na snagu Ustava Bosne i Hercegovine iz 1995. godine, dakle i prije nego što je Evropska konvencija ratifikovana 2002. godine. *Dakle, Evropska konvencija se u Bosni i Hercegovini primjenjuje kao „domaće pravo" ali i kao međunarodno ratifikovani ugovor.*

Zaštita osnovnih prava garantiranih Ustavom Bosne i Hercegovine i Evropskom konvencijom osigurana je prema članu VI.3.b) Ustava Bosne i Hercegovine, apelacionom nadležnošću Ustavnog suda Bosne i Hercegovine (Ustavni sud) prema kojoj „Ustavni sud ima također apelacionu nadležnost za pitanja iz Ustava koja se pojave na temelju presude bilo kojeg drugog suda u Bosni i Hercegovini", što podrazumijeva mogućnosti preispitivanja sudskih odluka na osnovu individualne apelacije *(„ustavne tužbe" kako se u nekim sistemima naziva)* ukoliko su povrijeđena Ustavom zagarantovana prava i

[1] *Contribution as originally delivered in Bosnian.*

slobode. Apelaciona nadležnost predstavlja jednu od važnijih i najčešće korištenih nadležnosti Ustavnog suda koja se sastoji od zaštite ustavnih prava i sloboda pojedinaca, uključujući i prava i slobode iz Evropske konvencije i Protokola uz Evropsku konvenciju. Apelacija je ustvari posljednja prilika da se unutar pravnog sistema Bosne i Hercegovine, odnosno na domaćem nivou, ispravi kršenje ljudskih prava i sloboda što je zapravo krajnji cilj svih mehanizama za zaštitu ljudskih prava.Vršenjem ove nadležnosti Ustavni sud postaje najjači domaći mehanizam zaštite ljudskih prava i osnovnih sloboda.

U Bosni Hercegovini Evropska konvencija se citira i primjenjuje gotovo svakodnevno a Ustavni sud svoju praksu zasniva na dosljednoj primjeni konvencijskih standarda i na praksi Evropskog suda za ljudska prava (Evropski sud), kao ovlaštenog tumača Evropske konvencije. Snažna volja, spremnost i odlučnost Ustavnog suda da se preuzmu evropski standardi kroz dosljedno poštivanje prakse Evropskog suda vidljiva je već od prvih godina rada Ustavnog suda, počev od 1997.godine[2].

2. Praksa Evropskog suda za ljudska prava i njena primjena u praksi Ustavnog suda

Mnogo je primjera u kojima se Ustavni sud pozvao na praksu Evropskog suda i svaki je značajan u kontekstu različitih pitanja postavljenih pred Ustavnim sudom. Kada je riječ o poštivanju prava na lični i porodični život, ili miješanja u prava na dom iz člana 8. Evropske konvencije, veliki je broj odluka u kojima je Ustavni sud Bosne i Hercegovine koristio stavove Evropskog suda zauzete u predmetu **Niemietz protiv Njemačke**[3]. U kontekstu prava na ličnu slobodu i sigurnost iz člana 5. Evropske konvencije jedna od presuda koja se može izdvojiti je presuda u predmetu **Winterwerp protiv Nizozemske** (od 24. oktobra 1979. godine). Presuda u predmetu **Unterpertinger protiv Austrije**[4] je bila od velike pomoći u kontekstu garancija iz člana 6. stav 3. tačka d). U predmetima koji se odnose na pitanja izvršenja pravosnažnih presuda (u kontekstu prava na pravično suđenje, član 6. Evropske konvencije), Ustavni sud često koristi stavove Evropskog suda zauzete u presudi **Hornsby protiv Grčke**[5]. Kada govorimo o pravu na pravično suđenje moramo spomenuti i primjenu u praksi Ustavnog suda principa koje je Evropski sud definisao u predmetu Dragojević protiv Hrvatske[6] koji se odnosio na pitanje posebnih istražnih radnji. U kontekstu prava koja garantira član 3. Protokola broj 1, u predmetima koji pokreću pitanja koja se odnose na izbore, značajni su stavovi iz presude **Mathieu-Mohin i Clerfayt protiv Belgije**[7].

Iz grupe predmeta koje su se odnosile na azil i ostala prava stranaca, odnosno mjere prema stranicima, treba spomenuti odluku Ustavnog suda u predmetu gdje je osporenim presudama

[2] Ustavni sud BiH je ustanovljen članom VI Ustava Bosne i Hercegovine koji je Aneks 4 Općeg okvirnog sporazuma za mir u Bosni i Hercegovini (tzv. Dejtonski odnosno Pariški mirovni sporazum od 14.decembra 1995.godine).Inače, tradicija ustavnog sudovanja u Bosni i Hercegovini datira još od 1964.godine kada je osnovan prvi Ustavni sud Bosne i Hercegovine.

[3] Evropski sud za ljudska prava, Niemietz protiv Njemačke, aplikacija broj 13710/88, 16.12.1992. godine

[4] Evropski sud za ljudska prava, Unterpertinger protiv Austrije, 9120/80, 24.11.1986. godine

[5] Evropski sud za ljudska prava, Hornsby protiv Grčke, 18357/91, 19.3.1997. godine

[6] Evropski sud za ljudska prava, Dragojević protiv Hrvatske, 68955/11, 15.1.2015. godine

[7] Evropski sud za ljudska prava, Mathieu-Mohin i Clerfayt protiv Belgije, 9267/81, 2.3.1987. godine

redovnog suda, rješenjima Ministarstva sigurnosti i Službe za poslove sa strancima apelant stavljen pod nadzor, te je i produženo njegovo stavljanje pod nadzor u Imigracionom centru, a na osnovu člana 99. stav 2. tačka b) Zakona o kretanju i boravku stranaca i azilu[8]. U obrazloženju osporenih odluka je navedeno da je nakon provedenog postupka utvrđeno da apelantovo prisustvo i dalje predstavlja prijetnju javnom redu i nacionalnoj sigurnosti Bosne i Hercegovine, te da je apelantu oduzeto pravo na boravak, odbijen zahtjev za međunarodnu zaštitu i izrečena mjera protjerivanja na period od pet godina, pa da je i radi izvršenja ovih odluka neophodan daljnji apelantov boravak pod nadzorom u Imigracionom centru. U odluci u navedenom predmetu Ustavni sud se osvrnuo na praksu Evropskog suda u predmetu **Al-Hamdani protiv Bosne i Hercegovine**[9]. Naime, razmatrajući pitanje kršenja prava na slobodu i sigurnost ličnosti u odnosu na tog aplikanta, Evropski sud je, između ostalog, naveo da je aplikant stavljen pod nadzor 23. juna 2009. godine jer su nadležni organi utvrdili da predstavlja prijetnju nacionalnoj sigurnosti, dakle, u vrijeme kada postupak protjerivanja aplikanta još uvijek nije bio pokrenut. S tim u vezi, Evropski sud je zaključio da apelantovo zadržavanje pod nadzorom u periodu od 23. juna 2009. godine pa do pokretanja postupka deportacije 8. novembra 2010. godine nije opravdano sa aspekta člana 5. stav 1. točka f) Evropske konvencije budući da je zadržavanje pod nadzorom opravdano jedino u slučaju dok traje postupak protjerivanja. Međutim, ***Evropski sud je u istom predmetu zaključio da nema kršenja navedenog člana Evropske konvencije zbog zadržavanja aplikanta pod nadzorom u periodu nakon pokretanja postupka deportacije, te je odbio navode o kršenju prava iz tog člana.*** U konkretnom slučaju apelant je stavljen pod nadzor 30. juna 2010. godine na period od 30 dana (do 30. jula 2010. godine) zbog toga što je utvrđeno da predstavlja prijetnju nacionalnoj sigurnosti, te da je nakon toga nadzor nad apelantom produžavan također na periode od 30 dana, a zadnji put, prema rješenjima obuhvaćenim apelacijom, rješenjem od 30. decembra 2011. godine. Ustavni sud je utvrdio da apelant nije osporio sva rješenja Službe, Ministarstva i Suda BiH već je kao prvo osporeno rješenje označio rješenje Službe o produženju nadzora od 20. augusta 2010. godine (kojim mu je produžen nadzor u periodu od 31. augusta do 30. septembra 2010. godine), te rješenje Službe od 22. septembra 2010. godine (kojim mu je produžen nadzor od 1. do 31. oktobra 2010. godine). Osim toga, Ustavni sud zapaža da je postupak protjerivanja pokrenut 6. oktobra 2010. godine nakon što je istekao rok za dobrovoljno napuštanje teritorije BiH, koji je apelantu ostavljen rješenjem o otkazivanju stalnog boravka, a da je rješenje o protjerivanju doneseno 15. oktobra 2010. godine. ***Imajući u vidu navedeno, te slijedeći navedeni stav Evropskog suda u predmetu Al-Hamdani, Ustavni sud je utvrdio da se u okolnostima konkretnog predmeta period apelantovog zadržavanja pod nadzorom po osporenim rješenjima po kojima je apelantu nadzor produžen u periodu od 31. augusta do 30. septembra 2010. godine, odnosno od 1. oktobra do 31. oktobra 2010. godine, a koji se***

[8] Ustavni sud Bosne i Hercegovine, Odluka broj AP 4518/10, 13.6.2012. godine

[9] Evropski sud za ljudska prava, Al-Hamdani protiv Bosne i Hercegovine, 31098/10, 7.2.2012. godine

odnosi na period prije pokretanja postupka apelantovog protjerivanja 6. oktobra 2010. godine, ne bi mogao smatrati opravdanim u smislu odredbi člana 5. stav 1. točka f) Evropske konvencije, te da u tom periodu postoji kršenje ovog apelantovog prava.

Prema praksi Evropskog suda iz presude **Pellegrin protiv Francuske** sporovi koji pokrenu javni službenici čiji posao ukazuje na specifične aktivnosti javnih službi i ako su ti službenici odgovorni za zaštitu općih interesa države ili drugih javnih vlasti (pripadnici oružanih snaga, policije i drugih snaga za održavanje reda, nositelji pravosudnih dužnosti, carinski službenici, diplomatsko osoblje i dr.) isključeni su iz djelokruga člana 6. stav 1. Evropske konvencije.[10] Ovu praksu slijedio je i Ustavni sud.[11] ***Međutim, Evropski sud za ljudska prava u predmetu Vilho Eskelinen i dr. protiv Finske[12] preispitao je svoju raniju praksu, te zaključio da je za isključivanje državnih službenika iz zaštite predviđene članom 6. stav 1. Evropske konvencije neophodno kumulativno ispunjenje dva uvjeta.*** «Prvo, država, u domaćem pravu, mora izričito isključiti pristup sudu za određenu poziciju ili kategoriju osoblja. Drugo, isključivanje mora biti opravdano i zasnovano na objektivnim razlozima interesa države» te da «ništa ne opravdava isključivanje običnih radnih sporova iz garancija na osnovu člana 6. – onih koji se odnose na plaću, nadoknadu drugih prava tog tipa – na osnovu posebne prirode odnosa između određenih državnih službenika i države. U stvari, postoji presumpcija da se član 6. primjenjuje". Ovakvu praksu je u cijelosti prihvatio i Ustavni sud.[13]

Ovo su samo neki, ilustrativni primjeri, s obzirom da svaka odluka Ustavnog suda sadrži citate presuda Evropskog suda i teško ih je a nije ni potrebno sve ih spomenuti.

Kao što se može vidjeti, utjecaj prakse Evropskog suda je značajan za rad Ustavnog suda. Međutim, u procesu rješavanja predmeta iz svoje nadležnosti Ustavni sud Bosne i Hercegovine često istražuje i druge izvore prakse pa tako, u skladu s potrebama predmeta o kojima Ustavni sud odlučuje, istražuje i praksu drugih sudova, npr. Evropskog suda pravde.

Praksa Evropskog suda pravde u odnosu na praksu Evropskog suda za ljudska prava nije tako često zastupljena, ali je značajna. U praksi Ustavnog suda postoji nekoliko odluka u kojima je od velikog značaja bila odluka **Schul** Europskog suda pravde U jednoj od odluka Ustavnog suda[14] je navedeno: ***Ustavni sud primjećuje da je materijalni sadržaj jedinstvenog tržišta jasno definirao Evropski sud pravde, dajući evropskim zemljama smjernice u ustavnopravnom razvoju ovog važnog aspekta. Prema***

[10] Evropski sud za ljudska prava, Pellegrini protiv Francuske, 28541/95, 8.12.1999. godine, st. 64. do 67.

[11] Ustavni sud Bosne i Hercegovine, Odluka broj AP 1766/15 od 16.1.2007. godine

[12] Evropski sud za ljudska prava, Vilho Eskelinen i dr. protiv Finske, 63235/00, 19.4.2007. godine, st. 42. do 62.

[13] Ustavni sud Bosne i Hercegovine, Odluka broj AP 2231/06 od 23. i 24.11.2007. godine, st. 10-13

[14] Ustavni sud Bosne i Hercegovine, Odluka broj U 68/02 od 25.6.2004. godine

tome, pozivanje na praksu Evropskog suda pravde je od izuzetne važnosti. U skladu s tom sudskom praksom, materijalni pojam «jedinstvenog tržišta» nalaže da se, ukidanjem svih tehničkih, administrativnih i drugih mjera, ostvari unutrašnje tržište u Bosni i Hercegovini [15].

U predmetu u kojem se Ustavni sud bavio pitanjem propisivanja **monopolskog položaja kolektivne organizacije za ostvarivanja autorskog i srodnih prava**[16] u prilog zaključku da monopolski položaj kolektivnih organizacija nije per se nedopušten Ustavni sud je ukazao na relevantne dijelove odluke Evropskog suda pravde u predmetu broj C-351/12 koji se također bavio pitanjem zakonom propisanog monopola. Evropski sud pravde je u ovom predmetu, između ostalog, istakao da činjenica da je država članica društvu za kolektivno ostvarivanje [...] dodijelila monopol na području te države članice radi ostvarivanja autorskih prava u vezi s jednom kategorijom zaštićenih djela nije sama po sebi protivna članu 102. Ugovora o funkcionisanju Evropske unije.

Ustavni sud se, kao i mnogi sudovi u regiji i šire, u nekoliko predmeta bavio ispitivanjem odluka donesenih u postupcima u kojima su se pokrenula **pitanja ništavosti ugovora o kreditu prema kursu švicarskog franka (CHF)**. U jednom od takvih predmeta[17] imajući u vidu apelacione navode kojima je, između ostalog, ukazano na nedostatak bitnih elemenata ugovora u vrijeme njegovog zaključenja i stav iz osporene presude iz kog proizlazi da je apelantica na jasan i potpuno razumljiv način (u pisanoj formi) bila obaviještena o bitnim elementima ugovora, Ustavni sud je napomenuo da je pri razmatranju okolnosti konkretnog slučaja imao u vidu Direktivu Vijeća Evropske zajednice broj 93/13/EEZ od 5. aprila 1993. godine („Službeni list Evropskih zajednica“ broj 95/29,) na temelju koje je Evropski sud pravde donio presudu u predmetu broj C-186/16 od 20. septembra 2017. godine povodom zahtjeva za prethodnu odluku koju je uputio Žalbeni sud u Oradei - Rumunija, u okviru spora između Ruxandre Paule Adriciuc i 68 drugih lica, s jedne strane, i Banca Romaneasca SA u vezi s **nepoštenim odredbama iz ugovora o kreditu prema kojima su korisnici kredita bili dužni vraćati mjesečne rate kredita u švajcarskim francima.** Posljedica toga je bila da su tečajni rizik koji podrazumijeva da se rata povećava u slučaju pada tečaja rumunskog leja u odnosu na CHF u potpunosti snosili oni. Ustavni sud je podsjetio da je nadležnost Evropskog suda pravde originalna a to znači da se pred tim sudom rješavaju predmeti koji za stranku još nisu izgubljeni pred nacionalnim sudovima, te, s tim u vezi, podsjetio na obavezu država članica Evropske unije da poštuju i provode odluke Evropskog suda pravde. U tom kontekstu, imajući u vidu da je vladavina prava osnovni princip na čijem ostvarenju rade svi nacionalni sudovi, pa tako i pravosuđe u Bosni i Hercegovini, Ustavni sud je istakao da, iako Bosna i Hercegovina nije članica Evropske unije i nema direktnu obavezu da provodi odluke Evropskog suda pravde kao što imaju države članice, ona može tumačiti domaće zakonodavstvo u duhu pravnog koncepta kakav podržava Evropska unija, tim prije što Ustav Bosne i Hercegovine u članu II/1.

[15] Evropski sud pravde, Schul, predmet broj 15/81, Zbirka 1982, str. 1431, stav 33

[16] Ustavni sud Bosne i Hercegovine, Odluka broj U-18/14 od 9.7.2015. godine

[17] Ustavni sud Bosne i Hercegovine, Odluka broj AP-5328/15 od 13.3.2018. godine

propisuje najviše standarde zaštite ljudskih prava u poređenju sa minimalnim standardima koje nameće Evropska konvencija.

3. Predmeti protiv Bosne i Hercegovine pred Evropskim sudom za ljudska prava

Kada je riječ o predmetima Evropskog suda protiv Bosne i Hercegovine u mnogim od podnesenih aplikacija aplikanti su prethodno vodili postupke pred Ustavnim sudom. U brojnim presudama u predmetima koji su se ticali neizvršavanja pravosnažnih odluka ***(npr. ratna šteta)*** Evropski sud je kao i Ustavni sud utvrdio kršenje prava iz Evropske konvencije (presude Janjić i dr. protiv Bosne i Hercegovine, Milinković protiv Bosne i Hercegovine, Mišković protiv Bosne i Hercegovine itd). Isti je slučaj i sa aplikacijama u kojima se radilo ***o lišavanju slobode lica sa duševnim smetnjama*** u Zavod za zbrinjavanje mentalno invalidnih lica bez odluke nadležnog građanskog suda (presuda Hadžimejlić protiv Bosne i Hercegovine). Evropski sud je u ovom predmetu istakao da su odluke Ustavnog suda zaista priznale navodnu povredu Evropske konvencije u predmetima aplikanata ali da nadležne vlasti nisu otklonile navedene nedostatke. ***Ustavni sud je stoga pored utvrđivanja povrede prava naložio nadležnim vlastima poduzimanje i konkretizaciju generalnih mjera kako bi se stanje ne samo u konkretnim slučajevima nego i općenito poravilo.***

Uz utvrđivanje povrede prava iz Evropske konvencije i Ustava Bosne i Hercegovine određene ***generalne mjere*** Ustavni sud je naložio i u odlukama koje su se ticale zakonitosti lišavanja slobode lica koja su ***krivično djelo učinila u stanju neuračunljivosti***, ali kao i u prethodnom slučaju te mjere u trenutku donošenja odluke Evropskog suda po aplikacijama nekih od lica koja su se prethodno obraćala Ustavnom sudu još uvijek nisu bile implementirane (presuda Halilović protiv Bosne i Hercegovine). Naime, iako je Zakon o krivičnom postupku izmijenjen, lica koja su smještena u Forenzičko-psihijatrijskom odjelu zatvora u Zenici još uvijek su čekala na premještaj u zdravstvenu ustanovu.

Radi potpunijeg sagledavanja ovoga odnosa (Ustavni sud BiH i ESLJP) moraju se navesti, barem kroz nekoliko primjera, karakteristični predmeti u kojima je došlo do potpunog mimoilaženja stavova Ustavnog suda i Evropskog suda.

U predmetu **Maktouf i Damjanović**[18] pritužbe aplikanata su se odnosile na krivični postupak pred Sudom Bosne i Hercegovine u kojem su proglašeni odgovornim i kažnjeni prema odredbama Krivičnog zakona Bosne i Hercegovine iz 2003. godine (KZ BiH) za zločine protiv civilnog stanovništva koje su počinili tokom rata od 1992 do 1995. godine. Oni su se žalili da je odbijanjem Suda BiH da primijeni Krivični zakon Socijalističke Federativne Republike Jugoslavije iz 1976. godine (KZ SFRJ), koji je bio na snazi u vrijeme počinjenja ratnih zločina, povrijeđeno pravilo zabrane retroaktivnog kažnjavanja sadržanog u članu 7. Evropske konvencije. Prema tom zakonu (KZ SFRJ), ratni zločini i genocid su se kažnjavali kaznom zatvora u trajanju od najmanje pet godina do najviše 15 godina ili, u najtežim slučajevima, smrtnom kaznom, koja je mogla biti promijenjena u kaznu dugotrajnog zatvora u trajanju od 20 godina.

[18] Evropski sud za ljudska prava, Veliko vijeće, Maktouf i Damjanović protiv BiH, 2312/08 i 34179/08, 18.7.2013. godine

Sudovi na nivou entiteta su na predmete ratnih zločina generalno primjenjivali ovaj zakon, a pošto se nakon stupanja na snagu Dejtonskog mirovnog sporazuma iz 1995. godine smrtna kazna nije više mogla primjenjivati u Bosni i Hercegovini, ti sudovi su za ratne zločine izricali kazne zatvora u trajanju do 15 godina. Taj pravni okvir je promijenjen 2003. godine, kada je Ured Visokog predstavnika u Bosni i Hercegovini (OHR) nametnuo Krivični zakon na državnom nivou (KZ BiH), koji propisuje kazne zatvora za ratne zločine, genocid i zločine protiv čovječnosti u trajanju od najmanje 10 godina (5 godina u slučaju postojanja posebno olakšavajućih okolnosti) do najviše 45 godina. Ovaj zakon se primjenjivao u najvećem broju predmeta koje je rješavao Odjel za ratne zločine Suda Bosne i Hercegovine. Za razliku od Ustavnog suda, koji je o apelaciji Maktoufa odlučivao 2007. godine te zaključio da nije došlo do povrede Evropske konvencije, Evropski sud je presudom iz 2013. godine utvrdio povredu člana 7. Evropske konvencije zbog retroaktivne primjene prava.

U predmetu **Muslija protiv Bosne i Hercegovine**[19] aplikant je prethodno podnio apelaciju Ustavnom sudu žaleći se da mu je suđeno dva puta, te da je dva puta kažnjen za isto djelo u vezi s istim događajem (u krivičnom i prekršajnom postupku). Ustavni sud je apelaciju odbio smatrajući da iako su obje odluke donesene povodom istog incidenta, djela su različita prema svojoj prirodi i namjeri. Međutim, Evropski sud je utvrdio da se postupak koji je pokrenut protiv aplikanta na osnovu Krivičnog zakona Federacije Bosne i Hercegovine, u suštini odnosio, na isto djelo za koje je aplikant već bio pravosnažno osuđen na osnovu Zakona o javnom redu Zeničko-dobojskog kantona, te je utvrdio povredu člana 4. Protokola broj 7 uz Evropsku konvenciju.

Odluka u jednom predmetu protiv Bosne i Hercegovine izuzetno je važna***. Radi se o predmetu Sejdić i Finci protiv Bosne i Hercegovine***[20] ***u kojem je Evropski sud po prvi put donio presudu prema Protokolu broj 12, odredbi koja garantuje jednako postupanje u pogledu svih zakonskih prava.*** Apelanti u ovom predmetu optužili su Bosnu i Hercegovinu za sistematsko lišavanje njihovih građanskih prava, jer im je onemogućeno da se kandiduju za najviša mjesta u državnim organima vlasti. Prema Ustavu Bosne i Hercegovine, ta mjesta su bila predviđena za „konstitutivne narode“ koji se izjašnjavaju kao Srbi, Hrvati i Bošnjaci, a „Ostali“ među koje su spadali aplikanti u ovom predmetu (kao pripadnici romske i jevrejske manjine) su neprihvatljivi. Evropski sud je utvrdio da Ustav Bosne i Hercegovine krši Evropsku konvenciju. Kasnije su uslijedili i drugi predmeti koji su pokretali slična pitanja.

Takav je i predmet **Pilav protiv Bosne i Hercegovine**[21] koji se odnosio na pitanje kandidature za člana Predsjedništva Bosne i Hercegovine i pokretao je također pitanja po članu 1. Protokola broj 12. uz Evropsku konvenciju***. Ustavni sud je 29. septembra 2006. godine utvrdio da nije došlo do povrede navedene odredbe dok je Evropski sud u presudi od 9. juna 2016. godine utvrdio kršenje.*** Odluke Evropskog suda u ovim predmetima još uvijek nisu

[19] Evropski sud za ljudska prava, Muslija protiv BiH, 32042/11, 14.1.2014. godine,

[20] Evropski sud za ljudska prava, Veliko vijeće, Sejdić i Finci protiv Bosne i Hercegovine: aplikacije br. 27996/06 i 34836/06, 22. decembar 2009. godine.

[21] Evropski sud za ljudska prava, Pilav protiv BiH, 41939/07, 9.6.2016. godine

izvršene, odnosno do izmjena Ustava Bosne i Hercegovine još uvijek nije došlo. U jednoj od odluka Ustavnog suda koja je donesena nakon usvajanja predmetnih odluka Evropskog suda i u fazi čekanja na njihovo izvršenje ***Ustavni sud je istakao da Bosna i Hercegovina, odnosno njene nadležne vlasti imaju obavezu da usklade Ustav Bosne i Hercegovine i Izborni zakon već po tri presude Evropskog suda, a Ustavni sud, ni dalje ne može predvidjeti obim tih izmjena. Ustavni sud je naročito naglasio da nema ni ustavotvornu ni zakonodavnu nadležnost, pa ne može svojim djelovanjem zamijeniti institucije, najprije Parlamentarnu skupštinu Bosne i Hercegovine koja ima nadležnost da, u propisanoj proced**uri*, mijenja Ustav Bosne i Hercegovine, odnosno da zamijeni institucije koje imaju obavezu preduzeti odgovarajuće mjere radi provođenja odluka Evropskog suda u navedenim predmetima[22].

Aplikanti u predmetu **Avdić i ostali protiv Bosne i Hercegovine**[23] su se pred Evropskim sudom žalili da im je odbijanjem ustavnih apelacija iz razloga nepostizanja većine glasova Ustavnog suda osporen pristup sudu. ***Naime, Ustavni sud je u „vijeću od osam sudija“ (kako to navodi Evropski sud)[24] odbio apelaciju aplikanta budući da se vijeće nije moglo složiti niti o jednom prijedlogu odluke u većini koju čini pet sudija. Evropski sud je utvrdio povredu prava na pristup sudu u smislu člana 6. Evropske konvencije.*** Ova odluka Evropskog suda je uticala na izmjenu Pravila Ustavnog suda prema kojima je sada predviđeno da „Izuzetno, kada u plenarnoj sjednici u donošenju odluke učestvuje manje od ukupnog broja od devet sudija, i to zbog razloga navedenih u članu 90. stav (1) ili članu 98. ovih pravila, kao i kada nisu izabrane sve sudije, ili kada je sudija/sudije u dužem periodu, zbog bolesti, spriječen vršiti svoju funkciju, ukoliko najmanje pet sudija ne glasa identično o prijedlogu odluke o zahtjevu/apelaciji, u slučaju iz člana 98. odlučivanje o toj odluci će se odgoditi za jednu od narednih sjednica ali ne duže od šest mjeseci, a ako se ista situacija nakon isteka tog roka ponovi, glas predsjednika Ustavnoga suda, odnosno sudije koji ga zamjenjuje, računa se dvostruko (član 42.5. Pravila)[25]

U jednom od predmeta kojim se bavio i Ustavni sud i Evropski sud apelant/aplikant kažnjen je zbog odbijanja da skine ***(prema njegovom uvjerenju) vjerski simbol (kapu)*** u sudnici[26]. Za razliku od Ustavnog suda koji je smatrao da ograničenje u konkretnom slučaju nije predstavljalo preveliki teret za apelanta, te da je mjera koju je preduzeo redovni sud slijedila legitimne ciljeve, u smislu člana 9. stav 2. Evrops-

[22] Ustavni sud Bosne i Hercegovine, Odluka broj AP 3464/18 od 17.7.2018. godine

[23] Evropski sud za ljudska prava, Avdić i ostali protiv BiH, 28357/11 31549/11 39295/11, 19.11.2013. godine

[24] Zapravo, odluka je donesena na Plenarnoj sjednici na kojoj je prisustvovalo osam od ukupno devet sudija jer u tom periodu jedno sudijsko mjesto nije bilo popunjeno

[25] Ranija odredba Pravila je glasila: Izuzetno, kada u plenarnoj sjednici u donošenju odluke učestvuje manje od ukupnog broja od devet sudija, i to zbog razloga navedenih u članu 93. stav 1. ili članu 90. stav 6. ovih pravila, kao i kada nisu izabrane sve sudije, ili kada je sudija/sudije u dužem periodu, zbog bolesti, spriječen da vrši svoju funkciju, ukoliko najmanje pet sudija ne glasa identično o prijedlogu odluke o zahtjevu/apelaciji, smatra se da je donesena odluka kojom se zahtjev/apelacija odbija. (član 40.3. Pravila («Službeni glasnik Bosne i Hercegovine» br. 60/05, 64/08 i 51/09))

[26] Evropski sud za ljudska prava, Hamidović protiv Bosne i Hercegovine, 57792/15, 5.12.2017. godine; Ustavni sud Bosne i Hercegovine, Odluka broj AP 3947/12, 9.7.2015. godine

ke konvencije, i da u konkretnom slučaju postoji razuman odnos proporcionalnosti između ograničenja i legitimnog cilja kojem se teži Evropski sud je utvrdio da aplikantovo kažnjavanje zbog nepoštivanja suda samo na osnovu njegovog odbijanja da skine kapu, nije bilo neophodno u demokratskom društvu, te da su domaći organi vlasti prekoračili široko polje slobodne procjene koje im je dato. Evropski sud je utvrdio da je došlo do povrede člana 9. Evropske konvencije.

Zanimljiva je i najnovija odluka Evropskog suda u predmetu Kovačević protiv Bosne i Hercegovine kojom je utvrđena povreda nekih aplikantovih prava (aktivno biračko pravo s obzirom na mjesto prebivališta i etničko ne/određenje) s obzirom da se aplikant ne izjašnjava kao pripadnik niti jednog od tzv. „konstitutivnih naroda u Bosni Hercegovini (Bošnjaci, Hrvati, Srbi)[27].

4. Direktnu primjena Konvencije u postupcima pred domaćim sudovima

Ustavni sud često ukazuje da prema članu II/2. Ustava Bosne i Hercegovine odredbe Evropske konvencije imaju ***supremaciju nad ostalim zakonima***[28], dok prema članu II/6. Ustava Bosne i Hercegovine svi sudovi i drugi organi vlasti imaju obavezu «da primjenjuju ljudska prava i osnovne slobode na koje je ukazano u stavu 2.»

Ustavni sud je u nizu slučajeva ukazao kako su redovni sudovi ispunili svoju zadaću u smislu navedenih odredbi. Ovi slučajevi su se uglavnom odnosili na direktnu primjenu člana 8. Evropske konvencije.

U jednom od predmeta ***Ustavni sud je istakao da je Vrhovni sud u osporenoj presudi direktno primijenio odredbe člana 8. Evropske konvencije***, te slijedom toga preinačio drugostepenu presudu na način da je potvrđena prvostepena presuda u dijelu u kojem se tužiocu priznaje ***pravo trajnog i nesmetanog korištenja predmetnog stana.*** Ustavni sud je naglasio da je Vrhovni sud u obrazloženju osporene odluke dao detaljne i jasne razloge kojima se rukovodio pri izvođenju zaključka da «predmetni stan» predstavlja tužiočev «dom» u smislu člana 8. Evropske konvencije, slijedom čega je i odlučio kao u izreci presude.[29]

Primjer direktne primjene člana 8. Evropske konvencije je još jedan predmetu koji se bavio pitanjem prava na „dom“. U ovom slučaju ***Vrhovni sud je u osporenoj presudi direktno primijenio odredbe člana 8. Evropske konvencije umjesto odredbi Zakona o vlasničkopravnim odnosima*** i na osnovu navedenih odredbi Evropske konvencije preinačio presude nižestepenih sudova tako što je odbio tužbeni zahtjev apelantica da im tužena preda predmetni stan u posjed. ***U osporenoj odluci Vrhovni sud je obrazložio da se predmetni stan ima smatrati tužiteljicinim „domom“ u smislu člana 8. Evropske konvencije*** jer je prema činjeničnom utvrđenju nižestepenih sudova tužiteljica u predmetni stan uselila zakonito kao vanbračna

[27] Evropski sud za ljudska prava, Kovačević protiv Bosne i Hercegovine, predmet br. 43651/22 objavljeno 29.08.2023.godine (u vrijeme pisanja ovoga rada nije poznato da li će biti podnesen zahtjev da o ovome predmetu odlučuje Veliko vijeće ESLJP

[28] Prema praksi odnosno stavu Ustavnog suda supremacija se odnosi na zakone ali ne i Ustav. U stručnoj i široj javnosti, međutim, ima kritičara ovakvoga stava koji smatraju da se supremacija odnosi i na Ustav Bosne i Hercegovine

[29] Ustavni sud Bosne i Hercegovine, Odluka broj AP 3864/17, 27.2.2018. godine

supruga L.M – pravnog prednika apelantica i da je u vanbračnoj zajednici s L.M. živjela od 1998. godine do njegove smrti 2005. godine i da je u tom stanu nastavila živjeti i nakon njegove smrti i tu ostvarivati svoje osnovne stambene i životne potrebe. ***Vrhovni sud je pri tome naglasio da je dom faktičko stanje koje ne zahtijeva postojanje pravnog osnova te se u vezi s tim pozvao na Odluku Ustavnog suda broj AP 663/04 u kojoj je Ustavni sud upravo i konstatirao da je „dom" faktičko stanje koje ne zahtijeva postojanje pravnog osnova***. Ustavni sud je naglasio da iz obrazloženja osporene presude Vrhovnog suda proizlazi da je ***Vrhovni sud zapravo ocijenio da je tužiteljicino pravo na „dom" u smislu člana 8. Evropske konvencije, koje je tužiteljica ostvarila živeći u predmetnom stanu u periodu dužem od osam godina, u konkretnom slučaju značajnije od prava na imovinu apelantica iz člana II/3.k) Ustava Bosne i Hercegovine i člana 1. Protokola broj 1 uz Evropsku konvenciju, koje stan nisu koristile za stanovanje, odnosno koje već imaju svoj dom.*** Shodno navedenom, Ustavni sud je zaključio da je u konkretnom slučaju osporena **odluka donesena u skladu s javnim interesom**, a to je zaštita prava i sloboda drugih, odnosno u ovom slučaju tužiteljicinog prava na „dom" i da je u konkretnom slučaju **uspostavljena pravična ravnoteža** između zaštite prava apelantica na imovinu i općeg interesa jer u ovoj situaciji na apelantice nije stavljen neprimjeren teret radi ostvarivanja zakonitog cilja, pogotovo imajući u vidu činjenicu da se u konkretnom slučaju radilo o tuženicinom pravu koje se nije moglo prenijeti na drugu osobu i koja je preko osam godina živjela u predmetnom stanu i još uvijek živi i koristi predmetni stan kao svoj dom.[30]

Vrhovni sud se na stav Ustavnog suda o domu kao faktičkom ***stanju pozvao u još jednom slučaju u kojem je također direktno primijenio Evropsku konvenciju.*** U ovom slučaju Ustavni sud je naglasio da je Vrhovni sud obrazložio da odluke nižestepenih sudova, kojima je usvojen tužbeni zahtjev apelantica koje su vlasnice predmetnog stana, ali ga nikada nisu koristile za stanovanje, odnosno imaju svoj dom, predstavljaju miješanje u pravo tužene na dom koje ne ispunjava kriterije opravdanosti i neophodnosti u demokratskom društvu u skladu s nekim od ciljeva iz člana 8. stav 2. Evropske konvencije ***jer prava apelantica, kao vlasnika stana, ne bi trebala prevagnuti nad interesom tužene koja bi u 82. godini trebala napustiti stan s kojim je ostvarila dovoljno jaku vezu da bi se mogao smatrati njezinim domom.*** Ustavni sud je zaključio da je Vrhovni sud dao jasno i argumentirano obrazloženje za svoju odluku da ***umjesto odredaba Zakona o vlasničko-pravnim odnosima u konkretnom slučaju direktno primijeni odredbe člana 8. Evropske konvencije, za što je imao ovlaštenje u odredbama čl. II/2. i II/6. Ustava Bosne i Hercegovine***, kao i da primjenom navedenih odredbi Evropske konvencije preinači nižestepene presude i odbije tužbeni zahtjev apelantica za predaju u posjed predmetnog stana.[31]

U kontekstu utvrđivanja da li određeni stan predstavlja nečiji dom treba spomenuti i pred-

[30] Ustavni sud Bosne i Hercegovine, Odluka broj AP 1522/15, 17.1.2018. godine

[31] Ustavni sud Bosne i Hercegovine, Odluk broj AP 1371/12, 10.11.2015. godine

met Ustavnog suda u kojem su ***upravni organi i Kantonalni sud*** proveli postupak, izveli dokaze i primijenili važeće materijalno-pravne propise Zakona o stambenim odnosma i Zakona o prestanku primjene Zakona o napuštenim stanovima, kao i da su direktno primijenili odredbe Evropske konvencije (član 8.) u smislu utvrđivanja da li predmetni stan predstavlja apelantov dom, te odbili apelantov zahtjev za povrat stana kao neosnovan. U vezi s ovim ***Ustavni sud je naglasio da su u suštini i organi uprave i Kantonalni sud došli do zaključka da predmetni stan ne predstavlja apelantov dom, s tim što su organi uprave taj zaključak temeljili na utvrđenju da apelant nije faktički ušao u posjed stana, a Kantonalni sud je zaključio da su postojale objektivne okolnosti zbog kojih apelant predmetni stan nije mogao koristiti, ali da je kod apelanta postojala objektivna namjera i stav da predmetni stan koristi kao svoj dom, kao i opravdano očekivanje da će riješiti svoje stambeno pitanje.*** Međutim, Kantonalni sud je u svojoj odluci kao konačnoj u konkretnoj upravnoj stvari, polazeći od činjeničnog utvrđenja da je ***apelant sa svojom suprugom riješio stambeno pitanje na način da je otkupio i postao suvlasnik drugog stana, u kojem sa svojom porodicom živi od 2001. godine, zaključio da apelantov povratak u predmetni stan nije stvaran i s namjerom da u njemu živi budući da ima drugi dom***. Ustavni sud je zaključio da su organi uprave i Kantonalni sud uzeli u obzir apelantove navode i tvrdnje, pri čemu su u obrazloženju dali jasne razloge za svoje odluke uz pozivanje na relevantne odredbe važećih materijalno-pravnih propisa i Evropske konvencije.[32]

5. Mišljenja Evropske komisije za demokraciju putem prava (Venecijanska komisija) dato u svojstvu *amicus curiae*

U skladu sa članom 16. stav 3. Pravila Ustavnog suda, Ustavni sud, odnosno sudija izvjestilac, može zatražiti i od drugih organa i organizacija ***stručno pisano mišljenje.*** Na adresu Venecijanske komisije Ustavni sud je do sada uputio nekoliko ovakvih poziva. Takva mogućnost je predviđena i regulativom prema kojoj radiVenecijanska komisija.

Prvi put je to učinio u predmetu u kojem se bavio ocjenom ustavnosti ***Zakona o grbu i zastavi Federacije BiH i Zakona o upotrebi zastave, grba i himne Republike Srpske***[33]. U ovom predmetu Ured Visokog komesara za ljudska prava, Ured OSCE-a u Bosni i Hercegovini i Venecijanska komisija su, kao *amicus curiae* pred Ustavnim sudom dostavili svoje zajedničko mišljenje.

U toku 2010. godine Venecijanska komisija je Ustavnom sudu dostavila mišljenje u svojstvu *amicus curiae* u predmetu ocjene ustavnosti *Izbornog zakona BiH i Statuta grada Mostara*[34].

[32] Ustavni sud Bosne i Hercegovine, Odluka broj AP-3681/14, 22.3.2017. godine

[33] Ustavni sud Bosne i Hercegovine, Odluka broj U-4/04, 31.3.2006. godine

[34] Ustavni sud Bosne i Hercegovine, Odluka broj U-9/09, 26.11.2010. godine

Ustavni sud je 2012. godine odlučivao o ocjeni ustavnosti ***Zakona o statusu državne imovine koja se nalazi na teritoriji Republike Srpske*** i pod zabranom je raspolaganja imajuću, između ostalog, u vidu i *amicus curiae* mišljenje Venecijanske komisije dato u ovom predmetu[35].

U odluci od 26. novembra 2015. godine[36] Ustavni sud je smatrao da ***izbor 9. januara kao datuma obilježavanja praznika Dan Republike Srpske*** nema simboliku kolektivnog zajedničkog sjećanja koje može doprinijeti jačanju kolektivnog identiteta kao vrijednostima koje imaju poseban značaj u multietničkom društvu koje se zasniva na uvažavanju i poštivanju različitosti kao osnovnih vrijednosti modernog demokratskog društva. U tom smislu, kako je istakao Ustavni sud, izbor 9. januara za obilježavanje Dana Republike kao jednog od praznika entiteta koji predstavlja ustavnu kategoriju i kao takav mora ***predstavljati i sve građane Republike Srpske*** kojima i sam Ustav Republike Srpske priznaje jednaka prava nije u skladu s ustavnom obavezom o nediskriminaciji u smislu prava grupa, ***jer uspostavlja povlašteni položaj samo jednog, srpskog naroda***, čiji su predstavnici 9. januara 1992. godine, bez učešća predstavnika Bošnjaka, Hrvata i Ostalih, donijeli Deklaraciju o proglašenju Republike srpskog naroda Bosne i Hercegovine, ***kao jednostrani akt***. Kao takav, prema mišljenju Ustavnog suda, te prema stavu Venecijanske komisije [***datom u svojstvu amicus curiae***], ne može se smatrati saglasnim s osnovnim vrijednostima izjavljenim u Ustavu Republike Srpske, tj. s poštovanjem ljudskog dostojanstva, slobode i jednakosti, nacionalne ravnopravnosti, s demokratskim institucijama, vladavinom prava, socijalnom pravdom, pluralističkim društvom, garantiranjem i zaštitom ljudskih sloboda i prava, kao i prava manjinskih grupa u skladu s međunarodnim standardima, zabranom diskriminacije (Preambula).

Venecijanska komisija je 17. oktobra 2016. godine dostavila Ustavnom sudu „Nacrt podneska ***amicus curiae*** za Ustavni sud o načinu izbora delegata u Dom naroda Parlamenta Federacije Bosne i Hercegovine“ za potrebe predmeta broj U-23/14 o kojem je Ustavni sud donio odluku na sjednici održanoj 1. decembra 2016. godine.

Mišljenje Venecijanske komisije dato u predmetu kojim se pokretalo pitanje ocjene ustavnosti **Zakona o Sudu BiH** nije našlo svoje mjesto u konačnoj odluci Ustavnog suda u ovom predmetu jer je u međuvremenu podnosilac zahtjeva odustao od zahtjeva te je Ustavni sud donio odluku o obustavi postupka.[37]

Zaključak

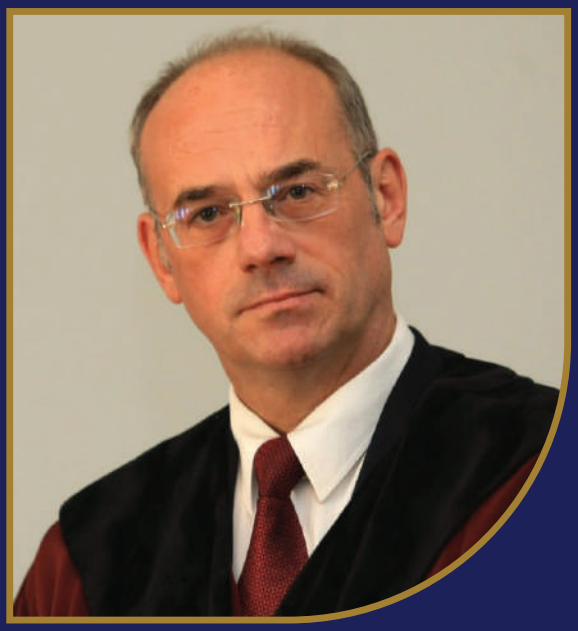
Promocija, zaštita i efektivno ostvarenje ljudskih prava i osnovnih sloboda u funkciji su izgradnje demokratskog društva općenito. U tom smislu Ustavni sud ima izuzetno značajnu ulogu, prije svega kao institucija koja garantuje zaštitu ljudskih prava i temeljnih sloboda na najvišem nivou.

Slijedeći praksu Evropskog suda za ljudska prava Ustavni sud Bosne i Hercegovine je, u okviru nadležnosti definiranih Ustavom Bosne i Hercegovine, postao institucionalni zaštitnik prava i sloboda odnosno standarda iz Evropske konvencije o ljudskim pravima i temeljnim slobodama u cijeloj Bosni i Hercegovini.

[35] Ustavni sud Bosne i Hercegovine, Odluka broj U-1/11, 13.7.2012. godine

[36] Ustavni sud Bosne i Hercegovine, Odluka broj U-3/13

[37] Ustavni sud Bosne i Hercegovine, Odluka broj U-15/20, 13.7.2023. godine



Contribution by
Mr. Atanas Semov, Judge of the Constitutional Court of Bulgaria

DIALOGUE BETWEEN CONSTITUTIONAL JURISDICTIONS IS AS CRUCIAL AS WITH THE EU CONSTITUTIONAL JURISDICTION

Honourable President and members of the Constitutional Court of Kosovo,

Honourable colleagues,

Above all I would like to congratulate you on organizing such a good international conference to celebrate the 14th anniversary of your court.

I'll be happy to welcome a lot of the colleagues present here in three days' time in Sofia for the first Forum of Balkan Constitutional Courts because we are all convinced that dialogue between constitutional courts is of great importance.

And with your permission, I'll continue in French, because French is the language of the Court of Justice of the European Union. I'll continue in French not only to prove that there are a lot of Francophones in the Balkans. In the Balkans, there are many French-speaking people. I would like to discuss a complicated issue, which is dialogue, or should I say the lack of dialogue between the EU constitutional jurisdiction and national constitutional jurisdictions.

Bulgaria joined the EU about 17 years ago. The Bulgarian Constitutional Court was established more than thirty years ago but has not yet approached the Court of Justice with a request for a preliminary ruling. We have not had a case for such a request yet.

The Constitutional Court of Bulgaria has nevertheless taken another action to nourish the dialogue between the jurisdictions. Our court is

the only constitutional jurisdiction in Europe whose Internal Rules (art. 18, para 3) oblige the supreme jurisdictions to submit questions to the Constitutional Court so as to verify whether the procedure pending before it falls within the scope of EU law and to clarify the applicable law and the consequences of the applicability of EU law. The Constitutional Court of Bulgaria has thus clearly stipulated that it is a prerogative of ordinary jurisdictions as EU law judges.

If we are dealing with EU law and an interpretation is requested from the Luxembourg Court, then the jurisdiction should request it without having to go through the Constitutional Court. Of course, my 5 minutes here are too short to elaborate on this topic.

I have published a book about the protection of national constitutional identity in EU. I see here ample room for cooperation, for broadening dialogue between Constitutional Courts. And also for dialogue with the Luxembourg Court.

The Constitutional Court of Bulgaria did something else in one of its decisions, as recently as in 2021. It ruled that any national jurisdiction is obliged to verify ex officio whether the case falls within the scope of EU law and should verify all consequences: whether there are self-executing EU norms to be applied to the matter; if not, what referring EU norms are to be taken into consideration for the purposes of a consistent interpretation of the domestic norms that should be applied; whether there is a conflict between the national law and EU law and to disapply the implemented conflicting domestic norms.

And it is very important that immediately after that the Supreme Administrative Court of Bulgaria confirmed this formula by saying that national jurisdictions are obliged to verify whether the matter falls within the scope of EU law and what the consequences are. And to do so *sua sponte* and without waiting for or relying on the initiative of the parties to the case pending before it. So this is quite positive.

We tend often to forget about the consistent interpretation of all domestic norms that fall within the scope of EU law. The Bulgarian Constitutional Court has not yet directly addressed the Luxembourg Court, but it requests and applies an interpretation of any domestic rule that is consistent with EU law – and with CJEU case-law.

I am aware that rushing ahead of a lunch break is an impossible task. So I will wrap up my presentation making two important points: strengthening dialogue between constitutional jurisdictions, on the one hand, and, on the other, between them and the EU jurisdiction. I am convinced that the EU is a very important organization for us all. And we should defend it lest it be transformed into a federation.

We don't need United States of Europe. We need States united within Europe.

Thank you.

Contribtuion by Mr. Louis Aucoin, Foreign Advisor on Rule of Law, Constitutional Development and Transitional Justice (United States Government Advisor throughout the drafting of the Constitution of the Republic of Kosovo)

LfFLETCHER
The graduate school of global affairs at Tufts University

COMPARATIVE PERSPECTIVES ON CONSTITUTION-MAKING: KOSOVO AND BEYOND

First and foremost, I would like to convey heartfelt thanks to my friend and colleague Mme. President Justice Gresa Çaka for organizing this wonderful event and including me in it. I also share the fondest memories of our work together throughout 2007 and 2008 on the independence Constitution that we are celebrating today.

I also want to share with you some of my reflections on the Kosovo constitution-making process drawing off of my own knowledge of the history of constitution-making in recent decades. I was the co-editor of *Framing the State in Times of Transition* that included the study of 19 constitutional processes of the twentieth century. The volume placed a great deal of emphasis on public participation in constitution-making processes.

Today, I would like to offer a brief historical perspective in order to place the process in Kosovo in historical perspective.

During the post-colonial phase of constitution-making the activity was perceived principally as an elite affair that took place behind closed doors with local and often international elites dominating the process. Constitution-making in this period focused exclusively on the task of drafting the document and in former colonies often foreign advisors from the former colonies wrote the text. The Director of the Constitution Commission in Eritrea offered a frank assessment of this process, stating: “these texts were often shoved down the throats of local actors who were considered by the foreign actors as incapable of creating such an important charter on their own.” This expe-

rience resulted in the development of enormous mistrust of foreign actors participating in such an exercise.

I witnessed this myself in 1993 in Cambodia where I worked as a foreign advisor invited by USAID. I tried to work with the drafting committee that the Cambodians had recently created. I worked hard to overcome their mistrust of a foreign expert and managed to assure them that I intended to act exclusively as a resource in order to assist them in their central role as drafters. However, although the drafting committee came to work very collaboratively with me and other foreign advisors, almost all of our collaborative effort was almost totally ignored because, unbeknownst to us, King Sihanouk had hired a French law professor to draft a text for him. When the Constituent Assembly became involved, the King's Draft became almost the exclusive focus of debate, ignoring the attempts by local NGOs, women's groups, human rights groups, and others to have their say in the process.

Interestingly in the same year, 1993, as South Africa emerged from apartheid, it chose to develop a new constitution in a new and innovative way. In the beginning of the process, it totally rejected all foreign participation and drew heavily off of the contributions and suggestions of its own citizens. In addition, it established an interim constitution that provided guidance on how the process of developing the final constitution would occur. Most importantly, it established guiding principles that would direct the process and the substance of the final constitution.

This process inspired the world and ushered in a new era of constitution-making which the literature on the subject has referred to as "new constitutionalism." It is a new version of constitution making which places a great deal of emphasis on the process of constitution making and even considers the process to be more important than the substance. The theory behind new constitutionalism is that by involving all sectors of the society, including women and minorities, the ultimate text will benefit from enhanced buy-in by the local population. The goal, of course, is to establish a charter that will enjoy legitimacy and stability in the long run.

As a result, anyone who analyzes the literature on this topic will see that there is a sort of ideal process that emerges from experts' reflections on the subject. What I would like to do now is to provide a thumbnail sketch of this model of constitution making and assess the way that Kosovo's process in 2007-2008 conformed to this emerging model.

A. Phased process

The good practice of constitution making that has emerged in the last several decades is that of providing for constitution making in phases. This of course is a far cry from the older and more stereotypical notion of constitution making as a relatively discrete event where elites sit around a table typically behind closed doors where they focus primarily on drafting.

B. Interim Arrangements

As was the case in South Africa, new constitutionalism suggests that it is important to start with an interim arrangement that provides some guidance on the process and includes the principles that should guide the process and be included in the final text. This is certainly a far cry from the older method. Now there is as much or even more emphasis on the process

than the substance of the making of the constitution. This design is to ensure transparency and inclusion so that the end result will be the culmination of an organic process involving the society at large and not just the elites. It should ideally then be designed and implemented by local actors.

In the case of Kosovo, there were a few elements that served to provide for interim arrangements leading up to the development of the constitution in the end. First, there was the Constitutional Framework that was developed when Kosovo was under international administration. While this was developed primarily by international actors, there was local involvement. Perhaps more importantly there was the Settlement Agreement spearheaded by President Marti Ahtisaari of Finland that was the result of protracted negotiations that closely involved local actors whose consent and approval was consistently required.

The guiding principles that formed the foundation of that settlement and that guided the process were binding norms of international law that focused on human rights and the protection of local minorities.

Article 10 of the Settlement agreement required transparency by stipulating that the public be kept informed throughout the process of the development of the constitution. While this provision could have provided for more detail on the role of the general public, it was interpreted as requiring the direct involvement of the public, and that is what actually happened during the process.

Justice Gresa Caka in her recent book chapter on "Kosovo's Independence Constitution" referred to this phenomenon as internationalized "*pouvoir constituant*" indicating that while international actors and international law guided the process, it was nevertheless a process based upon the consent of the population that the final text would govern–"a constitution that was compatible with the will of the people."

C. Phased public involvement

Of course, the involvement of the public at large is at the heart of new constitutionalism. Moreover, experience has shown that public participation itself should ideally also be conducted in phases. The first phase should ideally be devoted to educating the population on the constitutional questions that will be submitted to them for their input in a later phase. This should be done so as to improve the quality of the responses to the consultations that will occur in the second phase.

In Kosovo, in 2008, the Constitutional Commission was not afforded the luxury of the time needed to separate education and consultation into two discrete phases. However, the Commission responded to the resulting challenge by doubling down on the intensity of their efforts. Throughout February and March of 2008, the Commission engaged in intense efforts aimed at involving and including the population. The draft of the Constitution was made widely available on their website, and they participated in TV and radio discussions and roundtables throughout the country. They set up a mechanism for receipt of public comments and letters through their website. Thousands of comments

were received and considered. I recall in this connection the extraordinary effort of Mme. President Gresa Çaka who worked tirelessly in the final days of the process to ensure that the public input was taken into consideration. In the case of Kosovo, this exercise was highly successful in that 35% of the public comments were at least partially if not totally incorporated into the final text.

Conclusion

Since 2008 much has been written on the effect of public participation in constitution-making and on the process generally. While there doesn't seem to be a consensus on its effect generally, there can be no doubt that when the people see such a significant inclusion of their intent and desire in the final result, there will of necessity be an enhanced sense of buy-in by the population. Moreover, given the fact that the people of Kosovo will always associate their constitution as the final result of their decades long struggle for independence, taken together, these factors are very likely in my view to contribute to the long-term legitimacy of the Constitution and the stability of the country overall.


Georg Lienbacher
Judge
Constitutional Court of Austria
Mr. José Figueiredo Dias
Judge
Constitutional Court of Portugal
Ms. Marie Baker
Judge
Supreme Court of Ireland
Mr. Tom Ginsburg
Professor
Comparative Constitutional Law at
Chicago Law School
05
11


Mr. Atanas Semov
Judge
Constitutional Court of the
Republic of Bulgaria
Mr. Louis Aucoin
Professor
Comparative Constitutional Law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Ms. Grainne McMorrow
Vice-Chairman
Representative
Mr. Miraš Čenan
Vice-President
Constitutional Court of Bosnia
and Herzegovina
Mr. Atanas Semov
Judge
Constitutional Court of the
Republic of Bulgaria
Mr. Louis Aucoin
Professor
Comparative Constitutional Law


EMERALD


04

Contribution by Ms. Dineke de Groot, President of the Supreme Court of the Netherlands

HOGE RAAD DER NEDERLANDEN
HR

THE CONTRIBUTION OF CONSTITUTIONAL COURTS IN PROTECTING AND STRENGTHENING FUNDAMENTAL VALUES OF DEMOCRACY, RULE OF LAW, AND FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS A PERSPECTIVE FROM BELOW SEA LEVEL TO THE ACCURSED MOUNTAINS

1. Celebrating the 14th Judicial Year of Kosovo's Constitutional Court

Ms President of the Constitutional Court, Excellencies, Ladies and Gentlemen,

Thank you for organising this interesting international conference and for the warm welcome and hospitality. I would like to congratulate you, the members of the Constitutional Court and the people of the Republic of Kosovo on the opening of the 14th Judicial Year of the Constitutional Court of the Republic of Kosovo. In the invitation, this was called a moment to reflect on 14 years of history and to welcome representatives of fellow courts to your beloved country. The title of my contribution to Session III on the role of constitutional courts in protecting fundamental rights and freedoms through individual control of constitutionality of acts of public authorities' is: 'A perspective from below

sea level to the Accursed Mountains'. Why this title? That requires some explanation.

On 12 May 2022, Kosovo applied for the membership of the Council of Europe. The Council of Europe says on its website that it has been supporting Kosovo since 1999, in full compliance with the United Nations Security Council Resolution 1244. On the same website, the Council of Europe mentions that it supports the Constitutional Court of Kosovo in applying and disseminating European human rights standards. Thus, the preparation of the national implementation of the European Convention on Human Rights in Kosovo is well underway. When Kosovo will be a member of the Council of Europe, Kosovo is expected to ratify the European Convention on Human Rights (ECHR) at the earliest opportunity. The effects of the entry into force of the ECHR for Kosovo can be viewed with confidence, as it is already common for parties to invoke provisions of the ECHR, and for the Constitutional Court to consider those provisions when interpreting and applying national constitutional law. The Constitutional Court makes its decisions available on its website in several languages. Therefore, also the international community is allowed to learn about this practice. The clear way in which the decisions of the Constitutional Court of Kosovo deal with the ECHR, only 14 years after this court was founded, is in my view admirable.

The Netherlands acceded to the Convention at the very beginning. The ratification took place in 1954. At that time, the impression prevailed that the ECHR would not have much impact on national law, since infringements of fundamental rights and freedoms were deemed to be almost absent in the Netherlands. However, parties and lawyers started early on to invoke provisions of the ECHR before Dutch courts and, afterwards, filing complaints in Strasbourg against the Netherlands. In the following decades, the ECHR, and its dynamic interpretation by the ECtHR, had more influence on national law than initially expected. The search engine HUDOC lists settled complaints against the Netherlands from the early 1960s onwards. A private initiative, the Dutch Lawyers Committee for Human Rights, which was founded in 1974 as the Dutch section of the International Commission of Jurists (ICJ), has grown into an authoritative organisation. It successfully promotes the professional knowledge and awareness of human rights and freedoms in the Netherlands.

Nowadays, it is obvious in the Netherlands that courts, when interpreting and applying national law, also consider the ECHR, the Protocols thereto and the ECtHR case-law. National law must be interpreted and applied in accordance with this hermeneutical canon. When this is not possible, infringements of the ECHR must be avoided, for instance by disapplying a provision of national legislation. This is governed by the Constitution of the Netherlands.

As it is, both our courts, the Constitutional Court of Kosovo and the Supreme Court of the Netherlands, are committed to interpret and

apply national (constitutional) law in accordance with the ECHR. It is no longer a moot point that courts have an important role to play in protecting fundamental rights and freedoms of citizens and organisations through individual control mechanisms.

So, one explanation for the title of my contribution is that, as a birthday present, I wil provide some insight into the impact of the ECHR in the Netherlands. Considering that the Netherlands lie for more than a quarter below sea level, it would be no surprise if today's main concerns on the protection of human rights and freedoms relate to the impact of climate change and technology on human rights and freedoms. This is how it could be more and more in the future, but since the ratification of the ECHR by the Netherlands, ECtHR case-law in cases against the Netherlands concern a lot of provisions of the ECHR and the Protocols thereto, and a lot of topics. For instance, inclusiveness, vulnerability of people belonging to minorities, equality before the law, fair trial, respect for private and family life, freedom of expression, property, etc., were and still are actual topics in case-law in the Netherlands. I expect the Constitutional Court of Kosovo will be dealing also with such topics. There is far more comparative material below sea level than I can give you in a birthday present. But as the crow flies, there is a straight line between our courts in their role to protect fundamental rights and freedoms on the level of the individual in society.

Another explanation for the title of my contribution is that I fully agree with the expression in the invitation that you live in a beloved country. As inhabitant of flatland, I was impressed by the beauty of Kosovo's mountains, when I was able to visit the Accursed Mountains last year. In contrast to the name of these mountains, Kosovo shares them peacefully with Montenegro and Albania. I wish you will soon share the borders of Kosovo with all your neighbour countries peacefully. The presence today of so many representatives of fellow courts expresses, in my view, that the international community of constitutional courts recognises, appreciates and supports the challenges of the Constitutional Court of the Republic of Kosovo in promoting peaceful coexistence based on rights and freedoms of all people in the Balkans.

2. The ECHR in the Netherlands

Now, I will make some more remarks on the role of the Supreme Court of the Netherlands in protecting fundamental human rights and freedoms through individual control of constitutionality of acts of public authorities. I will mainly address the ECHR and I will leave EU law aside.

In the Netherlands, the ECHR is part of constitutional law. A ratified treaty like the ECHR directly effects the national legal order of the Netherlands. In 1919, a judgment of the Supreme Court of the Netherlands clarified that a certain provision of an international treaty had a double effect, i.e., between the state parties and between the Dutch state and a citizen. Since 1953, the immediate binding effect of international law, like the provisions of the ECHR, is regulated in the Constitution of the Netherlands.

With some other European countries, the Netherlands is among those whose state structure does not include a stand-alone constitutional

court. Questions arising under constitutional law may be decided by the ordinary courts and in last instance by the supreme court. This implies that every judge in the Netherlands functions both as an ordinary and a constitutional judge, for instance in applying the ECHR in a case. Every citizen and organisation may request a court for individual control of constitutionality of acts of public authorities. The Supreme Court is a court of cassation, with constitutional tasks as well. On the one hand, the Constitution of the Netherlands only allows courts to examine whether acts other than those of parliament are in conformity with the Constitution, like acts of municipalities. Whether acts of parliament are consistent with the constitution is not subject to review by the courts, according to article 120 of the Constitution. On the other hand, the same Constitution obliges the legislative, executive, and judicial branches of power to act in conformity with direct applicable international law. Therefore, the Supreme Court is obliged to examine whether acts of parliament are in conformity with other constitutional (international) law, like the provisions of the ECHR, when this is at stake in a case before the court. In doing so, the Supreme Court may review the constitutionality of acts of public authorities through individual control and must provide effective protection of fundamental rights and freedoms.

Over the course of time, the ECHR's underlying principles of effectiveness and subsidiarity have increasingly come to the fore in the Netherlands. The focus on the workload of the ECtHR in the context of the inclusion in the preamble of the principles of margin of appreciation and subsidiarity through Protocol 15, as well as the successful efforts of the ECtHR to gain more control over its workload, underlined the primary role of the national courts in the maintenance and realisation of fundamental rights and freedoms.

In other words, in the Netherlands, it is considered a primary duty of national courts to ensure access to justice on issues of fundamental rights and freedoms, as well as to guarantee their effective protection to individuals which is provided by the ECHR. The judicial branch shares such duties with the legislative and the executive branches, although their competences and responsibilities differ. In the Netherlands, a rather living dialogue on the rule of law and the protection of fundamental rights and freedoms exists, between the branches of power and within society. This dialogue does not guarantee the absence of problems, nor the timely identification of emerging issues. Every now and then, cases are submitted to the Supreme Court which include both questions of law and questions that are in full or in part outside the scope of interpreting and applying the law. The Supreme Court has a comprehensive case-law concerning its legal possibilities for answering such questions. These include, first, that the court will examine whether a national rule can be interpreted and applied in conformity with a rule of higher order, like a provision of the ECHR. As far as this is not possible, a rule that violates a binding rule of higher order may be disapplied or declared ineffective. A duty to provide effective legal protection may give rise to examine whether a justice deficit exists. If so, the court examines legal possibilities to provide recovery in a case. The Supreme Court will leave the choice of options to the legislator when several solutions are conceivable and the choice for a solution partly depends on general considerations of public policy or important choices of a

legal-political nature. Thus, the influence of the ECHR on the national legal order may also support the development of national law by other public authorities.

Several judgments of the Supreme Court of the Netherlands on the protection of fundamental rights and freedoms through review of the constitutionality of acts of state authorities have been challenged before the ECtHR. For example, in the case of the *Foundation Clara Wichmann* against the Netherlands and the *Staatkundig Gereformeerde Partij*, which is a confessional political party, rooted in Dutch Reformed Protestantism, the Supreme Court ruled, amongst others, that this political party's rejection of the right of women to stand for election was a violation of the fundamental right to be allowed to stand for election, guaranteed by the Constitution and several treaties. The political party filed a complaint against this Supreme Court judgment with the ECtHR. The ECtHR took 'the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14' and rejected the application of the political party as manifestly ill-founded.[1]

In the 20th century, several cases in which the ECtHR upheld a complaint against the Netherlands gave rise to changes in the law. This happened for instance in the cases of *Engel* and *Winterwerp* against the Netherlands about the procedural safeguards of articles 5 and 6 of the ECHR during disciplinary military detention[2] and during forced admission to a psychiatric hospital[3]. A judgment of the ECtHR in which it ruled that the Netherlands offered individuals to little access to court in administrative cases, was followed by an act of parliament to reorganise the review system for access to justice in administrative cases.[4]

Every now and then, it happens that a judgment of the ECtHR has major impact on Dutch law or court practice, whether it is a judgment in a case against the Netherlands or against another member state. The direct effect of the ECHR in the national legal order as well as the practice to examine whether a national rule can be interpreted and applied in conformity with ECHR provisions, has proven to be an effective way to anticipate possible conflicts between a national legal provision and constitutional law like provisions of the ECHR.

Thus, the role of the Supreme Court of the Netherlands in protecting fundamental rights and freedoms through individual control of constitutionality of acts of public authorities might be called an attentive role, to the extent that both the effective protection of human rights and freedoms must be safeguarded and well-founded complaints should be avoided

[1] Judgment of 10 July 2012 of the European Court of Human Rights, *Staatkundig Gereformeerde Partij v. The Netherlands*, 58369/10, paragraph 77.

[2] Judgment of 8 June 1976, *Engel v. the Netherlands,* 5370/72.

[3] Judgment of 24 October 1979, *Winterwerp v. the Netherlands,* 6301/73.

[4] Judgment of 23 October 1985, *Benthem v. the Netherlands,* 8848/80.

when predictable. The case-law of the ECtHR is carefully studied when dealing with court cases. Within the Supreme Court, the information on the website of the ECtHR is widely used. For instance, the case-law guides on various articles of the ECHR enable the court to consider best practices and to further striking balances in the effective protection of fundamental rights and freedoms. As an example of this anticipating approach, I mention that several limitations of access to justice in tax cases were removed by the Supreme Court, based on judgments of the ECtHR against other member states[5]. Afterwards, these judgments of the Supreme Court were codified by national legislation. Many other examples could be provided, of which I mention a judgment of the Supreme Court about lifelong prison sentences. The policy of the government in granting pardons was very restrictive, before the Supreme Court decided[6] that this practice was contrary to article 3 of the ECHR, as interpreted by the ECtHR. This judgment has stimulated the Dutch government to change its policy and to create a review possibility after 25 years in prison, which new policy respected article 3 of the ECHR according to the following judgment of the Supreme Court and was therefore held acceptable. Another example is about the right to challenge a judge and the possibilities of a court to encounter the abuse of this right.[7] Here, the Supreme Court applied the ECtHR judgment in the case of Micallef/Malta[8] to give guidance to first instance and appeal courts.

3. Closure

This contribution intended to provide some insight in the way the Supreme Court of the Netherlands deals with its role in protecting fundamental rights and freedoms through individual control of constitutionality of acts of public authorities. I wish the Constitutional Court of Kosovo all the best for the years ahead, and especially a both prudent and courageous constitutional role in the maintenance and realisation of fundamental rights and freedoms of the people of Kosovo.

[5] Judgment of 21 February 1984 of the European Court of Human Rights, *Öztürk vs. Germany*, 8544/79; Judgment of 23 November 2006 of the European Court of Human Rights, *Jussila vs. Finland*, 73053/01.

[6] Judgment of 5 July 2016 of the Supreme Court of the Netherlands, ECLI:NL:HR:2016:1325; Judgment of 19 December 2017 of the Supreme Court of the Netherlands, ECLI:NL:HR:2017:3185.

[7] Judgment of 25 September 2018 of the Supreme Court of the Netherlands, ECLI:NL:HR:2018:1770.

[8] Judgment of 15 October 2009 of the European Court of Human Rights, *Micallef v. Malta*, 17056/06.

Contribution by Mr. Villu Kõve, President of the Supreme Court of Estonia

SUPREME COURT
REPUBLIC OF ESTONIA

LIMITED POSSIBILITIES FOR INDIVIDUAL CONSTITUTIONAL CONTROL IN ESTONIAN CONSTITUTIONAL REVIEW SYSTEM

Dear Colleagues,

Firstly, I would like to sincerely thank and congratulate the Constitutional Court of the Republic of Kosovo on the occasion of the 14th Judicial Year and for organizing such an outstanding event. It is an honour to participate in the International Conference dedicated to constitutional jurisprudence and share knowledge with many esteemed colleagues around the world.

I would like to give a brief overview of the constitutional review system of Estonia, with a focus on specific norm control proceedings.

About the Estonian constitutional review system in general

To begin with, I would like to point out that, unlike many European countries, Estonia does not have a separate Constitutional Court. According to the Constitution[1], the Supreme Court also serves as the court for constitutional review. While the model of a single higher court is used in other countries as well, the Estonian Supreme Court has its clear peculiarities in this regard. This is evident, among other things, in the fact that constitutional review by the highest court in Estonia has not developed through judicial prac-

[1] The Constitution of the Republic of Estonia. – Available at: https://www.riigiteataja.ee/en/eli/530122020003/consolide.

tice but rather constitutes a direct role assigned to the Supreme Court by the constitution. This role includes the inherent authority to declare an unconstitutional provision void, essentially acting as a kind of negative legislator. Compared to the usual jurisdiction of the constitutional courts, there is no legalised form of individual complaint in Estonia, i.e. the right of everyone to appeal directly to the constitutional court in case of violation of their constitutional rights. In Estonia, this can only be done through the lower courts, if they accept the application for constitutional review. Still, in limited cases, the Supreme Court´s case-law recognises the individual complaint. Furthermore, there is no right for the parliamentary minority to seek constitutional review of decisions or laws adopted by the parliamentary majority. Nor do we have an established right to conduct impeachment proceedings against senior public officials. The jurisdiction of the Supreme Court is limited to determining whether higher officials are permanently incapacitated to perform their duties.

In the Supreme Court, there is a special Constitutional Review Chamber which is chaired ex officio by the Chief Justice. Other eight members of the Chamber are elected by the Supreme Court en banc (General Assembly), on the proposal of the Chief Justice. The members of the Constitutional Review Chamber are elected from among the members of the Civil, Criminal and Administrative Law Chambers. Every year, on the proposal of the Chief Justice, the Supreme Court en banc releases two most senior members and appoints two new members to the Constitutional Review Chamber, taking into account the opinion of and bearing in mind, as much as possible, the equal representation of the Administrative, Criminal and Civil Chambers within the Constitutional Review Chamber.

The Constitutional Review Chamber usually reviews cases with a composition of the panel of five members. In the most fundamental questions, for example, if the matter concerns essential constitutional issues or if other Chambers have reason to believe that a legislative act or refusal to issue it, which is relevant to the adjudication of the case is not in conformity with the Constitution – the case might be referred to the Supreme Court en banc. Consequently, it can be said that, to some extent, all justices of the Supreme Court also serve as constitutional justices.

The Supreme Court verifies the conformity of a legislative act with the Constitution on the basis of a reasoned request, court judgment or court ruling. According to the Constitutional Review Procedure Act[2] the petitions may be submitted to the Supreme Court by the President of the Republic, Chancellor of Justice, local government councils and Parliament. Individuals may approach the Supreme Court regarding constitutional review only in very limited cases: filing a complaint against the resolutions of the Parliament and the Board of the Parliament and the decisions of the President of the Republic, and a complaint or a protest against the decisions and acts of electoral committees.

The Constitutional Review Chamber hears the following matters:

- requests to review the constitutionality of an international treaty, a legislative act or the failure to provide it;
- appeals and protests against the activities of the organizer of elections or the decisions and actions of the election committee;

[2] Constitutional Review Procedure Act. – Available at: https://www.riigiteataja.ee/en/eli/512122019006/consolide.

- complaints against the decisions of the President of the Republic or the resolutions of the Board of the Parliament;
- requests for a position on how to interpret the Constitution in conjunction with European Union law;
- requests to terminate the mandate of a member of the Parliament or the activities of a political party.

In addition, the Constitutional Review Chamber decides to either consent to the Chairman of the Parliament, acting as President of the Republic, being able to declare extraordinary elections to the Parliament or granting him on her the power to refuse from promulgating laws.

As previously mentioned, the law does not expressly provide for a possibility to submit an individual complaints for the review of constitutionality of legislative act. However, the Supreme Court en banc has held that the Supreme Court can only refuse to hear a person's complaint if the person can avail itself of some other effective remedy for the exercise of the judicial protection guaranteed by section 15 of the Constitution[3]. The right to judicial protection, established in the Constitution, embraces the right of a person to submit an action with a court if his or her rights and freedoms are violated, as well as the obligation of the state to establish for the protection of fundamental rights proper judicial procedures, which are fair and ensure effective protection of persons'[4]. Therefore, the Supreme Court has acknowledged an individual´s possibility to directly address the Supreme Court if the person has no other effective remedy to protect their rights. However, in practice, there has been only one individual complaint that has been reviewed.

Specific norm control in the constitutional review system

The protection of individuals against violations of rights and freedoms stipulated by general legal acts in Estonia is organized through a specific norm control model. It concerns the legal norms applicable in criminal, civil, or administrative matters. The Constitution grants all courts the right to refrain from applying an unconstitutional legal act. Simultaneously, this entails the obligation for each court to independently assess the constitutionality of applicable legal norms. The question of constitutionality of a law may also be raised by a party to the proceedings. In practice, the subject of specific norm control is the relevant part of a legislative act, one or more provisions.

The precondition for refraining from applying a law and initiating specific norm control is the competent court´s conviction in the course of deciding the case that the relevant legal norm or its absence is unconstitutional. For this purpose, the court must ascertain the factually significant circumstances essential for resolving the

[3] Supreme Court en banc judgment of 17 March 2003 in case No 3-1-3-10-02. – Available at: https://www.riigikohus.ee/en/constitutional-judgment-3-1-3-10-02.

[4] Supreme Court Constitutional Review Chamber judgment of 5 February 2008 in case No 3-4-1-1-08. – Available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-1-08.

case. The court cannot refrain from applying a law based on a mere thought. Furthermore, the court is not allowed to seek a preliminary ruling on constitutionality. It must decide upon the case and, by doing so, not apply the unconstitutional provision. Non-application does not render the relevant provision invalid, only the legal consequence of the norm in a particular case is not applied. The competence for the binding determination of unconstitutionality lies solely with the Supreme Court. In initiating constitutional review concerning the omission to adopt a legislative act, the court must identify a specific and relevant legal or regulatory gap and determine significant circumstances that, in the court's assessment, require missing legal regulation.

The constitutional review proceedings will be initiated by transmitting the relevant judgment or court ruling to the Supreme Court. In the event of the rejection of a request for review, the parties to the proceedings have the possibility to appeal against the decision of the county, administrative or circuit court – this is ensured by a special rule on the time limit for appeal.

It is important to point out, that, whereas the Supreme Court decides whether to grant leave for appeal in regular cassation cases, all constitutional review matters have to be heard by the Court.

There are, however, some criteria for dismissing the case, the most important (and also most complex) of which is the relevance of the legal norm. Its purpose is to prevent overburdening the Supreme Court with abstract disputes. Over time, the Supreme Court has applied the relevance criterion sometimes narrowly and sometimes in a more broad manner. According to the classical formulation, a relevant provision is one that is decisive for the outcome of the case, and in the event of its non-compliance with the Constitution, the court should decide the case differently than in compliance with the Constitution[5]. In order to meet the condition of relevance, a rule must generally affect the operative part of the judgment. For example, a procedural norm is particularly relevant if it impedes the substantive resolution of the submitted claim or the actual exercise of procedural rights.

While evaluating the relevance criteria, the Supreme Court is not bound by the arguments of the court that submitted the application. Besides, the Supreme Court may deem irrelevant the norm or part of the norm that is the subject of the application or consider additional norms indicated in the application related to the norm. The Supreme Court has the competence to interpret the set-aside norm correctly, which includes also interpretation in conformity with the Constitution. In the case of various interpretation possibilities, interpretations consistent with the Constitution should be preferred over those that are not, and preference should be given to interpretations that ensure the greatest protection of constitutional values. The Supreme Court has no basis to declare a norm void on grounds of unconstitutionality if the norm can be interpreted in a constitutional manner.

[5] Supreme Court en banc judgment of 22 December 2000 in case No 3-4-1-10-00. – Available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-10-00.

While resolving the matter, the Supreme Court cannot deal with the questions which arise from the main legal dispute, but only the questions of constitutionality, unless the case has been referred by one of the Supreme Court´s Chambers – in this case the Supreme Court en banc will resolve it with respect to all issues that are relevant to the case.

As the primary goal of specific norm control is protecting the fundamental rights of the parties to the proceedings, the Supreme Court evaluates the conformity of the norm with the Constitution based initially on the circumstances of the main court case, checking whether the fundamental rights of the specific party has been proportionately restricted.

The outcome of resolving the specific norm control request largely depends on the intensity of the review. The intensity of control indicates the extent of doubts that the Supreme Court must overcome to establish the material constitutionality of the legal norm. This, in turn, varies depending on the relevant fundamental right, the intensity of its infringement, the life area regulated by the legal act, and other contextual factors. Based on case law, three main levels of review intensity can be identified. In practice, the test of reasonableness prevails, which typically is applied as a three-step proportionality test. Proportionality will be assessed for most infringements of fundamental rights, in particular the freedom rights. For this purpose, the court shall determine in detail the legitimacy of the infringement´s purpose and the appropriateness, necessity and moderation of the infringement[6]. In its assessment of proportionality, the Supreme Court is not bound by the legal views of any party involved in the proceedings, including the legislature, and does not have to presume the correctness of the legislator´s assessments. However, the Supreme Court may not interfere with the legislature´s discretion, meaning it should not make policy choices itself when multiple solutions are constitutional because of the discretion.

If the request for specific norm control is justified, the Supreme Court shall declare the legislative act or part of it unconstitutional and invalid, or in the case of an omission to adopt a legislative or regulatory instrument, declare it to be contrary to the Constitution. The effects of the judgments of the Supreme Court on questions of constitutionality are final and binding for all courts and national authorities, as well as for all individuals and legal persons. Therefore, a legislative act that has been declared invalid ceases to exist as a legal act, and it no longer creates any rights or obligations for anyone.

Finally, and with regard to the individuals´ right to initiate constitutional review proceedings, I would like to say a few words about the institution of the Chancellor of Justice, who plays an important role in the system of constitutional review of laws. The Chancellor of Justice is a rather unique constitutional institution that is independent and does not belong to the legis-

[6] See, for example, Supreme Court Constitutional Review Chamber judgment of 6 March 2002 in case No 3-4-11-02. – Available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-1-02.

lature, judiciary, or executive branches. Tasked with reviewing the legislation of the legislative and executive powers, as well as municipalities, for conformity with the Constitution and laws, the Chancellor of Justice also serves as an Ombudsman.

According to the law[7], everyone has the right of recourse to the Chancellor of Justice to review the conformity of a law or other act of general application with the Constitution or the law. If the Chancellor of Justice finds that legislation passed by the legislature, executive, or a local government conflicts with the Constitution or a law, the Chancellor proposes to the relevant body to bring the legislation into conformity with the Constitution or the law within twenty days. If the legislation is not adjusted within this period, the Chancellor of Justice proposes to the Supreme Court to declare the legislation invalid. Therefore, in a way, the possibility of submitting an individual complaint is essentially ensured through the Chancellor of Justice as well.

Thank you for your attention!

[7] Chancellor of Justice Act. – Available at: https://www.riigiteataja.ee/en/eli/ee/507042016001/consolide/current.

Contribution by Mr. Tomas Davulis, Judge of the Constitutional Court of the Republic of Lithuania

IMPACT OF THE CASE LAW OF THE CJEU ON THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

Introduction

In the Member States of the European Union, the supranational legal system that these states have adhered to has become a significant factor in the development of the national legal order. The present contribution aims to analyse the impact of the case law of the Court of Justice of the European Union (hereinafter referred to as the CJEU) on the jurisprudence of the Constitutional Court of the Republic of Lithuania (hereinafter also referred to as the Constitutional Court of Lithuania or the Constitutional Court). After a short overview of the competence of the Constitutional Court, the author presents the status of and the constitutional foundations for European Union law (hereinafter also referred to as EU law) in the legal system of the Republic of Lithuania. The cases of the Constitutional Court will be presented and analysed to demonstrate the significance of EU law and the case law of the CJEU and the General Court of the EU, the status of the said law in the Lithuanian legal system and its interpretation in the jurisprudence of the Constitutional Court.

I. The model of constitutional review in Lithuania

The Constitutional Court of Lithuania has been actively involved in the field of human rights protection and the rule of law since its very establishment in 1993. So, it is already 30 years that it has

adjudicated on the constitutionality of laws and other legal acts (including in the sphere of human rights) adopted by the Parliament, as well as on the constitutionality of acts adopted by the President of the Republic or the Government. The questions of constitutionality may be initiated by petitions of the whole Parliament or a group of not less than 1/5 of all the members of the Parliament, or the President of the Republic or the Government. In addition, the questions of constitutionality can reach the Constitutional Court through petitions from other Lithuanian courts in cases where they have doubts about the constitutionality of legal acts that should be applied in a concrete case. Finally, the Constitutional Court presents conclusions on whether the international treaties of the Republic of Lithuania are in conflict with the Constitution.[1]

The model of constitutional review in Lithuania was supplemented with the institution of individual constitutional complaints only four years ago, after the entry into force of the respective amendments to the Constitution of the Republic of Lithuania (hereinafter also referred to as the Constitution or the Lithuanian Constitution) on 1 September 2019. Thus, certain insights can also be provided into the experience of the Constitutional Court of Lithuania gained over these four years.

An analysis of the impact of EU law, as interpreted by the CJEU, and the significance of the case law of the CJEU for the jurisprudence of the Constitutional Court of Lithuania first requires the exploration of such important elements as the national constitutional principles and the constitutional provisions governing the status and place of international and supranational legal sources in the Lithuanian legal system.

II. The status of European Union law in the Lithuanian legal system

In the case law of the Constitutional Court of Lithuania, the Constitution is seen as an integral and coherent system of constitutional values. The principle of the supremacy of the Constitution is enshrined in Article 7(1) of the Constitution, providing that "any law or other act that contradicts the Constitution shall be invalid". This fundamental provision cannot be interpreted in isolation from other constitutional values, including the constitutional duty of the State of Lithuania to fulfil its international obligations in good faith. According to Article 135(1) of the Constitution, which establishes that "... in implementing its foreign policy, the Republic of Lithuania follows the universally recognised principles and norms of international law ...", this principle means the imperative to fulfil, in good faith, the international obligations assumed by the Republic of Lithuania under international law, *inter alia*, international treaties.[2] In this context, it is important to mention that the adherence of the State of Lithuania to the universally recognised principles of international law was declared already in the Act on the Restoration of the Inde-

[1] The Constitutional Court has so far adopted only one conclusion, i.e. the conclusion of 24 January 1995, in which it was stated that certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and of its Fourth Protocol are in compliance with the Constitution. In addition, by its decision passed on 12 October 2023, the Constitutional Court accepted for consideration the petition submitted by the Seimas (the Parliament) of the Republic of Lithuania on the compatibility of the provisions of the Istanbul Convention with the Constitution.

[2] See, among others, the Constitutional Court of the Republic of Lithuania, the ruling of 24 January 2014.

pendent State of Lithuania, which was adopted by the Supreme Council of the Republic of Lithuania on 11 March 1990. Thus, in the opinion of the Constitutional Court, the observance of international obligations undertaken by the Republic of Lithuania on its own free will and respect for the universally recognised principles of international law (as well as the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania.[3]

The status of international law in the domestic legal order is further defined by Article 138(3) of the Constitution. The provision playing an important role states that international treaties ratified by the Seimas (the Parliament) of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.[4]

Lithuania acceded to the EU by signing and subsequently ratifying the Treaty of Accession to the European Union.[5] The Accession Treaty is a classic international treaty, signed and subsequently approved or ratified accordingly by all the contracting states – the Member States of the European Union – in accordance with their constitutional procedures. Further, the relationship between the Lithuanian Constitution and EU law is determined, specifically, by the Constitutional Act on Membership of the Republic of Lithuania in the European Union.[6] This act is a constituent part of the Constitution.

When interpreting the provisions of that constitutional act, the Constitutional Court has held that "full participation by the Republic of Lithuania, as a Member State, in the EU is a constitutional imperative based on the expression of the sovereign will of the People; full membership by the Republic of Lithuania in the EU is a constitutional value".[7] Under Paragraph 2 of the said constitutional act, the norms of EU law are a constituent part of the legal system of Lithuania. In this paragraph, the Constitution also establishes *expressis verbis* the collision rule concerning EU law, consolidating the priority of the application of EU legislative acts in cases where the provisions of EU law arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts. Moreover, as Egidijus Jarašiūnas, a former judge of the Constitutional Court, has pointed out, the recognition of the full membership of the Republic of Lithuania in the EU as a constitutional value, which should be counterbalanced with other values protected by the Constitution, means that solutions must be found to ensure that none of such values will be denied or unreasonably restricted.[8]

[3] The Constitutional Court of the Republic of Lithuania, the ruling of 14 March 2006.

[4] The Constitutional Court of the Republic of Lithuania, the ruling of 9 December 1998.

[5] *Official Journal L 236, 23/09/2003, pp. 0017–0930.*

[6] The official gazette *Valstybės žinios*, 17/07/2004, No 111-4123. Available (in English) at https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192, accessed 1 December 2023.

[7] The Constitutional Court of the Republic of Lithuania, the ruling of 24 January 2014.

[8] Jarašiūnas, E., "Lietuvos Respublikos visateisė narystė Europos Sąjungoje kaip konstitucinė vertybė" ["Full Membership of the Republic of Lithuania in the European Union as a Constitutional Value"], *Jurisprudencija*, No 2018, 25(1), p. 35.

In interpreting those provisions in its jurisprudence, the Constitutional Court has set the clear limits on the implementation of this collision rule. Thus, in the ruling of the Constitutional Court of 14 March 2006, it was held that "the Constitution consolidates not only the principle that, in cases where national legal acts establish such a legal regulation that competes with a legal regulation established in an international treaty, the international treaty must be applied, but it also establishes *expressis verbis* the collision rule concerning EU law, entrenching the priority of the application of EU legislative acts in cases where the provisions of EU law arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of their legal force), with the exception of the Constitution itself."[9]

However, as regards membership in the EU and the obligations arising therefrom and the relationship between EU law and the provisions of the national Constitution, one more particularly important constitutional principle – the principle of the geopolitical orientation of the State of Lithuania – should be noted. It is developed by the Constitutional Court in its jurisprudence and implies membership of the Republic of Lithuania in the European Union (and NATO) and the necessity to fulfil the respective international obligations related to this membership. Such geopolitical orientation of the State of Lithuania is based on the recognised and protected universal democratic constitutional values that are shared by other European (and North American) states.[10]

In addition, under the Constitution, as long as the aforesaid constitutional grounds for membership of the Republic of Lithuania in the European Union, which are consolidated in the Constitutional Act on Membership of the Republic of Lithuania in the European Union, have not been annulled by referendum, any amendments to the Constitution that would deny the obligations of the Republic of Lithuania arising from its membership in the European Union are not permitted. This statement with regard to European Union membership was developed by the Constitutional Court in its official doctrine related to the limitations on the alteration of the Constitution.[11]

III. The case law of the CJEU and the Constitutional Court of Lithuania

The significance of the case aw of the CJEU for the Lithuanian legal system is also sufficiently clearly defined in the constitutional jurisprudence. The Constitutional Court has noted that the jurisprudence of the CJEU, as a source of the interpretation of law, is also important for the interpretation and application of Lithuanian law.[12] In the decision of 20 December 2017, it was concluded by the Constitutional Court that

[9] The Constitutional Court of the Republic of Lithuania, the ruling of 14 March 2006.

[10] The Constitutional Court of the Republic of Lithuania, the ruling of 7 July 2011. See also Jočienė, D., "From National Constitutional Identity to European Integration: the Relationship between the National Constitution and European Union Law", available at https://lrkt.lt/data/public/uploads/2022/09/rapport_jociene_en.pdf, accessed 1 December 2023.

[11] The Constitutional Court of the Republic of Lithuania, the ruling of 24 January 2014.

[12] The Constitutional Court of the Republic of Lithuania, the rulings, *inter alia*, of 27 March 2009, 21 June 2011 and 22 December 2011.

EU law is a source of the interpretation of law of the Republic of Lithuania, *inter alia*, the Constitution, in the areas where (under Article 1 of the Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union) the Republic of Lithuania shares with or confers on the European Union the competences of its state institutions.[13] The decision of 20 December 2017 is of particular importance, because, for the first time, the Court expressed the need to take into account EU law when interpreting the Constitution and formulating the official constitutional doctrine.[14] This decision comprises one of the two references to the CJEU for a preliminary ruling made by the Constitutional Court in the history of its activity (on its own initiative, without the parties raising doubts concerning the meaning of the provisions of EU law).

In seeking to clarify the true meaning of the provisions of EU law, the Constitutional Court used these references in situations where the provisions of EU law were relevant in deciding constitutional justice cases. Such a possibility stems from the EU Treaties and it is also enshrined in the provisions of the Law on the Constitutional Court.

a) The Constitutional Court's references to the CJEU

Article 28 of the Law on the Constitutional Court provides that one of the issues considered at a procedural sitting of the Constitutional Court concerning the preparation of a case for a judicial hearing can be the adoption of the decision to apply to the CJEU and request a preliminary ruling on questions relating to the interpretation or validity of the legal acts of the EU. If the Constitutional Court decides to apply to the CJEU and request a preliminary ruling on questions relating to the interpretation or validity of the legal acts of the EU, under Article 48 of the Law on the Constitutional Court, this constitutes grounds for suspending the consideration of the case.

The first reference to the CJEU was made by the decision of the Constitutional Court of 8 May 2007, adopted in the constitutional justice case in which the disputed question concerned connection to electricity networks. In that case, the Constitutional Court was requested to assess the constitutionality of the provision of Article 20 of the law implementing Directive 2003/54/EC of the EU concerning common rules for the internal market in electricity and repealing Directive 96/92/EC. At that time, the Constitutional Court decided that the impugned provision of the Law on Electricity must be interpreted in the context of the legal regulation of the directive; therefore, it referred to the CJEU in order to clarify both the meaning of the provisions of the directive and the limits of the application of the principle of subsidiarity, which allows the particular issues to be resolved by the state itself. It was

[13] This was repeated in the rulings of 6 January 2020 and 7 June 2023.

[14] The decision of 20 December 2017 and the ruling of 11 January 2019 of the Constitutional Court sparked the debate as to what extent EU law should be treated as a source for interpreting the Constitution. It is argued that the newly formulated constitutional doctrine has expanded the scope of the operation of EU law and the limits of interaction between the two systems should be developed. See Birmontienė, T., "Konstitucinė teisė ir tarptautinė bei Europos sąjungos teisė: kas diktuoja teisės sistemų sąveikos ribas?" ["Constitutional Law and International and European Union Law: Who Dictates the Limits of the Interaction between the Legal Systems"] in XXI amžiaus iššūkiai tarptautinei teisei. Liber Amicorum Sauliui Katuokai, Vilnius: MRU, 2020, pp. 92–95.

only after receiving the ruling of the CJEU that the Constitutional Court decided that the impugned legal regulation was not in conflict with the Constitution.[15]

The second reference to the CJEU was made in 2017 in the constitutional justice case on the regulation governing trade in raw milk.[16] The Constitutional Court referred to the CJEU requesting an interpretation of the content of Article 148 of Regulation No 1308/2013, which regulates freedom of contractual relations in the milk and milk products sector. In that constitutional justice case, the petitioner impugned the provisions of the law that had imposed restrictions on the contracting parties to agree on factors for the purchase price of raw milk other than those provided for in the law and the prohibition to reduce the price by more than 3 percentage points without the permission of the state institution.

Having held that EU law is also a source of the interpretation of the Constitution (in certain areas), the Constitutional Court stated that there is no constitutional basis for interpreting the Constitution in those areas differently from the way those areas are regulated under EU law (at least for now). Only after receiving the ruling of the CJEU, the Constitutional Court decided that, *inter alia*, the impugned legal regulation governing trade in milk, in terms of its adoption procedure, was in conflict with the Constitution.[17]

b) The case law of the CJEU in the jurisprudence of the Constitutional Court

Concerning the significance of EU law and the case law of the CJEU explaining EU law, the ruling of 11 January 2019 could also be singled out. In that case, the Constitutional Court decided on issuing a temporary residence permit in Lithuania to a foreign national in the event of family reunification; the question was raised in relation to a family formed on the basis of marriage with a person of the same sex in a foreign state (Denmark).[18]

The Constitutional Court reiterated that full membership by the Republic of Lithuania in the EU is a constitutional value; the constitutional imperative of full participation by the Republic of Lithuania in the EU also implies the constitutional obligation of the Republic of Lithuania to properly implement the requirements of EU law; EU law is a source of the interpretation of the law of the Republic of Lithuania, *inter alia*, the Constitution, in those areas in which, under Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, the Republic of Lithuania shares with or confers on the EU the competences of its state institutions.

Specifically, in that ruling, taking into account, among others, the obligations arising from EU law and international law, the constitutional concept of the family was interpreted as neutral in terms of gender and creating the preconditions for ensuring, among others, the free movement of persons on the basis of family reunifica-

[15] The Constitutional Court of the Republic of Lithuania, the ruling of 4 December 2008.

[16] The Constitutional Court of the Republic of Lithuania, the decision of 20 December 2017.

[17] The Constitutional Court of the Republic of Lithuania, the ruling of 6 February 2020.

[18] The Constitutional Court of the Republic of Lithuania, the ruling of 11 January 2019.

tion, as required by EU law and by the European Convention on Human Rights, which operates within the framework of the Council of Europe (this Convention is also considered a source of the interpretation of the Constitution, i.e. the jurisprudence of the European Court of Human Rights is also important for the interpretation and application of Lithuanian law[19]).[20]

The Constitutional Court emphasised that the constitutional provisions related to the free movement of EU citizens within the EU should also be interpreted in the light of the respective EU legal provisions. It was held in the ruling that, in order to ensure the free movement of persons **in accordance with EU law**, it is essential to respect the private and family life of EU citizens and pay regard to the prohibition of any discrimination, including on the grounds of gender and sexual orientation; the Member States must take account of a marriage or registered partnership (if the legislation of the host Member State treats registered partnerships as equivalent to marriage) lawfully concluded between same-sex persons in another Member State, to the extent necessary to ensure the exercise of the rights that these persons enjoy under EU law, among others, the right to move and reside freely in the territory of the Member States; a Member State cannot rely on the reservation of public order, including on the grounds that the law of that Member State does not provide for marriage between persons of the same sex (registered partnership between persons of the same sex if the legislation of the Member State treats registered partnerships as equivalent to marriage), in refusing reunification to a family founded by an EU citizen (among others, a citizen of that Member State) having made use of the right to freedom of movement and a same-sex third-country national, who have lawfully concluded a marriage (or a registered partnership) in another Member State.

In that ruling, the Constitutional Court relied on, among others, the provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union, as well as the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing *[other]* Directives.[21]

The Constitutional Court also relied on the relevant jurisprudence of the CJEU on the interpretation of the regulation of the civil status of individuals, as well as on the interpretation of the legislation (*inter alia*, the above-mentioned Directive) governing the right to move and reside freely within the territory of the Member States, in particular, the case of the CJEU of *Coman and Others* of 2018 at the request of the Romanian Constitutional Court.[22] The Constitutional Court of the Republic of Lithuania took into account the term "spouse" used in the above-mentioned Directive, which refers to a person joined to another person by the bonds

[19] *Inter alia*, the Constitutional Court of the Republic of Lithuania, the rulings of 11 January 2019 and 18 April 2019.

[20] Jočienė, D., "From National Constitutional Identity to European Integration: Relationship between the National Constitution and European Union Law", https://lrkt.lt/data/public/uploads/2022/09/rapport_jociene_en.pdf.

[21] Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[22] The Court of Justice of the European Union, the judgment of 5 June 2018, *Coman and Others*, C-673/16.

of marriage; according to the above-mentioned judgment of *Coman and Others*, this term within the meaning of the Directive is gender-neutral and may, therefore, cover the same-sex spouse of the EU citizen concerned.[23]

Thus, also in light of these considerations, the Constitutional Court recognised that the disputed provision of the Law on the Legal Status of Aliens, under which a temporary residence permit in Lithuania may be issued to a foreign national in the event of family reunification when the foreign national's spouse or the person with whom a registered partnership has been concluded is a citizen of the Republic of Lithuania residing in Lithuania or a foreign national holding a residence permit in Lithuania and residing in Lithuania, **was not in conflict** with the Constitution.

According to the Constitutional Court, **there are no grounds for holding that, under the impugned provision of the Law on the Legal Status of Aliens, in the event of family reunification, a temporary residence permit in Lithuania may be refused to a foreign national** who is not a citizen of an EU Member State or the European Free Trade Association **in cases where such a foreign national joins his or her same-sex spouse residing in Lithuania or a same-sex person with whom a registered partnership has been concluded and who resides in Lithuania** and is a citizen of the Republic of Lithuania or a foreign national holding a residence permit in Lithuania. It was stated in this ruling that, **only if the legal regulation** laid down in the said law i**s interpreted in the way indicated above, it is to be assessed as not violating the requirements arising from the Constitution**, Article 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, as well as from the constitutional principle of a state under the rule of law and the constitutional imperative of full participation by the Republic of Lithuania in the EU.

A few other examples of cases reflecting the most significant impact of EU law and the case law of the CJEU were also decided by the Constitutional Court this year.

By its ruling of 7 June 2023, the Constitutional Court recognised that the provisions of the Law on the Legal Status of Aliens according to which, in the event of a mass influx of aliens during a declared extraordinary situation, a state of emergency, or a state of war, all asylum seekers were obliged to be accommodated in designated places without being granted the right to move freely within the territory of the Republic of Lithuania, where the duration of such accommodation could be up to six months, in the absence of a decision by the competent authority that could be appealed against to a court, had conflicted with Article 20 of the Constitution. The Constitutional Court also recognised that the provisions of the same law according to which all asylum seekers were obliged to be accommodated in designated places without being granted the right to move freely within the territory of the Republic of Lithuania, where the duration of such accommodation could be up to

[23] Ibid., paragraph 35.

six months, conflicted with the same article of the Constitution.[24]

In that ruling, the Constitutional Court, among others, relied on the EU legal acts relating to the legal status of asylum seekers, including the requirements concerning the temporary accommodation of asylum seekers and restrictions on their freedom, i.e. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), which was implemented by the provisions of the disputed Law on the Legal Status of Aliens of the Republic of Lithuania. The Constitutional Court interpreted these provisions in the light of the said Directive. In that ruling, the Constitutional Court also took into account the judgment of the CJEU of *M. A. v (Valstybės sienos apsaugos tarnyba)* (State Border Guard Service) of 30 June 2022 in case C72/22 PPU, in which, *inter alia*, the provisions of the above-mentioned Directive were interpreted by paying attention to the legal regulation of the disputed law.

In this CJEU judgment, among others, it was noted that a third-country national who has been subjected to an "alternative" measure to detention within the meaning of Lithuanian law, i.e. placement in a detention centre of the State Border Guard Service, with the right of movement confined to the area of that detention centre, and who is not allowed to leave it without authorisation and escort, is to be regarded as a person who has been separated from the rest of the residents and who has been deprived of the freedom of movement, and who is thus considered to be a person who is subject to detention, as understood by Article 2(h) of the Directive (paras. 40–42).

Relying also on this position of the CJEU, the Constitutional Court drew the conclusion about the similarity of temporary accommodation in designated places in the case of the Lithuanian disputed legal regulation and detention. The Constitutional Court concluded that Lithuanian law provides for an alternative to detention, such as accommodation in a specified place, with the right to move only within the territory of the place of accommodation, without leaving it without permission and without being accompanied, which, by the way, is essentially identical to the measure applicable to asylum seekers under the provisions of the Lithuanian law challenged by the applicant, is to be regarded as detention, and that it is a coercive measure, which should only be applied when no other less restrictive means of personal liberty are available.

By its ruling of 5 July 2023, the Constitutional Court recognised that the legal regulation establishing individual cases when it is allowed to write personal names in the documents confirming the identity of a citizen of the Republic of Lithuania and in the records of civil status acts by using Latin-based characters (without diacritical marks) is not in conflict with the Constitution. The Constitutional Court held that the legislature implemented its constitutional powers to establish the legal regulation governing the writing of names and surnames of persons in the documents confirming the identity of a citizen of the Republic of Lithuania, taking into account the official conclusion of the State Commission of the Lithuanian Language Commission, as an institution with special competence in the field of the state language, and having properly assessed the position and proposals

[24] The Constitutional Court of the Republic of Lithuania, the ruling of 7 June 2023.

set out in that opinion, based on the special competence of that Commission. Therefore, the establishment of the impugned legal regulation has not violated Article 14 of the Constitution, which consolidates the constitutional status of the state language.[25]

This position of the Constitutional Court seems to be evolving compared to its previous judgments putting strong emphasis on the use of the state language in the public life of Lithuania, including the first page of identity documents, although it is allowed to supplement the entry in the state language in the passport of a citizen by writing the person's name in his or her mother tongue in the section of other entries of the passport.[26] In this case, the position of the Constitutional Court is quite strongly determined, *inter alia*, by the case law of the CJEU speaking in the name of fundamental freedoms in the sphere of the writing of surnames. The Constitutional Court noted that the CJEU had held that the objective pursued by national legislation seeking to protect a national language by laying down rules on the spelling of that language is, in principle, legitimate and capable of justifying restrictions on the right to freedom of movement and residence, provided for in Article 21 of the Treaty on the Functioning of the European Union, and can be taken into account in the balancing exercise between the legitimate interests at stake and those rights recognised by EU law. However, measures restricting fundamental freedoms, such as those referred to in Article 21 of the Treaty on the Functioning of the European Union, may be justified on objective grounds only if they are necessary for the protection of the interests that they are designed to safeguard and only insofar as those objectives cannot be attained by less restrictive means.[27]

Conclusions

The analysis of the relevant provisions of the Lithuanian Constitution and the jurisprudence of the Constitutional Court of Lithuania allows us to confirm the strong dedication and commitment of the state of Lithuania to the principles of international law. Respect for supranational legal order and the proper implementation of EU law is also based on the recognition of membership in the European Union as a constitutional value. It could be stated that the discussed Lithuanian constitutional legal regulation and the examples from the jurisprudence of the Lithuanian Constitutional Court affirm the significant impact made by EU law and the case law of the CJEU on the constitutional jurisprudence. These sources are used while interpreting and applying the Constitution (especially in the areas where the Republic of Lithuania shares with or confers on the European Union the competencies of its state institutions) and also other ordinary Lithuanian law. Thus, the Lithuanian Constitution and the developed constitutional jurisprudence, on case-by-case basis, become increasingly more open to EU law.

[25] The Constitutional Court of the Republic of Lithuania, the ruling of 5 July 2023.

[26] *Inter alia*, the decision of 6 November 2009 on the spelling of the name and family name of an individual in the passport of the Republic of Lithuania.

[27] The Court of Justice of the European Union, the judgment of 5 June 2018, 12 June 2011, *Malgožata Runevič-Vardyn and Others v Administration of the Municipality of Vilnius City and Others*, paragraphs 85–88.

Contribution by Claudio Monteiro, Supreme Administrative Court of Portugal

THE PROTECTION OF FUNDAMENTAL RIGHTS BY THE ADMINISTRATIVE COURTS IN PORTUGAL

Honorable President of the Constitutional Court of Kosovo, Madam Gresa Caka-Nimani,

Distinguished Judges of the Constitutional Court of Kosovo, Colleagues and friends

The aim of my presentation is to remind that the protection of fundamental rights is not an exclusive role of Constitutional Courts. Even in judicial systems that have a centralized system of constitutional control – like the Portuguese – citizens should have access to other – more agile - remedies for the protection of their fundamental rights, before other courts, especially against the Public Administration, who represents one of the major threats for those rights.

1. The Portuguese judicial organization

Portugal has two separate constitutionally defined jurisdictions: civil and administrative (art. 209 and following of the Constitution of the Portuguese Republic).

The jurisdiction of the Constitutional Court (in matters of juridical-constitutional nature) and of the Court of Auditors (verification of the legality of public expenses and judging of the accounts submitted to it by law) are also foreseen by the Constitution.

The current system of specialized courts for administrative and fiscal disputes also consists of three tiers.

At the base, we have the *circuit administrative courts*, in sixteen different locations around the country. In most cases, the circuit administrative courts and the tax courts are combined, as *administrative and tax courts*.

The middle tier consists of the *central administrative courts*, one covering the southern part of the country and the islands, located in Lisbon, and one covering the northern part of the country, located in Oporto. A new central administrative court located in Castelo Branco, in the center of the country, is due to be created by the end of the year.

At the top of the hierarchy is the *Supreme Administrative Court*, created in 1870.

All administrative court judges enjoy the same constitutional guarantees of immunity and independence as the judges in civil and criminal courts.

Procedural law defines the competent court for every case falling within the scope of jurisdiction of the administrative courts. For this purpose, the *Administrative and Tax Courts Statute* and the *Code of Procedure in the Administrative Courts* (referred to below as *Code of Procedure*) sets out criteria of competence on the grounds of subject matter, territory and hierarchy.

2. The scope of jurisdiction of the administrative courts

The material scope of jurisdiction of the administrative courts coincides as a general rule with that of *administrative disputes*. But the case law have considered that article 212, para. 3, of the Constitution, which reserves the judgment of actions relating to disputes deriving from legal administrative relations for the administrative courts, has the nature of a general clause without thereby seeking to prohibit the exceptional adoption of other criteria for jurisdiction.

The range of the jurisdiction of the administrative courts is not determined merely by substantive or material factors. Equally important are functional factors, relating to the difference between the roles of the administrative courts and of the administrative authorities: constitutional principles such as the separation of powers and the democratic legitimacy of executive power do not allow the courts to transform review into the final exercise of administration. This constitutional guideline is applied in two specific areas: that of respect for the initial decision-making power of the Administration and that of the limits on the judicial control of administrative discretion. These questions arise from the circumstance that review covers the exercise of public powers that belong primarily to the Government and not to the courts.

3. Remedies in administrative courts

The Code of Procedure regulates the principle of effective court protection in accordance with the relevant constitutional provision.

Article 2, para. 1, of the Code provides that:

"The principle of effective court protection includes the right to obtain a final and binding court decision with regard to each claim properly made in court within a reasonable time, together with the option of enforcing the same and obtain both mandatory and restrictive interlocutory injunctive relief, in order to ensure the effectiveness of the decision."

The catalog of remedies in the judicial review of administrative acts is founded on articles 20, para. 5 and 268, paras. 4 and 5, of the Constitution.

According to para. 5 of article 20, the law should assure citizens rapid judicial procedures assigning priority as appropriate, so that they may obtain effective timely protection from threats or breaches of individual civil and political rights guaranteed by the Constitution. But the guarantee of judicial protection by administrative courts is extended by article 268, paras. 4 and 5 to any other legal rights and not just to fundamental rights. These paragraphs lay down that judicial protection must be effective and include certiorari against illegal administrative decisions, declarations of any disputed rights or legal interests, injunctions ordering that certain administrative decisions be issued, judicial control of agency-made rules and appropriate interim relief. In addition, para. 3 of article 205 of the Constitution lays down that the law should regulate the terms of enforcement of judicial decisions against any other authorities.

These constitutional guarantees mean that there is a constitutional right to judicial review: any statutory provision establishing immunity from judicial review would be unconstitutional. But this right does not consist only of access to the administrative courts: the Constitution requires that the legislator provide a range of remedies able to restore any infringed right.

The catalog of remedies contains administrative actions (or procedures), urgent actions, interim relief and procedure for the enforcement of judgments.

Administrative actions in the administrative courts are the appropriate form of action for any claim. It may be used, not only to obtain a judicial decision quashing an unlawful administrative decision or rule, but also to settle any administrative dispute for which no specific remedy exists. It is therefore used to settle administrative disputes relating to contracts, the liability of the administrative authorities (civil liability and liability for legal administrative conduct which may cause specific and abnormal damages), negative or positive injunctions prohibiting certain actions or requiring others, when such action does not consist of administrative adjudication or rulemaking.

In addition to *administrative actions*, the Code of Procedure also provides for various types of *urgent actions*. We may refer to the most important of these:

a) Injunction for disclosure of administrative information;

b) Injunction for the protection of fundamental rights;

c) Public procurement cases, according to European Directives.

4. The injunction for the protection of fundamental rights

According to article 202, para. 2 of the Constitution, *"in administering justice the courts are responsible for ensuring the defence of those citizens' rights and interests that are protected by law, repressing breaches of democratic legality and deciding conflicts between interests, public and private"*.

Furthermore, article 204 states that *"in matters that are submitted for judgement the courts may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein"*.

This means that any judge, regardless of its jurisdiction, has an obligation of protecting fundamental rights of citzens when deciding a case, by not applying to it unconstitutional laws.

Of course, this is not as effective as having a specific remedy designed for the protection of fundamental rights, as unconstitutionality is not the only source of ofences to fundamental rights.

In our constitutional control system, despite its complexity (a mix of the American difuse control system with Austrian centralized system), we do not have an equivalent of a writ of protection, found in many Latin Constitutions (recurso de amparo), or a *constitutional complaint*, as in Austria or in Germany.

Notwithstanding, on the administrative jurisdiction we do have a specific remedy designed for that purpose – the *injunction for the protection of fundamental rights*.

Article 109, para. 1, of the Code of Procedure states that:

"An injunction for the protection of citizen's rights, freedoms and guarantees may be requested when the rapid issuance of a decision that requires the Administration to adopt a positive or negative conduct proves to be indispensable to ensure the exercise, in a timely manner, of such rights"

As we do not have enough time to analyze the scope and the procedure of this injunction, I will only make three remarks on its requirements:

1. This remedy only protects fundamental rights against a threat (by action or omission) of the Public Administration. In some circumstances, you may file the case against a private entity entrusted with public powers, like concessionaires, but you cannot use it in disputes between two private entities governed by civil law.

2. The scope of the protection does not include all fundamental or constitution rights, as (you may have noticed) the law refers to citizen's rights, freedoms and guarantees (individual civil and political rights), but not to social rights. There is an ongoing doctrinal and jurisprudential discussion on the possibility of extending the protection given by this remedy to any fundamental rights, or at least those whose content may be determined on the Constitutional text.

3. The injunction cannot be used if any other remedies foreseen in the Code of Procedure – including interim relief - is sufficient to ensure the need of protections of the fundamental right. The use of the injunction must be indispensable

The injunction for the protection of fundamental rigths have clearly helped to strengthens citizen's rights, freedoms and guarantees, but has also created a problem for the administrative jurisdiction, due to its excessive use – and abuse.

The Administrative Circuit Court of Lisbon alone receives nearly 3.000 injunction cases per year, the majority of it related to asylum, immigration and nationality law. 3.000 injunction cases that have to be decided by not more than 10 judges, that are also in charge of hundreds (or thousands) of other regular cases.

Of course this excessive workload limits the ability of the administrative courts to offer effective timely justice, which is, in itself, a right guaranteed by the Constitution.

Contribution by Mr. Mato Arlović, Judge of the Constitutional Court of the Republic of Croatia

USTAVNI SUD
REPUBLIKE HRVATSKE

THE CONSTITUTIONAL COURT PROTECTING THE RIGHTS AND FREEDOMS OF NATIONAL MINORITIES AND THEIR MEMBERS

Summary and keywords

The position, rights and freedoms and their protection of national minorities and their members are one of the unavoidable indicators of the degree of realization of a modern democratic, constitutional state - a state of human and minority rights and freedoms, the rule of law and all other legally regulated values, ideals, and principles of a democratic society.

It should be borne in mind that the existence and realization of a democratic constitutional state implies the existence not only of a formal legal constitution that recognizes, governs and guarantees these rights and freedoms on a normative level, but also of its functional-realistic implementation.

Certainly, the implementation of the constitution in this area of its content, both at the level of legislative regulation and at the level of concrete implementation of individual rights and freedoms of national minorities and their members, does not by itself exclude possible violations of their constitutional content.

In order to prevent and, ultimately, remedy possible violations of the rights and freedoms of national minorities and their members (as well as human rights and freedoms for all other holders), within the constitutional legal system, state and other public bodies have been established that are specifically competent for carrying out procedures and rendering decisions for their protection.

The constitutional courts, which protect these rights and freedoms on a double level, have a spe-

cial significance, role and jurisdiction in the area of protection of these rights and freedoms. At the level of abstract control of the constitutionality of laws and the constitutionality and legality of sub-legal acts that elaborate the rights and freedoms guaranteed by the constitution, and in concrete individual proceedings that citizens initiate before the constitutional courts, in the prescribed procedure, if and when they consider that the individual acts of state authorities, local self-government authorities and authorities of legal entities with public powers, violated those rights.

In the substantive part, the paper will give basic doctrinal approaches regarding the issue of the position, rights and freedoms of national minorities and their members, on the one hand, and on the other hand, how the Croatian and Kosovo constitution makers responded in the constitutional texts. On the third hand, the paper will present, from a constitutional legal aspect, a description of the position, jurisdiction, and, in some concrete examples, the actual actions and decision-making of the Constitutional Court of the Republic of Croatia in the protection of the rights and freedoms of national minorities and their members. Of course, to the extent that is appropriate for the purpose of this paper. I will not go into specific examples of the actions of the Constitutional Court of the Republic of Kosovo in the protection of these rights and freedoms, I am convinced that, if necessary, the judges and other representatives of that Court will talk more about this.

Keywords: *rights and freedoms of national minorities and their members, constitution, constitutional court, human rights and freedoms, democratic constitutional state*

I. Introduction

The constitutional legal framework related to the regulation of rights and freedoms and their protection of members of national minorities and their communities in the Republic of Croatia and the Republic of Kosovo is characterized by several general and special (specific) characteristics that arise from their formal and substantial (material) content. Despite the fact that there are certain differences between the two frameworks, which will also be discussed in the basic elements, I will deal more with the characteristics that indicate their similarity and/or uniformity in the essential substantial part. At the general level, we observe them in several segments. First, at the formal legal level, it is clear that this framework is limited by the following legal acts of internal and international law:

a) The Constitution of the Republic of Croatia[1], namely, the Constitution of the Republic of Kosovo,[2]

b) international legal regulations specified in Article 16 of the Constitution of the Republic of Kosovo, of which the Framework Convention of the Council of Europe for the Protection of National Minorities[3] a legal act that directly governs these issues, while all others, to a lesser or greater extent, govern them indirectly. In the Republic of Croatia, these are international regulations from Article 1 of the Constitutional Law on the Rights of National Minorities.[4] It

[1] Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 - refined text

[2] Constitution of the Republic of Kosovo, taken from: https://zka-rks.org/wp-content/uploads/2017/06/USTAV_REPUBLIKE_KOSOVO.pdf

[3] Framework Convention for the Protection of National Minorities, "Official Gazette - International Treaties" no14/1997.

[4] Constitutional Law on the Rights of National Minorities, "Official Gazette" No. 155/2002, Decision and ruling of the Constitutional Court of the Republic of Croatia, No. U-I-1029/2007 and U-I-1030/2007.

is interesting to note that the Kosovo constitution-maker and the Croatian legislator included in the list of these formal sources of international acts those that are not original legal acts by their legal nature.[5] Furthermore, when defining the position of international legal regulations as part of their constitutional legal systems, both accepted and implemented the principle of legal monism both with regard to these issues and all other issues regarding human rights and freedoms. The Republic of Kosovo in Article 19, paragraph 2 of the Constitution, and the Republic of Croatia in all international treaties under Article 141 of the Croatian Constitution. More will be said about the principle of monism in the special - specific characteristics of these constitutional legal frameworks.

c) The direct legal regulations with legal force in the Republic of Croatia are: the Constitutional Law on the Rights of National Minorities, which despite its name is an organic law. Then also organic laws: the Law on the Use of Languages and Script of National Minorities in the Republic of Croatia[6] and the Law on Education in Languages and letters of National Minorities.[7]

1. Indirect legal regulations that govern issues related to the exercise and/or protection of the rights and freedoms of members of national minorities and their communities through certain provisions. These are legal regulations that govern, for example, the electoral system, the system of local and regional self-government, the system of state administration, the system of administration in local and regional self-government, the judicial system, the system of upbringing and education, the system of work and employment, the prohibition of discrimination on any ground, except so called. positive discrimination in accordance with the law, etc.

- sub-legal acts of state authorities and general legal acts of competent authorities related to the implementation of laws governing these issues,
- other legal sources.[8]

2. Direct legal regulations with force of law of the Republic of Kosovo, the Law on the Protection and Promotion of the Rights of Communities and Their Members in the Republic of Kosovo.[9] The law contains an interesting solution in Article 15.2. Namely, the provision of that article gives this law a quasi-constitutional role because it stipulates: "*Upon entry into*

[5] A clear example is the General Declaration on Human Rights, "Official Gazette of the SFRY" No. 7/1976, which is not a legal act by its very name. However, it is one of the most significant acts of the international community (OUN) related to human rights and freedoms (including the rights of members of national minorities and their communities), for the study of which it is an indispensable text. The significance of this Declaration in the world is evidenced by the fact that it is the second most translated reading into world languages (right after the Bible).

[6] Law on the Use of Languages and Scripts of National Minorities in the Republic of Croatia, "Official Gazette" No. 51/2000 and 56/2000 - correction

[7] Law on Education in the Languages and Script of National Minorities, "Official Gazette" No. 51/2000. and 56/2000 - correction

[8] Other legal sources include judgments of the European Court of Human Rights and Freedoms from Strasbourg, as well as decisions and rulings of the Constitutional Court of the Republic of Croatia and the Republic of Kosovo. Namely, the decisions and rulings of these courts have a generally binding character, so everyone (including legislative bodies) is obliged to respect and implement them. In this regard, when they refer to the rights and freedoms of members of national minorities and their communities, they are a source of rights and in nature of things are an integral part of the constitutional legal framework that refers to that area of social relations.

[9] Law on protection and promotion of the rights of communities and their members in the Republic of Kosovo, Law no. 03/L-047, and Law no. 04/L-020 on amendments to Law no. 03/L-047 on the protection and promotion of the rights of communities and their members in the Republic of Kosovo.

force of this law, any law or regulation inconsistent with the provisions of this law shall be null and void to the extent of its inconsistency".

- indirect regulations in the same way as in the Republic of Croatia,
- sub-legal acts and general legal acts adopted by the competent law enforcement authorities, which refer to these issues,
- other legal sources.[10]

As a special, specific, legal regulation that enters into the system of legal acts of this constitutional legal framework are the legal regulations that govern, in accordance with the Constitution, the position, jurisdiction and actions of the constitutional courts in the Republic of Croatia and the Republic of Kosovo.[11] This issue will be discussed in more detail in the chapter dedicated to the role of the constitutional court in protecting the rights and freedoms of national minorities and their members.

II. The constitutional legal framework and its specifics governing the position, rights and freedoms of national minorities and their communities in the Republic of Croatia and the Republic of Kosovo

A. Essential specificities

Responding to the challenge of how to constitutionally regulate the position, rights and freedoms of members of national minorities and their communities, in a substantial (substantive) sense, the Republic of Croatia and the Republic of Kosovo decided (regardless of certain differences in their constitutional legal frameworks that relate to these issues) for a complete and integral approach. Such an approach implies the legal regulation of all open issues that are still open and present in individual states when they approach the recognition and legal regulation of the position, rights and freedoms of members of national minorities and their communities.

The open questions that required answers are: 1) acceptance of national law in this area as an integral part of its internal law according to the principle of legal monism; 2) defining the term national minority (community) in such a way that it is closest in substance to the definition of that term, which is most often used as a working term at the international legal level; 3) acceptance of the existence of individual rights and freedoms of members of national minorities, but also of the collective rights of their communities; 4) accepting the application of positive discrimination against members of national minorities and their communities in relation to the majority population, but also between national minorities and their members, when this is necessary and justified in a democratic society in order to be able, in addition to exercising human rights and freedoms, to exercise such special rights and freedoms belonging to national minorities and their members; 5) accepting that the establishment and protection of the rights and freedoms of members of national minorities and their communities be regulated and protected by the highest legal act and the high-

[10] As in the Republic of Croatia, see note no 8.

[11] See: Constitutional Law on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002 - the consolidated text and the Law on the Constitutional Court of the Republic of Kosovo, Law no. 03/L-121.

est law in the country - that is, by the constitution and the constitutional court established by it, which is empowered to make decisions on the protection of these rights and freedoms as the ultimate state authority. The same as with the protection of all other constitutionally guaranteed human rights and freedoms.

We consider it necessary to single out the aforementioned constitutional and legal facts simply because such an approach is, on the one hand, still relatively rare in the world, and on the other hand, because at the normative-legal level it fully corresponds to supranational law (even if it is broader than it in scope and content),[12] which regulates these issues. Thirdly, that these approaches are not only comprehensive in terms of regulating the position, rights and freedoms of members of national minorities and their communities, but are also very progressive and advanced compared to all others. More on all this, *inter alia*, in the elaboration of each of the mentioned questions.

1.1. Specifics of legal monism

Legal monism is expressed by the unity of the legal system that forms the constitutional legal framework for regulating and protecting the position, rights and freedoms of members of national minorities and their communities,[13] regardless of whether they are legal acts of the internal law of the country in question or legal acts of a supranational level.

Namely, the Constitution of the Republic of Croatia prescribed the conditions that, when it fulfills the international legal regulation, according to the Constitution itself, it becomes an integral part of the internal legal order of the Republic of Croatia, and as such it is above the law in terms of its legal force. In addition, by virtue of the same constitutional article, these international legal regulations (international treaties) can be "altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.[14]

In accordance with the mentioned article of the Constitution of the Republic of Croatia, in addition to other international treaties that regulate and protect the position, rights and freedoms of members of national minorities and their communities, they are above the law by their legal force, but must be in accordance with the Constitution of Croatia. Therefore, they are below the Constitution of the Republic of Croatia. Here is an opportunity to point out two, in my opinion, relevant constitutional moments. In the Croatian constitutional legal system, these international treaties are above the law regardless of the fact that they are rendered (confirmed), as a rule, by a simple majority vote of the representatives, while (organic) laws governing the rights of national minorities are passed by a two-thirds majority vote of all members of the Croatian Parliament.[15] The second moment

[12] The constitutional legal framework for the regulation and protection of the rights and freedoms of members of national minorities and their communities of the Republic of Croatia and the Republic of Kosovo fully accept the content of the Framework Convention for the Protection of National Minorities, but are somewhat broader, precisely because they provide a definition of national minorities, recognize in addition to individual and collective rights and allow, when legally possible, necessarily and justifiably positive discrimination between members of national minorities and their communities, and not only between them and the majority people.

[13] See more about legal monism in Padjen I., "Lessons of legal monism", Proceedings of the Faculty of Law in Zagreb, Zagreb Vol. 66, Iss. 5 (2016): 595-617.

[14] See in detail article 141 of the Constitution of the Republic of Croatia, "Official Gazette" No. 85/2010 - consolidated text.

[15] See Article 83, paragraph 1 of the Constitution of the Republic of Croatia, ibidem.

is the legal fact that the Croatian legislator as the main law (in addition to the Constitution of the Republic of Croatia) governing the rights of national minorities called it the Constitutional Law on the Rights of National Minorities. However, despite its name, this law does not have the character and force of a constitution by the procedure of its adoption, and by its substantial content and constitutional determination, but is only one of the organic laws.[16] This legal nature of this Constitutional Law actually stems from the very content of its Article 1, which prescribes the basis of which legal acts it is substantively based and passed in the Croatian Parliament.[17] Although in name it is a constitutional law, it was actually passed according to the procedure and in the manner prescribed by the constitution maker in the Constitution for other organic laws that regulate the rights of members of national minorities and their communities. It is about the Law on the Use of Languages and Script of National Minorities in the Republic of Croatia and the Law on Education in Language and Script of National Minorities.[18] These three organic laws, according to the procedure of adoption and the required number (2/3) of votes from the total number of representatives of the Croatian Parliament, in terms of their legal force are superior to the organic laws that elaborate human rights and freedoms, regardless of the fact that their content in some articles also include individual provisions that elaborate the rights and freedoms of members of national minorities and their communities. Namely, these laws are adopted by a majority vote of all representatives of the Croatian Parliament, so on that basis, in terms of their legal force, they are below the previous ones. All other laws which, in an indirect way (because, for example, they also contain some individual provisions regulating the way of exercising the rights and freedoms of members of national minorities and their communities) according to the Constitution of the Republic of Croatia, are passed by a simple majority of the votes of the representatives at the sessions of the Parliament, if for a decision is ensured quorum, by the nature of things they are below them in terms of their legal force.

By the way, despite the differences in the hierarchical structure of interrelationships in terms of legal force between the aforementioned legal regulations, the monistic model of the constitutional legal framework for the legal regulation of the position, rights and freedoms of members of national minorities and their communities has not been broken. After all, the monistic principle itself primarily refers to the unity of this constitutional legal framework, starting

[16] Constitutional Law on the Rights of National Minorities has the title "Constitutional", due to the demands of representatives of national minorities in the Croatian Parliament, when it was adopted, even though it was already clear in the Parliament at that time that it was an organic law. In fact, the name of this organic law is a question of *falsa nominatio*. The Constitutional Court of the Republic of Croatia took its position on this issue. Referring to it, Crnić Jadranko, former president of the Constitutional Court of the Republic of Croatia, points out that *falsa nominatio* "does not change the legal nature of laws, does not make them legally different from what they are according to the Constitution and their content, and the Constitutional Court does not judge them by their name but by its legal nature." See his book: "Commentary on the Constitutional Law on the Constitutional Court of the Republic of Croatia", Zagreb, 2002, p. 86; See my book: "The Law of National Minorities in the Republic of Croatia", Novi informator, Zagreb, 2015, especially p. 191, 309 and 500.

[17] See Article 1 of the Constitutional Law on the Rights of National Minorities of the Republic of Croatia, ibidem.

[18] Namely, these two laws, in accordance with Article 83, Paragraph 1 of the Constitution of the Republic of Croatia, are adopted by a two-thirds majority of all members of the Croatian Parliament. The same as the Constitutional Law on the Rights of National Minorities.

from the fact that it expresses a unique subsystem of order, regardless of the origin of the legal regulations according to their maker, which are part of it. Of course, this does not mean that the differences in legal force between these legal regulations are of no effect. On the contrary, they must be respected based on the principles of constitutionality and the rule of law. Every competent authority that ultimately decides on constitutionality and legality and/or on the protection of the guaranteed rights and freedoms of members of national minorities and their communities must take into account these issues, like it or not.

As the state authority in these two countries is the constitutional court, more will be said about these issues in the chapter dealing with its role in protecting the rights and freedoms of members of national minorities and their communities.

As much as there is similarity in terms of the concept of legal monism between the constitutional framework for regulating and protecting the rights and freedoms of national minorities and their communities in the Republic of Croatia and the Republic of Kosovo, there are also differences that I will primarily indicate in the text of this paper.

The first of them, which should be pointed out, refers to the position of the constitution maker of the Republic of Kosovo regarding the issue of direct application of international agreements and instruments when it comes to the exercise and protection of human rights and freedoms (including the rights and freedoms of members of national minorities and their communities) as a special and substantial part of them.

The Constitution of the Republic of Kosovo, in Article 22, in terms of content and procedure, regulated this issue in the same way as the Croatian constitution-maker in terms of the necessary qualified majority for their ratification, although only in relation to the enumerative listed international acts, but at the same time, in Article 19, it accepted the principle of legal monism.[19] But, there are also some differences. First, the abovementioned international acts are directly applied with constitutional force in the territory of the Republic of Kosovo, while in the Republic of Croatia (but only international treaties) they are an integral part of the constitutional legal order and are applied in accordance with the rule of law, and the principle of constitutionality and legality in specific constitutional cases of protection of human (including and minority) rights and freedoms. Secondly, in the Republic of Croatia, only international agreements (therefore, legal regulations) have, in accordance with the Constitution, their legal force above the law and are part of its constitutional legal order. *Ergo*, by *argument a contrario*, those international acts that do not have a legal character, even if it was the General Declaration on Human Rights, are not and cannot be part of the constitutional legal order according to the Constitution of the Republic

[19] See in detail, in this regard, Article 19, paragraph 2 of the Constitution of the Republic of Kosovo; ibidem.

of Croatia. Therefore, they cannot be applied directly, nor are they above the law in terms of their force.[20] In contrast to the Croatian constitutional approach to this issue, the Kosovo constitution-maker decided to establish the status of a legal regulation to the General Declaration on Human Rights by its own Constitution, and not just any legal regulation, but one that is directly applied and by its legal force is above laws and others. act of public institutions." Third; as already said, the Kosovo constitution-maker opted for a specific number of international acts regulating human rights and freedoms, which he enumerated in Article 22, which, according to the Constitution of the Republic of Kosovo, are an integral part of the constitutional legal order. Unlike him, in Article 141, the Croatian constitution-maker accepted a general clause according to which all international treaties, which meet the constitutional requirements of that article, are part of the internal legal order. Therefore, in addition to those that directly regulate and protect human rights and freedoms and the rights and freedoms of members of national minorities and their communities, and all other international treaties that may contain some of these rights and freedoms indirectly regulated.

However, it should be said that the observed differences, no matter how significant in the end, do not nullify the existence of legal monism, especially in the constitutional framework in both countries in the area of legal regulation and protection of the rights and freedoms of members of national minorities and their communities. Namely, the legal unity between international and internal law relating to these issues was indisputably achieved by the fact that in both countries, by virtue of their constitutions, they prescribed that the key international legal acts governing these issues became an integral part of the internal constitutional legal order, and according to their force are above legal regulations.

1.2. The specifics of the concept of national minorities

One of the open questions within the international community for which a generally acceptable answer has not yet been reached is the question of defining what is meant by the term national minority, that is, how to define that term in a generally acceptable way. The largest number of definitions, including those designed and offered by unquestionable scientists in defining the concept of national minorities, are, as a rule, taken *ad hoc* in international relations when discussing and deciding on this issue, as a working definition, but not as a final definition. One of the most famous of them is certainly that of Francesca Caportortia, but I will not dwell on it and all the others, but I refer interested readers to my book "The Law of National Minorities in the Republic of Croatia",[21] in which this problem is widely addressed as well as the reasons why it is not possible (for now) to reach an agreement at the international level that would lead to a generally accepted definition of the term national minorities. This

[20] Of course, this does not mean that the declared positions, especially with regard to human (including minority) rights and freedoms expressed in the General Declaration, have no influence on their regulation, realization and protection. On the contrary, in terms of content, in the vast majority of both international and internal legal acts related to these issues, they have been legally regulated and elaborated.

[21] The special issue of defining the term national minorities is dealt with in my book: "The Law of National Minorities in the Republic of Croatia", ibid; pg. 75 - 85.

is simply because the Republic of Croatia and the Republic of Kosovo have finally and completely settled this issue by their internal law. Namely, both countries have decided to determine and prescribe what is meant by the term national minority in their legal regulations. The Republic of Kosovo decided that by the norm of constitutional force (Article 57, paragraph 1 of the Constitution)[22] prescribes what is understood by the term national minority. Unlike the Republic of Kosovo, the Republic of Croatia has decided to define what is understood under that term[23] by the Constitutional Law on the Rights of National Minorities, as an organic law. Therefore, in the Republic of Kosovo there is a constitutional definition of the term national minority, namely its constitutional definition, while in the Republic of Croatia it is established as a legal definition. I find the reasons for such an approach (for the Republic of Croatia, although I believe that they were more or less present in the Republic of Kosovo as well) primarily in the following circumstances and motives. First, after their independence, both countries wanted to move the issue of inter-national tensions and conflicts from the sphere of politics to the sphere of legal issues. With such an approach, they tried to open a legal space in which, on the basis of the highest democratic standards and values, these issues would be resolved legally, in accordance with the rule of law, then the highest democratic standards and the desire to formally and realistically recognize, regulate, protect and exercise rights and freedoms of members of national minorities and their communities. Aware that it is in the interest of all of them as equal citizens, and not because the international community is asking for it with this and/or other reasons. Furthermore, aware of the democratic necessity and justification, that at today's level of civilizational development, every human being every human being, by the very fact of being human has and belong to him all human rights and freedoms, and members of national minorities and their communities, in addition to these rights and freedoms, must be protected as a special part of human rights and freedoms that are necessary for the realization and development of their nationality and national cultural and general life identity and survival. In this regard, the content of the above-mentioned definitions must be such that they can correspond with the substantial content of all individual and collective rights and freedoms of members of national minorities and their communities. In addition, by defining the term national minority in this way, space is open for every citizen to declare himself as a member of a specific national minority without any harm due to this, for himself and/or members of his family and national community, on the one hand, and on the other, to be organized and act as a recognized and regis-

[22] The aforementioned article in its paragraph 1 indirectly defines the term national minority by prescribing: "Citizens who belong to the same national or ethnic, linguistic or religious group that is traditionally present on the territory of Kosovo (community), enjoy special rights determined by this Constitution, in addition to human rights and basic freedoms, determined by Chapter II of this Constitution."

[23] Unlike the Republic of Kosovo, the Republic of Croatia, in its Constitutional Law on the Rights of National Minorities, directly defines the concept of a national minority by assigning in its Article 5. A national minority within the terms of this Law shall be considered a group of Croatian citizens whose members have been traditionally inhabiting the territory of the Republic of Croatia and whose ethnic, linguistic, cultural and/ or religious characteristics differ from the rest of the population, and who are motivated to preserve these characteristics. "

tered national minority (community).[24]

The abovementioned adopted approach opens space for national communities and their members to become a cohesive and progressive factor in the development of the social and state community, on the one hand, and on the other hand, to be in the function of creating a positive atmosphere in common life, overcoming national tensions and conflicts, and normalizing mutual relations between the conflicting national minority and the majority people and/or other national minorities. Of course, with the necessary assumptions that members of national minorities and their communities accept such a status in the state that, in addition to all human rights and freedoms that belong to everyone, they demand all their legally established rights and freedoms on the basis of such a status, on the one hand, and on the other hand, that as citizens of the respective country in which they have that status, they fulfill all the duties that any other citizen has without discrimination on any basis. The authors of the aforementioned legal acts were inspired by such a definition of the term national minorities in the theoretical definitions given by the doctrine, but also in the substantive content of the Framework Convention for the Protection of National Minorities. Then also in the international regulations that regulate this issue, and the empirical and theoretical knowledge of how these issues should be regulated in the area of the sovereignty of their countries.

1.3. Specifics about individual and collective rights and freedoms

By accepting the aforementioned definitions of the term national minorities, both countries have opened up space to provide an answer to another open question in the international community through legal regulations. It is about whether or not national minorities and their members should be recognized, in addition to individual, also collective rights and freedoms. Both countries decided to recognize the individual rights of members of national minorities and the collective rights of their communities in their constitutional legal systems.[25]

The most important collective rights of national minorities include: a) the right to their special representation in representative bodies of local (and in Croatia, regional) self-government units and in the highest representative (legislative) body at the state level; b) guaranteed right (in the Republic of Kosovo)[26] on representation in executive bodies of municipalities, where at

[24] Following this point of view, the Croatian constitution maker enumeratively listed all national minorities whose members live in the Republic of Croatia in the "Historical Foundations" of the Constitution, leaving open space for the possible creation of some new ones. These are national minorities: "Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenes, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others who are its citizens...", see paragraph 2 of the Historical Foundations of the Constitution of the Republic of Croatia; ibidem; The lawmaker of the Republic of Kosovo acted similarly, prescribing by law that the national communities (minorities) are: „Serbs, Turks, Bosniaks, Roma, Ashkali, Egyptians, Gorani and other communities.", see article 1, paragraph 1.4. of Law no. 03/L-047. Law on the Protection and Promotion of the Rights of Communities and their Members in the Republic of Kosovo, Amendments to that Law, Law no. 04/L-020. In addition to the aforementioned national communities, Croats also acquired the legal status of a national minority in the Republic of Kosovo in 2011.

[25] Very simplified, but therefore understandable to everyone, Lohmann G. defines individual and collective rights, writing that "a collective right is a right whose holder is a collective, just as an individual right whose holder is an individual." See his work "Collective human rights for the protection of minorities", Politička misao, FPZ, Zagreb, number 4/1999, p. 39

[26] See in detail Article 64, paragraph 2, points 1 and 2 of the Constitution of the Republic of Kosovo, ibidem; In the Republic of Croatia, the right to representation of national minorities in the Croatian Parliament is regulated by Article 19 of the Constitutional Law on the Rights of National Minorities, ibidem; and elaborated by the Law on the Election of Members of the Croatian Parliament ("Official Gazette" No. 120/2011 - consolidated text). For the election of representatives of national minorities, the electoral system of Croatia, in addition to the quota model, also applies the obligation to represent the Hungarian and Italian national minorities on the basis of bilateral agreements between the Republic of Croatia and Hungary and Italy.

least 10% of the population belongs to a national minority;[27] c) the right to cultural autonomy (Republic of Croatia),[28] in accordance with the Constitution and the law; d) special rights in the form of privileges belonging to associations and councils of national minorities;[29] e) the right to co-finance the activities of national minorities from the budget of the state, local and regional self-government units.[30] Of course, in accordance with the law and within their material and financial capabilities. In addition to the above, there are other collective rights and freedoms that belong to national minorities,[31] their associations and institutions and other legal entities of which they are the founders.

The specificity of the legal regulation of the rights and freedoms of members of national minorities and their communities, both individual and collective, in the Republic of Kosovo is reflected in the fact that they are established in the Constitution itself, while the Law on the Protection and Promotion of the Rights of Communities and their Members in the Republic of Kosovo, actually repeat and only elaborate them. the substantial content of these constitutional rights and freedoms, and their structure, obviously has its base in the Framework Convention for the Protection of National Minorities, but also in other international regulations that govern human rights and freedoms in general, and partly also of national minorities and their members, and according to the Constitution of the Republic of Kosovo, they are directly applicable in its territory.

Unlike the way chosen by the Republic of Kosovo, the Republic of Croatia in the constitutional text contains only the basics for determining the rights and freedoms of members of national minorities and their communities. Already in its preamble under the name "Historical Foundations", the Croatian Constitution enumerates all the national minorities (22 of them) living in it, but does not close that series as final. Namely, the series ends with the words "and others who are its citizens", which leaves open space for recognition of national minority status for other ethnic groups when they are formed and registered as such. At the same time, in this paragraph of the "Historical Foundations", the Croatian constitution-maker gave two guarantees to members of national minorities and their communities. Firstly, equality with citizens of Cro-

[27] See in detail Article 62 of the Constitution of the Republic of Kosovo, ibidem; The Republic of Croatia has regulated the representation of national minorities in representative bodies of local and regional self-government units in Articles 20 and 21 of the Constitutional Law on the Rights of National Minorities., ibidem.

[28] See Article 15, paragraph 4 of the Constitution of the Republic of Croatia, ibidem.

[29] See, for example, Article 15 of the Constitutional Law on the Rights of National Minorities of the Republic of Croatia, ibidem;

[30] See Article 15, paragraph 2, in connection with Article 28, paragraph 1 and Article 35, paragraph 4 of the Constitutional Law on the Rights of National Minorities of the Republic of Croatia, ibid; and Article 12, paragraph 13 of Law no. 03/L-047 (Law on Protection and Promotion of the Rights of Communities and their Members in the Republic of Kosovo).

[31] Among them, of greater importance (according to the Constitutional Law on the Rights of National Minorities of the Republic of Croatia) is the right to proportional representation in the executive body of local and regional self-government units (Article 22, paragraph 1). Representation in state administration bodies, judicial bodies, taking into account the participation of members of national minorities in the overall structure of the population at the level at which the body of the state administration, i.e. the judicial body, is organized, and about acquired rights (Article 22, paragraph 2), then the representation in administration bodies of self-government units in accordance with a special law and acquired rights (Article 22, paragraph 3). However, it must be emphasized that when filling these positions and/or public positions, preference is given to members of national minorities only if they meet the same conditions for their filling as other registered candidates. Such practice is firmly established in the Republic of Croatia and based on the decisions of the Constitutional Court of the Republic of Croatia, see for example decision number: U-III-4719/2005 of 12 March 2008, (www.usud.hr).

atian nationality, which implies their complete equality and equity in the possession, exercise and protection of human rights and freedoms, without discrimination on any grounds, on the one hand, and on the other hand, the rights and duties towards the social and state community are identical those that any other citizen has, regardless of his nationality and commitment. Second, the guarantee refers to the exercise of their "national rights in accordance with the democratic norms of the UN and the countries of the free world".[32]

In the normative content, only three constitutional provisions originally refer to the position, rights and freedoms of members of national minorities and their communities. These are: a) Article 12, paragraph 2, which stipulates that in "In individual local units, another language and Cyrillic or some other script may be introduced in official use together with the Croatian language and Latin script under conditions specified by law; b) Article 15, which content is entirely related to the rights and freedoms of members of national minorities and their communities; c) Article 83, paragraph 1, which prescribes by which qualified majority of votes out of the total number of votes of all representatives organic laws "regulating the rights of national minorities" are adopted. However, it is important to point out the specifics of these laws, which were determined by the Constitution of the Republic of Croatia itself. As significant as the qualified majority by which these laws are adopted may be, it cannot be qualified as a special feature because there are other legal regulations under the Constitution that are adopted by that majority. However, their specificity in relation to all other laws, including those related to human rights and freedoms, is reflected in the fact that they alone regulate the rights of their addressees (national minorities), while all other laws only elaborate human rights. and freedoms. From this constitutional approach of the Croatian constitution-maker, it would be wrong to conclude that the rights and freedoms of members of national minorities and their communities are not guaranteed by the Constitution. Namely, they are all basically guaranteed by the aforementioned item of the Historical Foundations, but also by Article 15 of the Constitution. Why all of them, because paragraph 2 of the Historical Foundations guarantees the exercise of their rights, which are established and regulated in the legal regulations "of the United Nations and the countries of the free world." Furthermore, Article 15, paragraph 1, guarantees "equal frights for the members of all national minorities", paragraph 2 stipulates that "the equality and protection of the rights of national minorities shall be regulated by a constitutional act. Paragraph 3 stipulates that, in addition to the general right to vote, the right of the members of national minorities to elect their representatives to the Croatian Parliament may be stipulated by law", and paragraph 4 guarantees " the members of all national minorities to express their nationality, to use their language and script, and to exercise cultural autonomy." All these rights and freedoms guaranteed by the Constitution of the Republic of Croatia (including those that are guaranteed by the "Historical Foundations") are determined and elaborated by organic laws that are adopted by a two-thirds majority of all members of the Croatian Parliament. In this way, *volens nolens* "in the substantive sense, many provisions of inter-

[32] Paragraph 2 of the Historical Foundations of the Constitution of the Republic of Croatia, ibidem.

national legal acts (e.g. the Framework Convention for the Protection of National Minorities) are in the substantive sense adopted in the Croatian laws governing these issues. However, by the fact that they have become the content of the law, they do not lose even an iota their legal force as an international regulation which, according to the Constitution of the Republic of Croatia, is above the law in terms of its legal force. In order to achieve this, it is sufficient for the applicant who requests the protection of the violated right and/or freedom of a member of a national minority, namely of his community to refer to the violation of that right and freedom from a specific international legal act. This legal circumstance is procedurally very important for the actions of all competent state bodies, including the Constitutional Court, in protecting the rights and freedoms of members of national minorities and their communities. More on this, *inter alia*, in the chapter in which I write about the role of constitutional judges in protecting the rights and freedoms of members of national minorities and their communities.

1.4. Specifics of positive discrimination

An open question that specifically characterizes the constitutional framework for regulating and protecting the rights and freedoms of members of national minorities and their communities in both countries is related to the question of their positive discrimination, that is, the positive benefits it recognizes for them.

The term "discrimination" itself is any distinction, exclusion, limitation or favoring, the aim of which is to deny an individual and/or group equality in protection, rights, freedoms... However, in some situations and in certain social circumstances, it is necessary to establish and implement the so-called affirmative (positive) benefits, which give a certain group and/or group, including national minorities, an advantage in relation to the majority in order to open up space for the exercise of their protection, rights and freedoms, especially those that are indicators of their existence, identity and uniqueness."[33] Such positive benefits are called: positive discrimination. It is clear from the very name of this term that it expresses discrimination, but one that is positive because it is "necessary and justified". Positive discrimination cannot be "arbitrary". It must be justified, necessary, reasonable and expected",[34] and of course, determined and regulated by law. It can be concluded that "the application of positive discrimination must be permitted, legally regulated ... commensurate with the need in the material-legal and procedural sense in order to achieve the protection of the rights and freedoms of national minorities and their members. In fact, positive discrimination should contain those positive measures that will provide minorities and their members normative arrangements for the protection of rights and freedoms and their realization in real life."[35]

The Republic of Kosovo has already accepted and prescribed positive discrimination against members of national minorities in the Constitution. This is how, for example, the representation of national minorities in the Assembly of the Republic of Kosovo is regulated by positive

[33] Arlović M., "The right of national minorities in the Republic of Croatia", Novi informator, Zagreb, 2015, p. 411.

[34] Ibidem.

[35] Ibidem.

discrimination,[36] then representation in the representative and executive bodies of municipalities where at least 10% of the population belongs to the national community.[37] Likewise, discrimination in favor of national minorities in upbringing and education in their own language and script, along with education in one of the official languages and script, guaranteed access and special representation in public media, as well as programs in their own language in accordance with law and international standards, etc., etc.[38]

Seen from a substantive aspect, the Republic of Croatia has similarly regulated and protected the rights and freedoms of members of national minorities and their communities through positive discrimination. However, unlike the Republic of Kosovo, it protected them with norms of legal force contained in organic laws.[39]

However, there is an additional specificity in the colors of the state when it comes to accepting positive discrimination and, based on it, regulating the rights and freedoms of members of national minorities and their communities. It is about the application of positive discrimination between the national minorities themselves and their members. The Framework Convention on the Protection of National Minorities approaches it (as a specificity) because such a possibility itself is an exception to the rule that "guarantees members of national minorities the right to equality before the law and equal legal protection." At the same time, the same regulation of supra-legal force opened an exception to the cited rule of principle. Namely, in paragraph 2 of Article 4 of the Framework Convention for the Protection of National Minorities, such a possibility is foreseen if the circumstances prescribed by it have been met. They are fulfilled when it is necessary to adopt and implement certain measures of positive discrimination "with the aim of promoting full and effective equality between members of the national minority and the majority population". However, in these circumstances, the parties (states) "will appropriately take into account the specific conditions of members of national minorities."

Based on specific conditions, the Republic of Kosovo, in its Law on the Protection and Promotion of the Rights of Communities and their Members in the Republic of Kosovo, for example, prescribed a special benefit for Serbs who, as a national community, were given "access to a licensed independent television channel in the Serbian language with coverage on the entire territory of Kosovo and which will work efficiently and without discrimination in accordance with the

[36] Article 64, paragraph 2, points 1 and 2 of the Constitution of the Republic of Kosovo, ibidem.

[37] See in detail Article 62 of the Constitution of the Republic of Kosovo, ibidem.

[38] See in detail Article 59 of the Constitution of the Republic of Kosovo, ibidem.

[39] See in detail the relevant provisions of the Constitutional Law on the Rights of National Minorities in the Republic of Croatia, ibidem; and the Law on the Use of Languages and Scripts of National Minorities in the Republic of Croatia, ibidem; and the law on Education in the Language and Script of National Minorities, ibidem.

law."[40] Another example is a special measure by which "special attention is paid to improving the situation in which the Roma, Ashkali and Egyptian communities are."[41]

In the Republic of Croatia, the Roma national minority and its members are covered by a special program, measures and funds from the state budget and the budget of local and regional community units. In order to further achieve positive measures for the Roma, the Republic of Croatia adopted the National Program for the Roma for the period from 2021 to 2027 and the Action Plan for its implementation, after the National Strategy for the Inclusion of the Roma was adopted for the period of 2013 – 2020 expired in December 2020. All these programs for Roma are necessary and justified because it is an undeniable (unfortunately) fact that Roma in Croatia (as well as in many other countries where they live) due to their "non-involvement in formal forms of work, lack of education, specific way of life and other characteristics, are marginalized to a greater or lesser extent: economically, spatially, culturally, politically."[42]

The constitutional legal framework for regulating and protecting the rights and freedoms of members of national minorities and their communities is completed as a whole by legal regulations that govern the competence and actions of various state authorities in the implementation of their protection. Among them, the constitutional courts of the Republic of Croatia and the Republic of Kosovo have a special significance and role. The aforementioned thesis is based on: a) the special constitutional position of constitutional courts; b) their competence in protecting the rule of law, constitutionality and legality, and human (including minority) rights and freedoms; and c) in the finality and generally binding force of their decisions.

The position, jurisdiction, as well as other issues for the constitution and work of the Constitutional Court of the Republic of Croatia are regulated by legal acts of constitutional force, namely the Constitution of the Republic of Croatia itself and the Constitutional Law on the Constitutional Court of the Republic of Croatia.[43] The Constitutional Law on the Constitutional Court of the Republic of Croatia is adopted according to the procedure and in the manner prescribed for the adoption or revision of the Constitution,[44] so by that very fact the regulation has constitutional force. This approach of the Croatian constitution-maker regarding the selection of legal regulations and their legal force for regulating the position, jurisdiction and other issues of importance for the work of the Croatian Constitutional Court is related to the desire to provide the Constitutional Court with the strongest possible constitutional position that guarantees its stability and security, on the one hand that it "by the nature of things reversibly strengthens its primarily institutional independence"[45] and

[40] See Article 6, Paragraph 5 of Law no. 03/L-047.

[41] Article 9, paragraph 2., ibidem;

[42] Office for Human Rights and Rights of National Minorities of the Government of the Republic of Croatia, at: https://ljudskaprava.gov.hr>nacion....

[43] Constitutional Law on the Constitutional Court of the Republic of Croatia, "Official Gazette" No. 49/2002. - consolidated text.

[44] See in detail article 132, paragraph 2 of the Constitution of the Republic of Croatia, ibidem.

[45] Arlović M., "Assessment of the constitutionality and legality of other regulations", Pravni vjesnik of the Faculty of Law, Osijek, YEAR 30, number 3 - 4/2014, p. 14.

thereby create a constitutional basis for the individual independence, autonomy and neutrality of its judges.

The stability and security of the Constitutional Court of the Republic of Croatia derives, furthermore, from its constitutional position, which prescribes stricter rules for its amendment, supplementation, including the prevention of hasty decisions motivated by the pragmatic-political *ad hoc* interests and needs of the authorities.[46] A stricter procedure for changing the legal regulation of the position and jurisdiction of the Constitutional Court of the Republic of Croatia, than any other legislative procedure prescribed for the adoption of legal acts, thus by virtue of the constitution itself, becomes one of the strong means of guaranteeing the position of the Constitutional Court of the Republic of Croatia as the protector and guardian of the Constitution.[47] The second is the position of the Constitutional Court in the substantive structure of the Constitution of the Republic of Croatia itself. It is positioned in a special chapter V of the Constitution of the Republic of Croatia dedicated only to it. In this way, in the constitutional text, it is physically separated from all other bodies of state power (legislative, executive and judicial, including the President of the Republic of Croatia and judicial bodies that are not judicial power). At the same time, by its position, it is a state body and a body of constitutional adjudication with special competences established by the Constitution of the Republic of Croatia itself.[48]

With such an approach, the Croatian constitution-maker wanted to clearly point out, both visually and substantively, the special position of the Constitutional Court of the Republic of Croatia and its separation, autonomy and independence from all other state authorities. Of course, within the framework of its competence, established by the Constitution. The competences of the Constitutional Court of the Republic of Croatia are numerous and from the aspect of protection of the rule of law, constitutionality and legality and the guaranteed goods protected by them, especially human (including minority) rights and freedoms of exceptional importance for the Croatian constitutional and legal order. Due to the nature of this paper, I will refer only to those jurisdictions that are related to the role of the Constitutional Court of the Republic of Croatia in protecting the rights and freedoms of members of national minorities and their communities. However, before moving on to the processing of these competences, it should be said that, as far as the position, competence and other issues important for the work of the Constitutional Court of the Republic of Kosovo are concerned, there is a great similarity, although not the same as that of the Constitutional Court of the Republic of Croatia. Firstly, due to the constitutional fact that key issues regarding position, jurisdiction, but also other issues of importance for its work, are regulated by the Constitution itself, that is the norms of constitutional force. Second, the Constitutional Court of the Republic of Kosovo is also positioned in

[46] Ibidem.

[47] I took the thesis on the constitutional court as the protector and guardian of the constitution from Häberle P., see his work "Constitutional State", Zagreb, 2002.

[48] The competences of the Constitutional Court of the Republic of Croatia are determined by Article 129 of the Constitution of the Republic of Croatia, ibidem. Jurisdictions of the Constitutional Court of the Republic of Kosovo under Article 113 of the Constitution of the Republic of Kosovo; ibidem.

the content structure of the Constitution of the Republic of Kosovo in a special chapter VIII, which is dedicated only to it. Third, the competences of the Constitutional Court of the Republic of Kosovo, the composition and mandate of its judges, the significance and legal force of its decisions and other matters of importance for the judges of the Constitutional Court and its work are regulated by the Constitution itself. Fourth, the Constitution of the Republic of Kosovo establishes the Constitutional Court as the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution, thus promoting it to a key state body that is the protector and guardian of the Constitution in Häberle's sense. From these constitutional circumstances, *mutandis mutatis*, positions can be drawn that correspond to those of the Constitutional Court of the Republic of Croatia.

However, unlike the Constitutional Court of the Republic of Croatia, other important issues for its work, such as organization and functioning, appointment and dismissal of its judges, the procedure for submission and consideration of submissions, basic questions of procedure before it, etc. are regulated by norms of legal force, namely by the Law on the Constitutional Court of the Republic of Kosovo.[49] As significant this legal fact may be, it should be said that it does not, in essence, affect the distinction between the positions and jurisdictions between these two constitutional courts. Simply because this Law does not even regulate these issues with regard to the Constitutional Court of the Republic of Kosovo, but they, as in the case of the Constitutional Court of the Republic of Croatia, are regulated by the norms of constitutional force.

In fact, considering its specifics as part of the constitutional and legal framework, as a whole, for the protection of the rights and freedoms of members of national minorities and their communities, I think that the point of view can rightly be expressed that these constitutional and legal frameworks constitute the vanguard (especially at the formal level) in the approach to the legal arrangement of these issues. Similar, but milder evaluations than my own regarding these constitutional legal frameworks were given both by eminent constitutional law experts and competent international organizations.[50]

III. The Constitutional Court as a protector of the rights and freedoms of members of national minorities and their communities

Among the numerous competences of the Constitutional Courts of the Republic of Croatia and the Republic of Kosovo, for this paper (because of its topic) relevant are the ones related to: deciding on the compliance of the law with the Constitution, the compliance of other regulations with the Constitution and the law, and deciding on constitutional complaint (in the

[49] Law no. 03/L - 121.

[50] Thus, for example, the Advisory Committee of the Framework Convention for the Protection of National Minorities points out: "1. Kosovo has a solid legal and political framework for the protection of members of national minorities, which was additionally improved during the monitoring period." See "Fifth Opinion on Kosovo - Summary and Recommendations of this Committee", dated 16 February 2023, p. 3. On the other hand, constitutional law expert Häberle P. points out "that we must join those who claim that the 'Christmas' Constitution has already raised the constitutional framework for the protection of the rights of national minorities in Croatia to a high level." See his interview conducted by Posavec Z., contribution in Häberle's book "Constitutional State", Zagreb, 2002, p. 277.

Republic of Kosovo constitutional complaints) against individual decisions of state authorities, authorities of local and regional self-government units, and legal entities with public powers when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.[51]

I will continue to elaborate, primarily, the role of the Constitutional Court of the Republic of Croatia in protecting the rights and freedoms of members of national minorities and their communities from the aspect of abstract control of constitutionality and legality, then the protection of individual rights and freedoms on the basis of a constitutional complaint , and I will finally, in basic terms, point out the significance of the decisions of the Constitutional Court of the Republic of Croatia in the implementation of this task. To a lesser extent, I will also refer to this role of the Constitutional Court of the Republic of Kosovo, believing that it will be discussed more in the works and speeches of fellow judges from the Constitutional Court of the Republic of Kosovo.

1. The Constitutional Court in protecting the rights and freedoms of members of national minorities and their communities in the implementation of abstract control of constitutionality and legality

The constitutional legal framework as a whole, as well as its previously presented specifics, are very significant constitutional legal issues that the constitutional courts of the Republic of Croatia and the Republic of Kosovo must and do take into account when acting and deciding in the procedures of abstract control of the constitutionality and legality of legal regulations governing the rights and freedoms of members of national minorities and their communities, and in procedures for the individual protection of those guaranteed rights and freedoms, which they conduct on the basis of individual complaints or constitutional complaints.

1.1. On objective constitutional dispute

Performing an abstract control of the constitutionality and legality of legal regulations governing the rights and freedoms of members of national minorities and their communities, it is primarily bound by the procedural process and actions that are characteristic of an objective constitutional dispute.[52] In principle, due to the fact that an objective constitutional dispute is a feature of the actions of constitutional courts in the implementation of abstract control of the constitutionality and legality of legal regulations, regardless of the area of social relations they regulate. “The essence of this procedure is reflected in the fact that the constitutional court should determine what corresponds to objective law, and not about the possible interest or violation of the individual subjective right of one or another participant in the dispute. In an objective constitutional dispute, issues related to objective law are resolved... and not those that

[51] Compare Article 129, paragraph 1, sub-paragraphs 1, 2 and 3 of the Constitution of the Republic of Croatia with Article 113, paragraph 2, points 1 and 2, and paragraphs 5 and 7 of the Constitution of the Republic of Kosovo, from which it is clear that in terms of content regarding these competences, regardless of the differences regarding their stipulation, the constitutional rights and duties of both constitutional courts coincide.

[52] I took the term objective constitutional dispute from Krbek I., “Constitutional adjudication”, Zagreb, 1962, p. 76, where he warns when using this term that “the objective dispute by its basic nature cannot be a narrow-party dispute at all.”

are related and concern the subjective rights and obligations of the participants (parties) in a subjective court dispute between them. For an objective constitutional court dispute, it is not important whether or not the request (proposal) of the initiator of the dispute will be accepted, as it is important for a dispute between the parties, it is of crucial importance that the issue of constitutionality and/or legality of the challenged normative act be resolved as a whole... In this procedure, the constitutional court is not bound and cannot be bound by the reasons given by the applicant in his proposal for the assessment of constitutionality and legality. Therefore, when the constitutional court examines, assesses and decides on the constitutionality and/or legality of a challenged legal regulation, namely. individual parts of it, it takes measures, actions and implements the necessary procedures according to its own judgment (in accordance with the prescribed procedure) that will enable it to make such an interpretation and taking a position that will consider (determine) the question of challenged constitutionality, namely, the constitutionality and legality of the challenged legal regulation."[53] The constitutional basis of an objective constitutional dispute is found in certain provisions of the constitution that prescribe and regulate in a direct and/or indirect manner the principles of constitutionality and legality and the rule of law.[54]

1.2. On the abstract control of the constitutionality and legality of legal regulations governing the rights and freedoms of national minorities

An objective constitutional dispute includes the implementation of an abstract control of constitutionality, namely the constitutionality and legality of the challenged legal regulation in relation to the constitution as a whole[55], which, by the nature of things, includes all the specificities prescribed for it. When it comes to the specifics of the legal regulation, exercise and protection of the rights and freedoms of members of national minorities and their communities in the constitutional legal orders of the Republic of Croatia and the Republic of Kosovo, this was previously discussed in this paper. Basically, they can be classified into two groups. The first, which is the result of the application of the principle of monism, according to which it is an integral part of the constitutional legal order, along with internal law, and international law, which refers to this area of constitutional law. The second, which results from the constitutionally prescribed hierarchical order in the structure of the constitutional legal order of an individual state. None of the prescribed relationships and procedures within these groups can be skipped. Especially when it comes to the implementation of abstract control of the challenged legal regulation from the aspect of formal (un)constitutionality, respectively, (un) constitutionality and (il)legality.

[53] Arlović M., "The Constitutional Court, guardian of the Constitution and protector of the rule of law", paper (manuscript) presented at the International Conference "Constitutional Justice: Dignity, Freedom and Justice for All", dedicated to the Constitution Day of the Republic of Kazakhstan and the 75th anniversary of the Universal Declaration of Human Rights, Astana, 7. - 8, September 2023, p. 12.

[54] See Articles 3 and 5 of the Constitution of the Republic of Croatia in more detail, ibidem.

[55] The Constitutional Court of the Republic of Croatia also took a position on the fact that the Constitution is a whole and that in the implementation of the abstract control of constitutionality and legality it must be approached as a whole. See his decision number: U-I-3789/2003 of December 8, 2010, "Official Gazette" number 142/10.

Thus, due to the constitutional determination that international treaties concluded in accordance with Article 141 of the Constitution of the Republic of Croatia and are in force, due to their legal force above the law, for each assessment of the constitutionality of a challenged legal regulation, the Constitutional Court of the Republic of Croatia is obliged to assess whether it in compliance with that international agreement and the Constitution of the Republic of Croatia. There are no doubts about the way the Constitutional Court of the Republic of Croatia has acted in this way since the mid of nineties, when it took the position that it has the right to decide on the compatibility of laws with international treaties.[56] The Constitutional Court of the Republic of Croatia confirmed this position by its decision number: U-I-745/1999 of 8 November 2000, "Official Gazette" number 112/00. The aforementioned position of the Constitutional Court of the Republic of Croatia was clearly presented by Prof. S. Sokol, former president of the Constitutional Court of the Republic of Croatia, by the words: "If the decision of the Constitutional Court on the compliance of a law with the Constitution, and on the compliance of other regulations with the Constitution and the law, is in fact a decision on the compliance of a lower-ranking regulation with a higher-ranking regulation and with the Constitution, as the highest-ranking regulation, then the authority of the Constitutional Court to review the compliance of a law with an international treaty is a logical consequence of the constitutional provision whereby the international treaty, which has been ratified and published, forms a part of the domestic legal order and is by legal force ranked higher than a law. Having established the non-compliance of the evaluated provisions of the Law on Expropriation with the provisions of Article 6, paragraph 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the Court repealed the relevant legal provisions solely for this reason, and this is the precedential importance of this decision."[57]

This is the point of view the Constitutional Court of the Republic of Croatia has consistently established in specific cases of constitutionality assessments, namely assessments of the constitutionality and legality of the challenged legal regulations governing the rights and freedoms of members of national minorities and their communities, assessing them also from the aspect of their compliance with the Framework Convention for the Protection of National Minorities, and other international treaties that govern these issues, and according to the Constitution of the Republic of Croatia, are part of its constitutional and legal order.[58]

The Constitutional Court of the Republic of Kosovo, in my opinion, is in a similar situation when it comes to conducting an assessment of the harmonization of internal laws with inter-

[56] Decision number: U-I-920/1995 and U-I-950/1996 of 8 November 2000, "Official Gazette" number 112/00.

[57] Sokol S., "The Constitutional Court of the Republic of Croatia in the protection and promotion of the rule of law", Proceedings of the Faculty of Law in Zagreb, Zagreb, number 6/2001, p. 1169.

[58] Particularly important decisions of the Constitutional Court of the Republic of Croatia in the field of abstract control of constitutionality and legality are: U-I-376/2010 and U-I-3553/2011 of July 29, 2011, "Official Gazette" number 93/11.; U-I-120/2011 of 29. July 2011, "Official Gazette" number 93/11 and U-I-3597/2010 and others from 29 July 2011, "Official Gazette" number 93/11. The importance of the aforementioned decisions stems from the positions taken by the Constitutional Court on the basis of discussions and decisions on positive discrimination, quotas in the electoral system for the selection of representatives of national minorities, etc.

national acts that are an integral part of the internal constitutional legal order of the Republic of Kosovo. I take such a position based on the provisions of Article 19, paragraph 2 of the Constitution of the Republic of Kosovo. I believe that a teleological interpretation of this provision cannot lead to a different position, except for the one according to which it is the right and duty of the Constitutional Court of the Republic of Kosovo (as well as the Constitutional Court of the Republic of Croatia) that when conducting an abstract control of the challenged constitutionality of laws, namely the constitutionality and legality of sub-legal acts, it must conduct an assessment of their compliance, both with the Constitution and with the international treaty, which is an integral part of its constitutional legal order by the will of the constitution-maker of the Republic of Kosovo.

1.3. The Constitutional Court in protecting the rights and freedoms of members of national minorities and their communities on the basis of a constitutional lawsuit

The competence of the constitutional courts of the Republic of Croatia and the Republic of Kosovo to act and decide on the protection of the rights and freedoms of members of national minorities and their communities, on the basis of a constitutional complaint, derives from their competence to decide on that basis if to the applicant of the constitutional complaint "human rights and freedoms as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia have been violated."[59] From this general jurisdiction also derives the specific jurisdiction of the constitutional courts of these countries to act and decide on the basis of a constitutional lawsuit in cases of rights and freedoms of members of national minorities and their communities, simply because the constitution makers (rightly) consider these rights to be human rights and freedoms.

The constitutional bases for acting and deciding on the protection of the rights and freedoms of members of national minorities and their communities are contained in Article 129, paragraph 1, sub-paragraph 4, of the Constitution of the Republic of Croatia, and in Article 113, paragraph 7, of the Constitution of the Republic of Kosovo.

The procedure before the constitutional courts, as well as the rights and obligations of the applicants of constitutional lawsuits based on them, are regulated: in the Republic of Croatia by the Constitutional Law on the Constitutional Court of the Republic of Croatia, namely in Chapter V. Protection of human rights and fundamental freedoms, which includes the provisions contained in Articles 62. to 80 of his text. In the Republic of Kosovo, these issues are regulated by the Constitution[60] and the Law on the Constitutional Court of the Republic of Kosovo (Law No. 03/L-121), namely in Subchapter 1 of

[59] Article 129, paragraph 1, sub-paragraph 4 of the Constitution of the Republic of Croatia, ibidem.

[60] Article 113, paragraph 7 of the Constitution of the Republic of Kosovo, ibidem.

Chapter 9, entitled "Procedure for cases defined in Article 113, Paragraph 7 of the Constitution of the Republic of Kosovo", which includes Articles 46. to (inclusive) 50.

The specificity of both legal solutions is that they approach the protection of the rights and freedoms of members of national minorities and their communities as human rights and freedoms, which is evident from the very content of the articles of these regulations that refer to these issues. At the same time, there are differences in the approach itself. I will point out only the (in my opinion) more significant ones. First, the Croatian constitution-maker decided to completely regulate these issues with the norms of constitutional force. In contrast to him, the Kosovo constitution-maker decided to regulate the jurisdiction and basic principles for acting on a constitutional complaint by the norm of constitutional force, while the issue of their elaboration was left to the legislator, so they are regulated by law.

Second, perhaps (regarding the issue of protecting the rights and freedoms of members of national minorities and their communities based on a constitutional lawsuit) the most significant difference is related to the question of who is authorized to file a constitutional lawsuit. Article 62, paragraph 2 of the Constitutional Law on the Constitutional Court of the Republic of Croatia prescribes: "(1) Everyone may lodge a constitutional complaint with the Constitutional Court...". From the cited stipulation, it is understandable, by the nature of things, that in the constitutional sense, for the protection of these rights and freedoms, a constitutional complaint can be submitted to the Constitutional Court by both natural and legal persons, in accordance with the Constitution and the Constitutional Law on the Constitutional Court of the Republic of Croatia. In contrast to the Republic of Croatia, the Kosovo constitution-maker determined in Article 113, paragraph 7, that the authorized persons of this right are only "individuals", namely natural persons. Such an approach may be too strict, especially if it is taken into account that the Constitution of the Republic of Kosovo recognizes both individual and collective rights and freedoms of national minorities, namely their members and communities.

However, the key link that indicates the similarity of the constitutional regulation of this issue is related to the fundamental principles (conditions and criteria) prescribed by both constitution makers when a constitutional lawsuit can be filed for the protection of these rights, on the basis of which the constitutional courts must act and decide. They can be classified into three fundamental issues arising from the norms of constitutional force.[61]

First, it refers to the constitutional fact that it is a right that is guaranteed to natural (and in the Republic of Croatia also legal) person as a constitutional right and freedom by the Constitution itself. In other words, the constitution-maker of the constitution assumes that these rights and freedoms are subject to constitutional protection only if they are guaranteed by the constitution.

Second, that these rights and freedoms, based on the constitution, have been violated (or so the applicant claims and proves in his constitutional complaint).

[61] Namely, in the Republic of Croatia, they are contained in Article 62 of the Constitutional Law on the Constitutional Court, which is a legal regulation with constitutional force, and in the Republic of Kosovo in Article 113, Paragraph 7 of the Constitution of the Republic of Kosovo, ibidem.

Thirdly, that the applicant of the constitutional complaint used all other legally prescribed and permitted legal remedies for the protection of these rights and freedoms, before filing the constitutional complaint. Only after the last allowed legal remedy for the protection of these rights and freedoms has been used, and has not succeeded in their protection, the applicant of the constitutional complaint can submit it to the Constitutional Court for processing and decision.

It is very important to understand the stated principles (that is, the conditions and criteria prescribed by the constitution for filing a constitutional lawsuit) in order to assess the admissibility of a constitutional lawsuit, and then decide whether or not the applicant's rights and freedoms have been violated.

It is a complex and demanding procedure that must be carried out by the Constitutional Court. This procedure requires, not only the determination of whether or not human (minority) rights and freedoms have been violated, but whether these are those prescribed and guaranteed by the constitution, and not any other legal rights and freedoms of physical and legal persons in civil society. Namely, any violation of legal rights and freedoms is a violation of the law, but at the same time, it does not necessarily have to be a violation of constitutional rights and freedoms, namely the constitution. However, any violation of the constitutionally prescribed rights and freedoms is always a violation of the law.[62] When conducting the interpretation procedure, the constitutional court must assess whether the constitutional rights of the applicant are violated by the act challenged in the constitutional complaint and/or not. This work shows how complex and demanding the procedure of the Constitutional Court is for a constitutional lawsuit. All the more so because in the initial practice of the constitutional adjudication, they were conducted without taking into account "the distinction between subjective rights based on law and constitutional rights", starting from the point of view that "any illegality was also held to be a violation of the constitutional right."[63]

The Constitutional Court of the Republic of Croatia resolved this Gordian knot only at the end of the nineties of the last century. More precisely, by its decision number: U-III-1097/1999, "Official Gazette" number 38/00, when it took the following position: "12. The Constitutional Court, as a rule, does not engage in questions of whether the courts have correctly and fully established the factual situation, it does not engage in either the assessment of evidence or the legal assessment of the courts. For the Constitutional Court, the relevant facts are the facts on the existence of which the assessment of the violation of the constitutional right depends, and erroneous application of substantive law is not, in itself, a valid reason for filing a constitutional complaint."

The constitutional courts are obliged to take into account the above-mentioned principles and act according to them when deciding on constitutional lawsuits for the protection of any constitutionally prescribed and guaranteed con-

[62] Belajec V., "Constitutional grounds for filing a constitutional complaint t" in "Constitutional court in the protection of human rights", Proceedings, Croatian Institute for Human Rights, Novi Vinodolski and Hanns Seidel Stiftung, Croatian Legal Center and Organizer, Zagreb, 2000, p. 101 - 102.

[63] Ibidem; p. 100.

stitutional right and freedom, as well as for the protection of the rights and freedoms of members of national minorities and their communities. This is also evident in concrete examples of actions and decisions based on constitutional complaintsby the constitutional courts of the Republic of Croatia and the Republic of Kosovo, which will be discussed *inter alia*.

IV. Examples of decisions of the Constitutional Court of the Republic of Croatia for the protection of rights and freedoms of members of national minorities and their communities

The discussion on the action of the Constitutional Court of the Republic of Croatia in protecting the rights and freedoms of members of national minorities and their communities would be incomplete and only on a theoretical level, if its decision-making on the basis of the judgments it rendered in procedures for abstract control of constitutionality and legality, namely concrete control of the protection of those rights and freedoms on the basis of a constitutional complaint. Especially if they fail to emphasize, in addition to the substantial content of the enacting clauses of those decisions, also the position taken in their reasoning, on which it bases its enacting clause. All the more so, when it is taken into account the fact that the generally binding character of the decisions of the Constitutional Court of the Republic of Croatia includes the obligation of the enacting clause and the positions taken in its reasoning. Indeed, the positions taken are a decisive indicator of both the reasons for which such a decision was rendered, as well as the starting content for the interpretation of violations of the protected constitutional and/or convention rights and freedoms of members of national minorities and their communities. On the other hand, they show exactly what objective right and/or freedom was applied in specific cases and how it was interpreted by the Constitutional Court in those proceedings.

An illustrative example is the Decision and Ruling No.: U-I-732/1998 of 12 April 2001, which shows the commitment of the Constitutional Court of the Republic of Croatia in enforcing the protection of the rights and freedoms of members of national minorities and their communities in the Republic of Croatia.

The applicant of the proposal for the constitutional review of the Constitutional Law on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia ("Official Gazette" no. 65/91, 27/92, 34/92 - consolidated text, 53/00 and 105/00 - consolidated text; hereinafter: the Constitutional Law)[64] challenged, in its entirety, Article 17 of the Constitutional Law, considering it unconstitutional because it allows national minorities as special groups as part of the people to elect their representatives in Croatian Parliament, which violated the right of equality of all citizens (nationals) as a people to elect their (all) representatives . Therefore, the proponent considers that the challenged article of the Constitutional Law is inconsistent in entirety with Article 14, paragraph 2 of the Constitution of the Republic of Croatia. On its

[64] The aforementioned law ceased to be valid with the adoption of the Constitutional Law on the Rights of National Minorities in the Republic of Croatia, "Official Gazette" No. 155/02. and its entry into force. See its Article 44 in this regard.

own initiative, the Constitutional Court of the Republic of Croatia initiated the procedure of assessment of paragraphs 3 and 4 of Article 17 and Article 25 of the Constitutional Law in the part in which it prescribed that representatives of national minorities in the Croatian Parliament represent only the minorities that elected them and in that part which stipulates the revocation of members of national minorities.

For the applicable law, regarding the constitutional review of the challenged provisions of the Constitutional Law, the Constitutional Court took the corresponding provisions of the Constitution of the Republic of Croatia and the provisions of Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities. Taking the relevant provisions of the Framework Convention as the applicable law, the Constitutional Court decided to assess, in accordance with the Constitution of the Republic of Croatia, the compatibility of the challenged provisions of the Constitutional Law both with the Constitution and with the Convention itself, respecting the constitutional provision according to which its legal force is above the law.

Therefore, it based its decision not only on Article 15, paragraph 2 of the Constitution, but also "on the provisions of the Framework Convention for the Protection of National Minorities. According to these provisions, the parties undertake to adopt appropriate measures, if necessary, with the aim of promoting full and effective equality between members of national minorities and the majority population. In this regard, the parties will take into account the specific conditions of members of national minorities in an appropriate manner, and those measures adopted in accordance with these provisions are not considered an act of discrimination (Article 4, paragraphs 2 and 3 of the Framework Convention)."[65]

After the deliberations, the Constitutional Court of the Republic of Croatia did not accept the proposal of the applicant (Croatian Pure Party of Rights for the constitutional review of Article 17 as a whole of the Constitutional Law). At the same time, on the basis of its own initiative, it decided to repeal: a) the provision of Article 17, paragraph 3 in its entirety; b) the provision of Article 17, paragraph 4, in the part that reads "and revokes"; and c) the provisions of Article 25 in the part that reads: "and revokes".[66]

The Constitutional Court of the Republic of Croatia repealed these provisions, considering them to be contrary to Article 74, paragraph 1 of the Constitution, according to which, the representatives in the Croatian Parliament "do not have a binding mandate, but a representative one; which means that in their activities - in debates, taking positions and voting – are independent of the views of the voters who elected them." By prescribing a binding mandate for representatives of ethnic and national communities or minorities, the legislator, according to the Constitutional Court, put one category of representatives in an unequal position before the Constitution and the law."[67]

Another judgment of the Constitutional Court of the Republic of Croatia that I decided to cite as an example of its decision-making in the process of abstract control of the constitutionality

[65] "Selection of decisions of the Constitutional Court of the Republic of Croatia 1996 - 2009", Official Gazette, Zagreb, 2010, p. 71.

[66] Ibidem; p. 70.

[67] Ibidem; p. 71.

and legality of legislation governing the rights and freedoms of members of national minorities and their communities is contained in decision number: U-I-3597/2010 of July 29, 2011 ("Official Gazette" number 93/11.). This decision is significant, not only because it aroused greater interest among Croatian national minorities and the entire Croatian public, but even more so because of the number and significance of the positions taken by the Constitutional Court of the Republic of Croatia, which it also referred to in its judgments in similar cases and/or repeated consistently later. By this decision, the Constitutional Court of the Republic of Croatia is on the proposal of several applicants,[68] decided that "I. The procedure for assessing compliance with the Constitution is initiated and Article 1 of the Constitutional Law on Amendments to the Constitutional Law on the Rights of National Minorities ('Official Gazette' number 80/10) is repealed...". The reasons for this decision by the Constitutional Court, summarized in Chapter VIII. Conclusions of the Constitutional Court, in subsection 1) point 1 of the enacting clause in point 61. 1), 2), 3), 4), 5), 6) and 7) of the said decision, I will not mention them separately in this text. However, the positions taken in the reasoning of this decision deserve to be highlighted additionally, because they are the basis for precisely such point I of the enacting clause, as well as for the reasons that justify it, on the one hand, and on the other hand, they are today the basis of its established constitutional court practices in the same and/or similar cases. These points of view are, first of all, the following: a) The Framework Convention for the Protection of National Minorities, as an international treaty, according to the Constitution is "part of the internal legal order ... and in terms of legal force it is above the law."[69] It is part of the applicable law for constitutional review of the challenged provision of the Constitutional Law. With such a position, the Constitutional Court, in fact, expressed its position on legal monism, on the one hand, and on the other hand gave the Framework Convention the position of a quasi-constitutional act. Of course, in the process of constitutional proceedings, b) the enacting clause recognized the existence of legally guaranteed and secured seats for members of national minorities in the Croatian Parliament, which are filled on the basis of special legal rules for voters - members of national minorities, in a special electoral unit for minorities. In addition to these "positive (affirmative) measures (which are also called positive discrimination, my note) the text lists several others who belong to national minorities in the implementation of candidacy and election of their representatives to the Croatian Parliament;[70] c) the principle of equality in the majority-minority relationship, contained in Article 3 of the Constitution, and in the minority-minority relationship in Article 15, paragraph 1 of the Constitution of the Republic of Croatia, was elaborated;[71] d) positive measures (positive discrimination) must be prescribed by law, reasoned, reasonable and justified by the goal for which they were imposed;[72] e) formal equality "among minorities does not necessarily

[68] See closer points 1. - 3. of the reasoning of decision.

[69] Ibidem; point 22.

[70] Ibidem; see closer point 24.

[71] Ibidem; point 54.

[72] Ibidem; point 61. 5)

mean, and in real life most often does not mean, their mutual equality. In a situation where there is one or more numerically superior national minorities in society in relation to others, the constitutional demand for their mutual equality is not sufficient to interpret in the light of their formal equality ... More important than that are the actual effects of the applied measures ..."[73] This position of the Constitutional Court of the Republic of Croatia is the basis for the application of positive measures (measures of positive discrimination) also between national minorities when this is necessary, objective and justified (reasonable) reasons for this. It is a key argument, for example, for the imposition of special positive measures in favor of the Roma national minority in relation to all others in the Republic of Croatia, which were already discussed in the previous part of the text.

The third decision of the Constitutional Court of the Republic of Croatia in the area of abstract decision-making on the constitutionality and legality of legal regulations, which deserves attention, is the decision in case number: U-I-1029/2007 et al. of 7 April 2010 ("Official Gazette" number 47/10). This decision deserves our attention because it has the consequent effect of narrowing the circle of entities who can file constitutional complaints for violation of constitutionally guaranteed human (including minority) rights and freedoms. Namely, with it the Constitutional Court accepted the applicant's proposal, initiated the procedure for assessing compliance with the Constitution and repealed the provision of Article 38, paragraph 3 of the Constitutional Act on the Rights of National Minorities ("Official Gazette" No. 155/02). The applicant challenged the aforementioned provision of the Constitutional Law on the Rights of National Minorities, considering that, contrary to the Constitution of the Republic of Croatia, it extended the competence of the Constitutional Court beyond the scope established by the Constitution, regarding authorized entities that can file a constitutional complaint in the protection of the rights and freedoms of members of national minorities and their communities. Considering the challenged provision in relation to the relevant provisions of the Constitution and the Constitutional Law on the Constitutional Court of the Republic of Croatia, the Constitutional Court found that it is not in compliance with them.

The Constitutional Court finds the reasons for its non-compliance with the relevant provisions of the Constitution and the Constitutional Law on the Constitutional Court in the legal fact that national minority councils and the Council for National Minorities are special political institutions established by the Constitutional Law on the Rights of National Minorities in public and political life. Their establishment, work and jurisdiction are governed by the provisions of Articles 23 - 37 of the Constitutional Law on the Rights of National Minorities. From the analysis of these provisions, it is clear that the submission of a constitutional complaint to the Constitutional Court is not foreseen in their jurisdiction. When it comes to the protection of human rights and freedoms, including the rights and freedoms of members of national minorities and their communities before the Constitutional Court on the basis of a constitutional complaint, the Constitutional Law on the Constitutional Court of the Republic of Croatia regulates this in its Article 62, paragraph 1.[74] This

[73] Ibidem; point 55.

[74] See in detail points 5, 6 and 7 of the reasoning of this decision.

article of the Constitutional Law guarantees the right to everyone, including members of national minorities, to file a constitutional complaint in order to protect their rights, guaranteed by the Constitution and the Convention, but under the conditions prescribed by it.[75] This decision is significant for several reasons. Firstly, due to the fact that the political institution of the subject of public law (Council of National Minorities and Council for National Minorities) excluded them from the right to file constitutional complaint, if in their own opinion or in case of the initiative of members of national minorities they believe that the rights and freedoms of members of national minorities have been violated as prescribed by the Constitutional Law on the Rights of National Minorities and a special law. I consider the decision of the Constitutional Court to be completely justified. There is no reason why these political-legal institutions can file constitutional complaint for the protection of these rights and freedoms and do so according to their own judgment because this is the subjective right of individuals belonging to national minorities, or legal entities that bear the collective rights and freedoms of national minorities. In addition, the aforementioned institutions are legal entities with public powers *ex lege* by virtue of their competences, so by the nature of things they themselves, in the implementation of legal regulations, deciding on the rights and freedoms of members of national minorities and their communities, can violate these rights and freedoms by their individual acts. This fact alone excludes them from the possibility of being the bearer of such a right and that according to their own assessment. Thus, without knowledge and consent that they represent an individual member of a national minority or their community which right and/or freedom has been violated.

Secondly, by this decision, the Constitutional Court expressly confirmed that the rights and freedoms of members of national minorities and their communities are in fact human rights and freedoms and that in relation to their protection in the procedural and substantive sense before the Constitutional Court (but also other authorities of state power and bodies with public authorities) have the same status and treatment. Such a position of the Constitutional Court is of great importance for the protection of the rights and freedoms of members of national minorities and their communities in concrete proceedings before it, based on a constitutional complaint.

Ruling of the Constitutional Court of the Republic of Croatia in case number: U-II-425/2002 of 16 January 2008 ("Official Gazette" number 14/08), which did not accept the proposal of several proponents to institute the proceedings for reviewing compliance with the Constitution and the law of Article 3 paragraph 2, Article 5 paragraph 3 and Articles 8, 9 and 10 of theRevisions and Amendments to the Statute of the County of Istria ("Official Gazette of the County of Istria" number 12/01). In the reasoning of the aforementioned decision, the Constitutional Court stated: "According to the Constitution and relevant laws, the county as a unit of regional self-government has the authority by statute to prescribe the equal official use of the minority language and script in its territory, it has the right to regulate the promotion and protection of its indigenous ethnic, cultural and other peculiarities, and nurturing the tradition-

[75] Ibidem;

al expression of regional affiliation, which does not prescribe administrative regional affiliation or create discrimination against certain residents of the county in relation to others, and has the right to prescribe the bilingual writing of the name of the county on the seal, stamp, name plates and letterheads because this does not determine the name of the county, but ensures the equal official use of the minority language and script."[76]

The Constitutional Court found that the arrangement of positive measures regarding the equal use of the minority language and script as stipulated by the Revisions and Amendments to the Statute (including its challenged provisions, the constitutionality and legality of which is challenged by the proponent) are not contrary to the relevant provisions of the Constitution and the law governing these issues. On the contrary, that the challenged provisions of the Revisions and Amendments to the Statute of the County of Istria are in accordance with the relevant provisions of the Constitution and laws of the Republic of Croatia. With such a position, the Constitutional Court of the Republic of Croatia took a positive position regarding the positive discrimination of national minorities, if and when the local and regional self-government units, with their statutes, expand the scope of positive measures for the exercise of their rights and freedoms regarding the use of their language and script, nurturing, maintaining and developing their customs, traditions and culture in order to maintain their peculiarities, which constitute the very essence of their identity.

Setting from the position taken in this case, the Constitutional Court of the Republic of Croatia rendered a decision not to accept the proposal to initiate proceedings for the assessment of compliance with the Constitution and the law of the Decision on the naming and renaming of streets and squares in the area of the settlement of Bale number: O. U. 3/3-94 of 14 September 1994. In fact, the reasons for such similar treatment in the case of the settlement of Bale, for the Constitutional Court of the Republic of Croatia, were essentially the same, to the extent that they relate to the very content of the subject matter of the constitutional dispute.

To the aforementioned decisions and rulings of the Constitutional Court, could be added others from area of its abstract control of the constitutionality and legality of legal regulations that govern the rights and freedoms and their protection of members of national minorities and their communities, and which have just taken the positions of the Constitutional Court of the Republic of Croatia in the aforementioned decisions and rulings, a common link.[77] These positions (either individually or together, depending on the nature of the case) are consistently applied by the Constitutional Court of the Republic of Croatia whenever it is necessary and appropriate and in its proceedings in specific cases of protection of the rights and freedoms of members of national minorities, which were brought before it by authorized applicants by a constitutional complaint. In order to confirm the presented statement, I will cite a couple of decisions of the Constitutional Court from which this is evident. But before that, I must say

[76] "Selection of decisions of the Constitutional Court of the Republic of Croatia 1996 - 2009", ibidem; p. 221.

[77] See, for example, the following decisions of the Constitutional Court of the Republic of Croatia: Decision number: U-I-3786/2010, "Official Gazette" number 93/11.; Decision number: U-I-120/2011 et al., "Official Gazette" number 93/11.; Decision number: U-II-993/1997 and others of 8 November 1999; etc.

that in the overall number, the cases for the protection of human rights and freedoms based on a constitutional complaint, is relatively small, almost negligible number are related to the protection of the rights and freedoms of members of national minorities and their communities. Within them, those related to the exercise of the right to representation in judicial bodies (courts and the state attorney's office), as well as the right to stand for election and to elect representatives of national minorities to representative bodies of local and regional (area) self-government, are significantly more represented. In view of the stated fact, I will point out specific cases from these areas on which the Constitutional Court of the Republic of Croatia decided.

With regard to decision-making and taking positions in cases related to the exercise of the right to representation of members of national minorities in state authorities, it should be said that the Constitutional Court of the Republic of Croatia took its positions in the case of abstract control of the assessment of compliance with the Constitution of Article 22, paragraph 2. 3 and 4 of the Constitutional Law on the Rights of National Minorities of the Republic of Croatia ("Official Gazette" number 155/02). It is about its Ruling number: U-I-402/2003 et al. of 30 April 2008.

The Constitutional Court did not accept the proposal to initiate an assessment of the compliance with the Constitution of the challenged provisions contained in Article 22 of the Constitutional Law on the Rights of National Minorities. Reasoning the enacting clause of its ruling, the Constitutional Court emphasized "According to the Constitutional Court's assessment, the prescribed advantage in employment should be seen as a special positive measure in favor of national minorities with the aim of enabling members of national minorities to participate effectively in public affairs through employment in state administration bodies, judicial bodies and bodies of self-governing units ... Prescribing the aforementioned positive measure in the employment of members of national minorities falls within the scope of the legislator's discretion and is to be considered justified and permissible as long as the reasons for its imposition last, which are primarily decided by the legislator, namely as long as it does not violate the principle of proportionality, prescribed in Article 16 of the Constitution, which is primarily the subject of constitutional court control. Therefore, as long as the positive measure prescribed in Article 22 of the Constitutional Law can be assessed as justified, permissible and proportionate, it cannot be considered discrimination, prohibited by Article 14, paragraph 1 of the Constitution."[78]

In addition to the cited position, the Constitutional Court of the Republic of Croatia also expressed the following position in that case: "Preference in the employment of members of national minorities is not automatic and unconditional, and is applied only with the fulfillment of prescribed conditions, and its application ensures equality in the representation of members of national minorities in administrative and judicial authorities in a way that ensures their equal position with other citizens of the Republic of Croatia."[79] The Constitutional Court has consistently reiterated this position in its Ruling number: U-I-2767/2007 of 31 March 2009.

[78] "Selection of decisions of the Constitutional Court of the Republic of Croatia 1996 - 2009", ibidem; p. 164.

[79] Ibidem; p. 163.

In the case based on a constitutional complaint filed for the protection of the right of priority in the employment of representatives of national minorities from Article 22, paragraph 4, the Constitutional Court issued decision number: U-III-1286/2012, which rejected the constitutional complaint. The Constitutional Court based the key reasons for such a decision on the positions taken in previous cases of abstract control, which it already applied in its decision number: U-III-3862/2010 of 23 May 2012, which also rejected the constitutional complaint.

By decision number: U-VIIA-54057/2009 of 25 November 2009, the Constitutional Court of the Republic of Croatia, in an election dispute, granted the appeal of the representative of the Serbian national minority because the decision of the County Election Commission annulled the decision of the City Election Committee on candidacy for deputy mayor. In reasoning its decision, the Constitutional Court reasons, setting from the Law on the list of voters, which binds only the fact of residence to the day of the election announcement, but not other facts that are legally relevant for exercising the right to vote in local elections, "Therefore, it annulled the decision of the CEC and upheld the decision of the CEC on the summary list of valid candidacies, in which the appellant is also listed."[80] However, at that time, the Constitutional Court assessed "that the legal recognition of the legal possibility of changing any of the data relevant to the exercise of the voter's passive right to vote even after the election announcement day (Croatian citizenship, over 18 years of age, business capacity, surname and first name, nationality and gender or some other attribute that the legislator could link to the right to vote) weakens the democratic nature of the election process because it opens up space for various and multiple abuses of the passive right to vote ... the Constitutional Court considers that it is not sufficient to link the fact of residence with the day of the election ... but it is necessary to link to that day the existence of other facts that are legally relevant to the validity of the candidacy, except for those that, due to their nature, the legislator can link to another date, which must be explicitly stated in the law."[81]

Taking into account the position and warning of the Constitutional Court expressed in this decision, the Croatian legislator made amendments and revisions to the legal regulations[82] on the basis of them, passing a completely new Law on Local Elections,[83] and upon its entry into force the Law on Elections of Municipal Heads, Mayors, of the Prefect and Mayor of the City of Zagreb ("Official Gazette" numbers 109/07 and 125/08) went out of force.

[80] Ibidem; p. 406.

[81] Ibidem; p. 406.

[82] See in more detail Article 19, paragraph 3 in conjunction with paragraph 1 of the same Article of the Law on Local Elections (consolidated text containing text published in "Official Gazette" nos. 144/12, 121/16, 98/19, 42/ 20, 144/20 and 37/21), in force from 10 April 2021.

[83] Ibidem.

V. Execution of decisions of the Constitutional Court and protection of the rights and freedoms of members of national minorities and their communities

A significant indicator of the success of constitutional courts in enforcing the protection of the rights and freedoms of members of national minorities and their communities is their decisions on these cases, both from the aspect of their validity, scope of application and legal force, and from the aspect of their application. The makers of the Constitution of the Republic of Croatia and the Republic of Kosovo decided to use legal norms of constitutional force to determine the obligation, scope of application, enforceability and legal force of the decisions of their constitutional courts.

That is how the Croatian constitution maker prescribed in Article 31 of the Constitutional Law on the Constitutional Court of the Republic of Croatia: "(1) The decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them. (2) All bodies of the central government and the local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.(3) The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court.(4) The Constitutional Court might determine which body is authorized for the execution of its decision, respective its ruling.(5) The Constitutional Court may determine the manner in which its decision, respectively its ruling shall be executed."

Unlike the Republic of Croatia, the constitutional framework of the Republic of Kosovo, which refers to regulation, obligations, areas of application, legal force, and especially enforceability, is much more modest in scope and content. Although the constitutional provision in the Constitution of the Republic of Kosovo is, in terms of scope and content, significantly narrower than that contained in Article 31 of the Constitutional Law on the Constitutional Court of the Republic of Croatia, it must be said that, as far as obligations, areas of application and legal force are concerned, it is clear and indisputable. The key difference in these two solutions is related to the issue of enforceability, namely how the constitution maker prescribed the method of execution (implementation) and which bodies he entrusted with this duty. While the Croatian constitution-maker clearly and comprehensively prescribed these issues, the Kosovo constitution-maker failed to regulate them in their entirety, in the Constitution itself. However, the aforementioned issues did not remain legally completely unsettled. They were partially regulated by the Constitutional Court of the Republic of Kosovo itself with its rules of procedure,[84] therefore, a legal act whose provisions have lower legal force than those that have the character of a constitutional norm. In terms of content, these provisions of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo are coherent (aligned) with the solutions that were foreseen and prescribed

[84] See in detail article 66 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, "Official Gazette" number 18/18.

for this issue by the Croatian constitution maker in his Constitutional Law on the Constitutional Court of the Republic of Croatia. However, unlike the Constitutional Court of the Republic of Croatia, the Constitutional Court of the Republic of Kosovo does not (not even on the basis of its Rules of Procedure) have the right to "designate the body to which it entrusts the implementation of its decision, namely ruling." But it (like the Constitutional Court of the Republic of Croatia) can (but does not have to) determine the manner of implementation of its decision, namely ruling. In fact, it was left to both constitutional courts to make a free judgment as to whether or not it is necessary to determine the manner of implementation of their decision. When deciding whether to prescribe the manner of implementation of its decision or ruling, the Constitutional Court will be guided by all relevant circumstances from real life that may affect the prescription of the manner of implementation of its decision or ruling, on the one hand, and on the other hand, the requirements that are conditioned and related to the respect and protection of the rule of law, as well as the associated legal certainty and overall credibility and enforceability of the constitutional and legal order in the country. On the basis of such circumstances and initial positions, the Constitutional Court will explain why it prescribes the manner of implementation of its decision.

Based on the aforementioned provisions, we can conclude: a) decisions and rulings of the constitutional courts of the Republic of Croatia and the Republic of Kosovo are legal acts of general binding force for all natural and legal persons in the territory of their respective states. These are legal acts that operate *erga omnes* and everyone is obliged to respect them; b) considering that their generally binding character is prescribed by the norm of constitutional force, they themselves have the force of law in the area of their operation; c) the decisions or rulings of the constitutional courts of these countries are final and no legal remedy can be profitably applied to them in the area of their validity.

These characteristics of the decisions, namely rulings of the constitutional courts of the Republic of Croatia and the Republic of Kosovo, are of exceptional importance for all the values that are protected by them, as well as for the rights and freedoms of members of national minorities and their communities. In fact, only through their implementation (realization) in real life it can be established that the constitutional courts have achieved their goal and fulfilled the task entrusted to them, namely achieved the protection of these rights and freedoms. By giving this position to the decisions, namely rulings of the constitutional courts within their constitutional legal systems, the constitution makers of both countries confirmed their intention to give the constitutional courts the final task of protecting the rights and freedoms of members of national minorities and their communities. Identical to the one that they determined by assigning to them the task of being the final body in the area of their activity that protects all other constitutionally prescribed and guaranteed human rights and freedoms of every person in the area of their jurisdiction.

How important is the issue of respecting and implementing decisions, namely rulings of constitutional courts in general, including in the area of protecting the rights and freedoms of members of national minorities and their communities, for the implementation of the entire constitutional legal order based on the value of the rule of law was

noted by Mr. Johann Sattler, head of the European Union delegation in Bosnia and Herzegovina,at the recent conference on the "Enforcement of Decisions of the Constitutional Court of Bosnia and Herzegovina" held in Jahorina, Bosnia and Herzegovina, on 13 and 14 June 2023,. He then pointed out that the respect and implementation of the decisions of the Constitutional Court is the fourth criterion out of fourteen, which should be fulfilled as a prerequisite for European integration. In this regard, the execution of the decisions of the constitutional courts "is not only technical, but also an issue that has deep political implications," Sattler said. According to him, in every democratic society, disobeying the judgments of the Constitutional Court has profound consequences because it practically means lawlessness.[85] If we apply that point of view to the non-execution of the decisions of the constitutional courts related to the protection of the rights and freedoms of members of national minorities and their communities, then we can rightly say: a) that lawlessness reigns in real social relations in that area; and b) that a good normative constitutional legal framework for the protection of the rights and freedoms of members of national minorities and their communities is just a dead letter. A mere formal-legal utopia that is not respected and implemented in real social relations.

It is understandable, in itself, that all states and their bodies that have an established constitutional legal order based on the values, principles and ideals of a democratic society of human (and minority) rights and freedoms, as well as the rule of law and the separation of powers, have such consequences due to non-execution of decisions, namely rulings of their constitutional courts, they cannot and will not accept this. This is precisely why all competent bodies, each within their constitutionally and legally determined scope of work, undertake, in accordance with the constitution and the law, the necessary measures and actions to implement the decisions of the Constitutional Court in social life. This particularly applies to those decisions, namely rulings of constitutional courts that protect human rights and freedoms, including the rights and freedoms of members of national minorities and their communities.

When it comes to decisions, namely rulings of the Constitutional Court of the Republic of Croatia that it has rendered, either in the field of abstract control of the constitutional review of laws or the constitutionality and legality of other regulations, or in the field of concrete protection of the rights and freedoms of members of national minorities and their communities, based on the constitutional complaint, the Constitutional Court of the Republic of Croatia has no decisions of its own that have not been executed.

VI. Conclusion

Legal regulation and protection of the status, rights and freedoms of members of national minorities and their communities and their realization is one of the important indicators of the acceptance and implementation of the highest democratic standards in specific countries inhabited by multinational populations.

Modern constitutional and legal orders of democratic states recognize and legally regulate the status, rights and freedoms and protection of

[85] See in detail the article by V. B., published by Hina, on 13 June 2023 under the title: "The authorities in Bosnia and Herzegovina do not respect the judgments of the Constitutional Court, and the prosecutor's office does not react", at: https://www.tportal.hr/

members of national minorities and their communities, as a rule, in the same way as they regulate human rights and freedoms. As a rule, they are regulated, guaranteed and protected by norms of constitutional force, or they are basically regulated by such norms, while their elaboration is left to laws passed by a qualified majority.

Considering the compactness and mutual compatibility and the specific features of its legal arrangement within the framework of the constitutional legal order, this part of the constitutional legal order can be singled out and, for didactic and scientific-theoretical reasons, called the constitutional legal framework for the regulation and protection of the rights and freedoms of members of national minorities and their communities.

Such a possibility arises from the normative content of the constitutional and legal systems of the Republic of Croatia and the Republic of Kosovo with regard to this subject of their regulation. Their constitutional and legal frameworks for the legal arrangement of positions, rights and freedoms, their realization and protection of members of national minorities and their communities, viewed from the aspect of compliance of their normative content with the legal regulations of the international community that regulate these areas of social relations, belong to the highest range that are in that area achieved by individual countries in the world to date.

The paper shows how the Republic of Croatia and the Republic of Kosovo regulated and protected the status, rights and freedoms of their citizens, members of national minorities and their communities with their constitutional legal frameworks. Especially from the aspect of elaborating certain specifics that are still points of debate in the international community and about which, at its level, there is still no agreement and generally acceptable positions.

Furthermore, the paper pays the necessary attention to the role of constitutional courts in protecting the constitutionally guaranteed rights and freedoms of members of national minorities and their communities, both through the implementation of abstract control of the constitutionality and legality of laws and other regulations that govern them in a general way, as well as in specific cases their protection on the basis of a constitutional complaint submitted by citizens and legal entities to the constitutional court, considering that their individual and/or collective rights have been violated.

In addition, concrete examples of the protection of the rights and freedoms of members of national minorities and their communities from the practice of the Constitutional Court of the Republic of Croatia are given in the paper from the aspect of both possibilities of proceedings before the Constitutional Court in the performance of these responsibilities.

The paper does not deal with concrete examples from the practice of the Constitutional Court of the Republic of Kosovo, due to the author's belief that at this Convention, if necessary, judges of the Constitutional Court of the Republic of Kosovo will write and speak about it.

At the end, the paper points out the importance of the execution of decisions, namely, decisions of constitutional courts in general, including in this area. In particular, indicating the importance of their execution for the achievement of accepted democratic standards and the rule of law and legal security in the social and state community.

Fjala e z. Osman Kadriu, Gjyqtar i Gjykatës Kushtetuese të Republikës së Maqedonisë së Veriut[1]

SUNDIMI I SË DREJTËS, DEMOKRACIA DHE TË DREJTAT E NJERIUT

Shtruarja e problemit

Nga vetë emërtimi i temës vërehen edhe fjalët kyçe të saj. Ato janë, nën një, s drejta; nën dy, sundimi i së drejtës; nën tre, demokracia; dhe nën katër, të drejtat e njeriut. Fjalët kyçe janë faktikisht institucionet juridikë, por edhe politikë që kanë të bëjnë me sundimin e së drejtës, të demokracisë dhe si institucion i veçantë është ai i cili i referohet të drejtave dhe lirive themelore të njeriut dhe të qytetarit respektivisht shtetasit (në vazhdim të tekstit – të drejtat e njeriut).

Pa dyshim se trajtimi i temës në brendinë e saj ngërthen një muri të çështjeve dhe të pyetjeve me relevancë të veçantë, pyetjeve të cilat janë aktuale në jetën e përditëshme gati të çdo shteti bashëkohor dhe në veçanti të atyre shteteve të cilat përcaktohen për një demokraci të plotë respektivisht për një demokraci të vërtetë.

Komponent i veçantë i temës – sundimi i së drejtës, demokracia dhe të drejtat e njeriut, është ai i cili ka të bëjë me të drejtat e njeriut, siguria dhe mbrojtja e tyre juridike. Kjo aq më tepër – *a fortiori* kur dihet se nga shkalla e respektimit dhe realizimit të të drejtave të njeriut vlerësohet edhe shkalla e demokracisë në një shtet, në çdo shtet demokratik. Vlerësuar vetëm nga ky aspekt dhe kriter konkluzioni është i qartë se tema në fjalë është tejet komplekse.

Kompleksiteti i temës në fjalë nxjerr në pah edhe çështjet që kanë të bëjnë edhe me sundimin e së drejtës dhe të vetë demokracisë. Kjo nga shkaku se nocioni i sundimit të së drejtës ngërthen një muri të çështjeve prej të cilave shumë prej tyre janë të debatueshme, të mos themi edhe të kontestueshme. Janë të debatueshme në shkencë, sidomos ajo juridike dhe politike, nga njëra anë, kurse në rregullimin e tyre në të drejtën pozi-

[1] *Contribution as originally delivered in Albanian.*

tive, qoftë ajo nacionale ose ndërkombëtare, hasim edhe në dallime të ndryshme lidhur me brendinë e sundimit të së drejtës, qofshin ato edhe në nuanca, nga ana tjetër.

Çështja e demokracisë përfaqëson fenomen shoqëror me një domethënie relevante. Në kuadër të temës elaborohet vetëm një segment i saj, qoftë ai të jetë i përgjithshëm dhe i përgjithësuar. Segmenti ka të bëjë me raportin e demokracisë me liritë dhe të drejtat e njeriut si dhe raporti i sundimit të së drejtës me demokracinë. Nga këto raporte me rëndësi janë të nënvizohen, përveç tjerash, pasojat juridike dhe politike. Pasojat paraqiten në dy nivele ose lloje, dhe ato: nën një, në qoftë se në një shtet nuk zbatohet sundimi i së drejtës nuk ka demokraci; dhe nën dy, në qoftë se në një shtet demokratik nuk gëzohen të drejtat dhe liritë e njeriut, po ashtu nuk ka demokraci.

Për një pasqyrim sa më të plotë të temës në fjalë, në vazhdim të këtij punimi jemi në mendim të shpalosen çështjet që janë në lidhje të ngushtë me këtë problematikë. Veçojmë disa prej tyre. Sundimi i së drejtës është pyetje kyçe ose më mirë me thënë pyetje e cila në brendinë e saj ngërthehen një mori të çështjeve konkrete. Për kuptimin e sundimit të së drejtës, së pari është e nevojshme të shpjegohet çështja e mendimeve të ndryshme rreth termeve "shteti juridik" dhe "sundimi i së drejtës".

Pyetje me relevancë janë edhe ato që kanë të bëjnë me sundimin e së drejtës si kusht për funksionimin e demokracisë si sistem politik i qeverisjes. Ajo që është fundamentale ka të bëjë me demokracinë në një vend dhe gëzimin e të drejtave të njeriut.

Të drejtat e njeriut janë materie kushtetuese – *materia constitutionem*. Kemi të bëjmë me një çështje e cila është gjithmonë aktuale. Në këtë vështrim, të drejtat e njeriut elaborohen në dy nivele, dhe atë, nën një, përcaktimi dhe rregullimi i të drejtave të njeriut me norma kushtetuese; dhe nën dy, mbrojtja juridike e tyre në kuadër të mbrojtjes juridike, në këtë punim bëhet përpjekje për shqyrtimin e kësaj çështje në veçanti në kuadër të mbrojtjes kushtetuese – gjyqësore.

Për çështje e përmendura do të përqendrohemi në një nivel adekuat dhe natyrisht në suazat e hapësirës e cila i mundësohet punimit në fjalë.

1 Diçka rreth mendimeve të ndryshme të parimit të sundimit të së drejtës

Që të kuptohet nocioni i sundimit të së drejtës paraprakisht është e nevojshme të shpjegohet çështja e mendimeve rreth nocionit në fjalë, domethënë sundimi i së drejtës, nga njëra, dhe nocionit – shteti juridik, nga ana tjetër. Mendimet janë të ndryshme. Secili mendim me argumente konkrete e shpalos mbrojtjen e tezës të ekzistencës ose *vis a vis* të mosekzistencës të dallimit ndërmjet nocioneve "shteti juridik" dhe atij që emërtohet "sundimi i së drejtës". Çështja e mendimeve të ndryshme është aktuale edhe në të drejtën bashkëkohore.[2]

Në lidhje me çështjen e mendimeve të ndryshme, në teorinë e së drejtës kushtetuese hasim në tre pikëpamje respektivisht në tre mendime. Sipas një mendimi i cili mbështetet me argumente konkrete, ekziston dallimi ndërmjet "shtetit juridik" dhe "sundimit të së drejtës". Dallimi ekziston jo vetëm në kuptimin terminologjik por edhe në kuptimin e përmbajtjes të nocioneve në fjalë. Me kalimin e kohës, ky dallim bëhet

[2] Prof. Dr. Pavle Nikoliq, *E drejta kushtetuese*, Beograd, 1995, f. 345.

edhe më i vërejtur. Konform këtij mendimi, ndërmjet "sundimit të së drejtës" angleze dhe "shtetit juridik" gjerman – *Rechtsstaat*, nuk ka asgjë të përbashkët.[3]

Vlerësohet në veçanti edhe pikëpamja e dytë. Sipas pikëpamjes së dytë mbrohet teza se shprehjet "shteti juridik" dhe "sundimi i së drejtës" përdoren si sinonime, që do të thotë kanë një domethënie.[4]

Sipas mendimit të tretë, dallime esenciale ndërmjet institucioneve në fjalë nuk ka. Shteti juridik në verzionin anglosakson është sundimi i së drejtës – *rule of law*.[5] Në këtë kuptim në literaturën juridike jo rrallë përdoret edhe mendimi se termi juridik që ka të bëjë me sundimin e së drejtës është shpikje juridike.[6]

Nga kjo që u theksua, vetëm në aspektin formalo juridik vërehen disa dallime ndërmjet termeve "shteti juridik" dhe "sundimi i së drejtës". Dallimet vërehen në çështje siç janë: nën një, paraqitja e tyre në vende të ndryshme; nën dy, paraqitja në periudha konkrete kohore; nën tre, secili prej këtyre institucioneve në paraqitjen e tyre ka qenë i kushtëzuar dhe i determinuar me kushtet historike; dhe nën katër, nocionet në fjalë dallohen nga numri i institucioneve që i posedojnë në brendinë e tyre veç e veç.

Filluar nga këto rrethana, institucioni "shteti juridik" lind në shtetin gjerman në shekullin XIX. Shteti juridik – *Rechtsstaat* në Gjermani vendoset si kundërtezë e shtetit policor në këtë shtet.

Edhe diçka që të kuptohet vendosja e shtetit juridik në Gjermani. Së pari duhet theksuar se normat juridike i sjellë shteti. Me normat juridike të shtetit, vetë shteti dhe funksionimi i tij organizohet me ato norma. Normat juridike, ose me thënë më mirë, të drejtën që e krijon shteti ai edhe e sanksionon. Vlerësuar nga ky aspekt, çdo shtet është shtet juridik. Në këtë rast, nocioni shtet juridik përdoret në kuptimin themelor.

Por, vendosja e shtetit juridik në kuptimin e problematikës e cila trajtohet në këtë punim, ka domethënie tjetër e cila dallohet nga kuptimi themelor i nocionit në fjalë. Vendosja e shtetit juridik në Gjermani ka pasur për qëllim qo policia t'i nënshtrohet ligjit. Me parimet e shtetit juridik në këtë kuptim bëhet kufizimi i pushtetit administrativ dhe kufizohet mvetësia e saj.[7]

Prandaj, shteti juridik faktikisht dhe juridikisht i kundërvihet shtetit policor. Edhe shteti policor në një mënyrë ka qenë shtet juridik por në ushtrimin e pushtetit ka ushtruar pushtet të pakufizuar si në kuptimin formal, po ashtu, edhe në kuptimin përmbajtësor – materialo juridik.[8]

Sistemi juridik me atributet e sundimit të së dre-

[3] Mendimi në fjalë mbrohet edhe nga Lidija Basta Flajner, vepra *Politika në kufijtë e së drejtës*, Beograd, 2012, f. 115 – 116.

[4] Për mendimin e dytë, më konkretisht Laurent Richer, *Les droits de l'homme et du citoyen*. (Vepra është cituar në librin e Prof. Pavle Nikoliq, po aty).

[5] Për këtë mendim edhe tek autori Zharko Puhoski, vepra *Mundësitë e shtetit juridik në Jugosllavi*, në librin *Shteti juridik*, f. 48.

[6] Grup i autorëve, *The concis Oxford Distionary of policies* (vepra është e përkthyer në gjuhën shqipe – *Fjalor Përmbëledhës i Politikës*, Tiranë, 1996, f. 284).

[7] Për këtë Dr. Radomir Llukiq, Për shtetin juridik, Beograd, 1991, f. 11.

[8] Më gjerësisht, Dr. Vlladan Kutleshiq, *Fillet e së drejtës*, Beograd, 2005, f. 303 – 304.

jtës – *rule of law*, vendoset në Angli. Përkrahës i flaktë i sundimit të së drejtës në Angli ka qenë profesori i së drejtës kushtetuese Alfred Dajsi (A. V. Dicey). Dajsi në veçanti e ka zhvilluar doktrinën për sundimin e së drejtës.[9]

Nga kjo që u theksua si më sipër, vendlindja e shtetit juridik është Gjermania, kurse vendlindja e sundimit të së drejtës është Anglia. Nga kriteri materialo juridik, siç u përmend, nuk ka dallime ndërmjet institucioneve në fjalë. Përkundrazi, të shumta janë pikat lidhëze ndërmjet tyre. Prandaj, në teorinë e së drejtës kushtetuese përkrahet dhe mbizotëron pikëpamja se institucionet në fjalë janë sinonime. Konkluzioni është i qartë. Nëqoftëse sundimi i së drejtës është koncepcion anglez, shteti evropian është ide evropiane kontinentale.

Nga shkaqet e përmendura dhe arsyeja e elaboruar si më sipër, në vazhdim të tekstit do të përqendrohemi në sundimin e së drejtës.

2 Sundimi i së drejtës dhe parimet e tij

Sundimi i së drejtës është temë me një mori të çështjeve të fushave të ndryshme shkencore siç janë ajo filozofike, politike dhe juridike. Përqendrohemi në fushën juridike e cila ka interesim të veçantë për studimin e institucionit, pra, të sundimit të së drejtës.

Në të drejtën kushtetuese në dy nivele shpjegohet sundimi i së drejtës. Së pari, në aspektin formalo juridik; dhe niveli i dytë ka të bëjë me vlerësimin e së drejtës konform institucionit të sundimit të së drejtës. Përmbajtja e sundimit të së drejtës shprehet edhe me termin juridik "kushtetutshmëri". Në këtë kontekst, me nocionin kushtetutshmëri nënkuptojmë nënshtrimin e shtetit dhe organeve shtetëror të drejtës objektive. Ky nënshtrim vlen edhe për individët që ato të gjithë të respektojnë Kushtetutën e vendit dhe ligjet e tij. Shteti i krijon normat juridike. Është në pyetje, pra, e drejta shtetërore. Me normat juridike shteti e rregullon organizimin e tij si dhe punën dhe veprimet e organeve të tij. Me normat shtetërore shteti bën vetëkufizim.[10]

Në ushtrimin e pushtetit organet përkatëse nuk vendosin sipas vullnetit të tyre por sipas së drejtës objektive të shtetit. Edhe diçka, shteti sikurse me norma juridike e rregullon organizimin e vetë shtetit dhe punën e organeve shtetërorë, po ashtu i përcakton edhe kufijtë e pushtetit në raport me të drejtat dhe liritë qytetare. Për këtë çështje norma më e lartë juridike emërtohet "kushtetutë".[11]

Niveli i dytë i trajtimit të sundimit të së drejtës ka edhe një pikëpamje dhe qasje tejet cilësore. Me nocionin – sundimi i së drejtës mund të kuptohet se ai duhet të jetë edhe instrumenti juridik për vlerësimin e vlefshmërisë dhe të drejtësisë të së drejtës. Fjala është për ekstra norma juridike në kuptimin e një ideali politik.

Edhe në të drejtën krahasuese hasim në mendime të qarta për vlerësimin e së drejtës pozitive nga aspekti dhe kriteri i drejtësisë. Në këtë drejtim, mendimtari Fridrih Hajek prononcohet se sundimi i së drejtës është kriter (masë) për vlerësimin e vlefshmërisë të drejtës pozitive. Në këtë kontekst, autori në fjalë thotë se sundimi i

[9] Albert ven Dicey, *Introduction to the study of the law of the Constitution*, London, 1956, f. 163 dhe në vazhdim.

[10] Mendimtari i njohur Leon Dygi e kundërshton teorinë që shteti me normat juridike që ai vetë i sjellë të bëjë edhe vetëkufizimin e vet. Për këtë në veprën a autorit Leon Duguit, *Traité de droit constitutionnel*, Paris, 1923, f. 592.

[11] Më gjerësisht, Prof. Dr. Ratko Markoviq, *E drejta kushtetuese dhe institucionet politike*, Beograd, 1995, f. 601.

së drejtës nënkupton "ligjshmëri të plotë". Por kjo, thotë ai, nuk mjafton. Kështu për shembull, nëqoftëse ligji i mundëson Qeverisë së vendit pushtet të pakufizuar që ajo të sjellë akte si to dojë, aktet e saj janë ligjorë, por me gjithë[12] atë, siç mund të ndodh, mund të jenë në kundërshtim me sundimin e së drejtës.

Në hapësirat e ish Jugosllavisë, shkrimtari juridik Kosta Çavoshki shprehet qartë për sundimin e së drejtës. Sipas tij, sundimi i së drejtës nuk përfaqëson sundimin e ligjeve të çfarëdoshme... por sundimin e atyre ligjeve siç duhet të jenë, pra, të atyre që përfaqësojnë idealin politik.

Konorfm këtyre pikëpamjeve lirisht mund të konkludohet se sundimi i së drejtës është diçka më e lartë se sundimi i ligjeve pozitivë, duke përfshirë edhe vetë Kushtetutën e vendit. Sundimi i së drejtës nuk është vetëm "kushtetutshmëri dhe ligjshmëri e thejshtë", siç pohojnë juristët pozitivist. Sundimi i së drejtës është rend i lirisë. E drejta pozitive vlen dhe zbatohet me qenë se është në përputhje me parimet e idealit politik.

Nga karakteristikat e përmendura, sundimi i së drejtës është sinonim i bashkësisë demokratike; është rend i lirisë dhe me parimet e sundimit të së drejtës sigurohen të drejtat individuale.[13]

E drejta duhet të harmonizohet me drejtësinë. Drejtësia është parimi më i lartë dhe si parim përfaqëson kriterin (masën) për vlerësimin e saktësisë respektivisht të drejtësisë së ligjeve pozitivë.[14]

3 E drejta kushtetuese dhe të drejtat e njeriut

Të drejtat e njeriut janë të drejta morale dhe të patjetërsueshme. Kanë përmbajtje humanitare. Parimet e të drejtave të njeriut janë formuluar nga fundi i shekullit XVIII në Deklaratat revolucionare françeze dhe të atyre amerikane, në kohën e luftërave për pavarësi të SHBA. Më vonë të drejtat e njeriut janë vërtetuar nga Organizata e Kombeve të Bashkuara me akte – dokumente ndërkombëtare. Akti më i rëndësishëm i OKB është Deklarata Univerzale e të Drejtave të Njeriut, viti 1948. Kjo Deklaratë, kur flitet për të drejtat e njeriut, përfaqëson faktikisht kodifikimin e parë të të drejtave të njeriut.[15]

Me garantimin e të drejtave të njeriut vërtetohet pozita juridike e individëve në raport me organet e shtetit. Të drejtat e njeriut përcaktojnë kufirin të cilin pushteti shtetëror nuk mund t'a kapërcen, nëqoftëse shteti është i organizuar mbi parimet e demokracisë. Dhe kur jemi te nocioni i demokracisë, edhe diçka. Demokracia në një vend është institucion i gjerë. Definohet se është sistem politik i qeverisjes në një vend. Si sistem politik është në gjendje të siguron: nën një, barazi politike; nën dy, mbrojtje të lirive dhe të drejtave të njeriut; nën tre, mbrojtje të interesave të përbash-

[12] Hayek Friedrich A., *The Constitution od Liberty* (The University of Chicago Press), Chicago, 1960, në më shumë faqe.

[13] Për këtë mendim edhe te mendimtari, R. L. Sharwood. Mendimet e këtij mendimtari janë cituar në veprën e Prof. Dr. Ratko Markoviq, po aty.

[14] Gjorgjo del Vekio: *E drejta, drejtësia dhe shteti* (vepra e tij është përkthyer në gjuhën serbe: Pravo, pravda i drzhava), Beograd, 1940, f. 1.

[15] Më konkretisht, Deklarata Univerzale për të Drejtat e Njeriut, viti 1948.

këta; nën katër, të siguron plotësimin e nevojave të qytetarëve; dhe nën pesë, të siguron vendosje që në mënyrë të barabartë të plotësohen interesat e individëve. Fenomeni demokraci ngërthen edhe atribute tjerë, kurse këto që u përmendën kanë relevancë të veçantë.[16]

Nga kjo që u theksua si më lart, demokracia nuk shpie vetëm në të drejtat e njeriut. Por, është evidente se pa garancën dhe realizimin e të drejtave të njeriut nuk ka demokraci. Diçka edhe në vazhdim. Të drejtat e njeriut, sikurse edhe vetë Kushtetuta, është pengesa e pushtetit arbitrar dhe absolut të pushtetit të papërgjegjshëm. Prandaj, në të drejtën kushtetuese theksohet se të drejtat e njeriut janë instrumenti për kufizimin e pushtetit shtetëror. Të drejtat e njeriut janë e drejta e qëndresës ndaj pushtetit. Ato janë liritë e qëndresës – *libertés résistances*.[17]

Vlerësuar nga kriteri i parashkrimit dhe të garancës të të drejtave të njeriut, në një pjesë të doktrinës juridike bëhet distinksioni ndërmjet shtetit liberal, nën një, dhe atij totalitar, nën dy. Shteti është liberal kur u mundëson qytetarëve një "zonë" të lirë dhe më të gjerë të aktiviteteve privatë. Sikurse shprehet mendimtari Moris Diverzhe, shteti u mundëson qytetarëve një "fushë – lëmi të rezervuar", fushë në të cilën shteti nuk mund të intervenojë.[18] Nga ana tjetër, shteti është totalitar kur synon të intervenon në të gjitha fushat e marrëdhënieve në shoqëri dhe kur nuk e pranon dallimin ndërmjet jetës private dhe asaj publike.

Pikëpamjet e shkencave juridike, në veçanti ato të së drejtës kushtetuese, implementohen në kushtetutat bashkëkohore.

Ajo që është me rëndësi të theksohet është dhe ka të bëjë me atë se të drejtat dhe liritë themelore të njeriut dhe të qytetarit (të shtetasit) përcaktohen dhe rregullohen vetëm me Kushtetutën e vendit dhe normat kushtetuese. Pra, çështja e të drejtave të njeriut është materie kushtetuese – *materia constitutionis*. Me vetë faktin se të drejtat e njeriut rregullohen me aktin më të lartë juridik të vendit lind edhe konkluzioni juridik për rëndësinë dhe relevancën e tyre që kanë në një shtet me demokraci të vërtetë.

Dy tendenca, sidomos, vërehen në kushtetutat bashkëkohore dhe qasja që ka kushtetutvënësi i një vendi kur janë në pyetje të drejtat e njeriut dhe garantimi i tyre. Tendenca e parë, e cila edhe realizohet, ka të bëjë me faktin se për të drejtat e njeriut dhe rregullimin e tyre me Kushtetutë, ato kanë përparësi në krahasim me rregullimin e pushtetit shtetëror dhe organizimin e tij, si dhe në krahasim me përcaktimin e organeve tjerë ose të çështjeve nga lëmitë politike, ekonomike dhe shoqërore. Kjo risi jo rastësisht theksohet. Në sistemet njëpartiakë, ndodht e kundërta – *vice versa*. Në kushtetutat e asaj periudhe, përparësi kishte përcaktimi dhe rregullimi i pushtetit shtetëror dhe me dispozita tejet të prgjithësuara kushtetutvënësi parashikonte edhe rregullimin për të drejtat e njeriut.

Tendenca e dytë, që faktikisht bëhet realitet, kushtetutat bashkëkohore përcaktojnë një katalog, parimisht, të gjerë të të drejtave të njeriut. Kjo ka një rëndësi të veçantë për sundimin e së drejtës. Në të drejtën kushtetuese theksohet se sa më i gjerë të jetë katalogu i të drejtave dhe lir-

[16] Për këtë më gjerësisht Dejvi Held, *Global Transformation*. Politika, 1999, në më shumë faqe dhe Entoni Gigens, *Sociology*, Beograd, 2001, f. 425.

[17] Prof. Dr. Ratko Markoviq, vepra e cituar, f. 555.

[18] Maurice Dyverger, *Le système politique français*, PUF, 1986, f. 421 dhe në vazhdim.

ive të njeriut, në atë masë ose proporcionalitet bëhet edhe kufizimi i pushtetit shtetëror.

Kushtetuta e Republikës së Maqedonisë së Veriut,[19] viti 1991, i përcakton, rregullon dhe garanton të drejtat dhe liritë themelore me një mori të dispozitave kushtetuese. Dhe më konkretisht, nga numri i përgjithshëm i dispozitave kushtetuese (134 nene), 1/3 e dispozitave u përkushtohen të drejtave dhe lirive themelore të njeriut dhe të qytetarit.[20]

Ajo që në veçanti është e rëndësishme për të drejtat e njeriut si dhe përcaktimi dhe rregullimi i tyre me norma kushtetuese, ka të bëjë me sigurimin e tyre që ato të realizohen. Qytetari, pra, t'i gëzon në jetën e përditshme. Për këtë çështje, në të drejtën kushtetuese, me të drejtë apostrofohet një mendim. Thuhet se për një shtet demokratik, në të cilin sundon e drejta, është shumë e rëndësishme, shteti të siguron mjete dhe mekanizma juridikë për mbrojtjen e të drejtave të njeriut. Kjo qasje është më e rëndësishme se sa që në Kushtetutë të vendosen të drejtat dhe liritë.

Nga kjo që u theksua dhe si rrjedhojë, pasoja është e qartë. Nëqoftëse shteti nuk i siguron mjetet juridike, garantimi i të drejtave të njeriut mungon. Garantim nuk ka. Vetëm vendosja e të drejtave të njeriut në Kushtetutë ngel si një "listë e dëshirave të mira në letër", por pa realizim.[21]

Nga kjo që u theksua si më sipër, në kushtetutat bashkëkohore parashikohet edhe mundësia juridike për mbrojtje juridike të të drejtave të njeriut. Garantimi sigurohet me përcaktimin e organeve dhe të institucioneve përkatëse të shtetit dhe intervenimi i tyre për mbrojtjen e të drejtave të njeriut në kuadër të kompetencave që kanë. Prej organeve shtetërorë, në mbrojtjen e të drejtave të njeriut, kompetencë të theksuar kanë: gjyqësori i vendit; Gjykata Kushtetuese; Avokati i Popullit (Ombudsman persona); dhe shumë institucione dhe komisione tjerë.

Përcaktohemi shkurtimisht për Gjyqësinë Kushtetuese.

4 Gjykatat kushtetuese dhe sundimi i së drejtës

4.1 Temat hyrëse

Gjykata Kushtetuese e një vendi ka kompetencë të pakapërcyeshme dhe rol të pazëvendësueshëm në mbrojtjen e të drejtave të njeriut. Mënyrat e shkeljes të të drejtave të njeriut janë të ndryshme dhe, mjerisht, të shumta. Në çdo lëmi të marrëdhënieve shoqërore ndodhin lëndime, cënime, shkelje ose kontestime të ndryshme kur janë në pyetje të drejtat e njeriut dhe mosrealizimi i tyre. Duke marrë parasysh mënyrat e cënimeve të të drejtave të njeriut dhe llojet e tyre, nga aspekti i kompetencave të Gjykatave Kushtetuese, në dy mënyra, në veçanti paraqitet shkelja e të drejtave të njeriut dhe nevoja e intervenimit të organit në fjalë. Mënyra e parë është shkelja e të drejtave me akt normativ i sjellë nga organi kompetent i shtetit dhe i cili akt, konform Kushtetutës i nënshtrohet kontrollit kushtetues. Mënyra e dytë është shkelja e të drejtave të njeriut me akt individual

[19] Kushtetuta e RMV është Kushetuta e parë e sistemit pluralist. Është miratuar më 17.11.1991. Kushetuta është botuar në "Gazetën zyrtare të RM" nr. 52/1991.

[20] Për këtë, dispozitat e neneve 9 – 60 të Kushtetutës, viti 1991, dhe në veprën e autorit, Rregullimi kushtetues i Maqedonisë së Veriut, Kërçovë, 2019, f. 77 – 154.

[21] Më konkretisht për mbrojtjen e të drejtave dhe lirive të njeriut, vepra e cituar e autorit, f. 155 – 169.

ose veprim individual i ndërmarrë nga ndonjë organ i shtetit.

Për këto dy mënyra të shkeljeve të të drejtave, çështja e mbrojtjes së tyre trajtohet në kuadër të dy kompetencave të Gjykatës Kushtetuese. Kompetenca e parë titullohet kushtetutshmëria dhe ligjshmëria, kurse ajo e dyta është kompetenca që ka të nëj dhe i dedikohet mbrojtjes të të drejtave të njeriut para organit në fjalë.

4.1.1 Kushtetutshmëria dhe ligjshmëria, kompetencë me relevancë

Në kushtetutat bashkëkohore kompetenca e parë, gati pa përjashtime, është kushtetutshmëria dhe ligjshmëria e akteve juridikë. Në literaturën juridike për këtë kompetencë në përdorim është edhe termi juridik – kontrolli normativ. Në kuadër të kësaj kompetence, Gjykata Kushtetuese e vendit bën vlerësimin kushtetues të ligjeve, të akteve nënligjorë dhe të akteve tjerë të përgjithshëm të cilat, konform Kushtetutës, i nënshtrohen kontrollit.[22]

Ajo që është risi e kësaj kompetence, kontrolli kushtetues i akteve është kontroll abstrakt. Të shumta janë rastet kur gjykata Kushtetuese konstaton se me një ligj konkret, në tërësi ose ndonjë dispozitë e tij (një ose më shumë), janë cënuar normat kushtetuese. Prej normave kushtetuese në veçanti cënohet sundimi i së drejtës si parim kushtetues. Në ato raste Gjykata Kushtetuese bën anulimin e ligjit ose të aktit tjetër për të cilin është kërkuar kontrolli normativ.

Nëqoftëse ndodh që me ligj ose akt tjetër normativ, për të cilin kërkohet kontrolli normativ, dhe të vërtetohet se me këto akte janë cënuar të drejtat për struktura konkrete të qytetarëve në një vend, kontrolli shpie në kontekst gjyqësor kushtetues. Në rast se konstatohet cënimi i sundimit të së drejtës, Gjykata Kushtetuese vendos dhe bën anulimin e aktit. Me anulimin e ligjit ose të akteve konkretë, struktura e qytetarëve të dëmtuar e fiton të drejtën e shpërblimit.

4.1.2 Mbrojtja e të drejtave të njeriut para gjykatave kushtetuese

Siç është e njohur, mbrojtja e të drejtave të njeriut para gjykatave kushtetuese është kompetencë e veçantë. Shkelja e të drejtave të njeriut, për të cilën shkelje Gjykata Kushtetuese ka kompetencë, mund të ndodhë me akt ose veprim individual të organit konkret të shtetit.[23]

Kuvendi i Republikës së Maqedonisë së Veriut akoma nuk ka miratuar ligj për Gjykatën Kushtetuese. Në mungesë të ligjit, Gjykata Kushtetuese me Rregulloren e saj, e miratuar në vitin 1992, i ka rregulluar edhe çështjet që kanë të bëjnë me mbrojtjen e të drejtave dhe lirive të njeriut para këtij organi. Në këtë kuptim, me Rregulloren e Gjykatës janë përcaktuar kushtet dhe procedura për mbrojtjen e të drejtave të njeriut. Disa prej kushteve janë: nën një, akti ose veprimi individual i ndërmarrë nga organi konkret të jetë i plotfuqishëm. Kjo do të thotë të jenë shterë mjetet juridike para organeve tjerë të shtetit; dhe nën dy, kërkesa (në mungesë të padisë ose ankesës kushtetuese) të ushtrohet në afat prej 2 muajsh nga dita kur akti individual ose veprimi është bërë i plotfuqishëm. Ngel konstatimi i Gjykatës. Në ato raste kur Gjyka-

[22] Kjo kompetencë për Gjykatën Kushtetuese përcaktohet edhe me kushtetutën e Maqeodonisë së Veriut. Për këtë më konkretisht, neni 110 alinea 1 dhe 2 të Kushtetutës.

[23] Edhe Gjykata Kushtetuese e Maqedonisë së Veriut ka kompetencë të veçantë në mbrojtjen e të drejtave dhe lirive të njeriut. Për këtë, dispozitat e nenit 110 alinea 3 e Kushtetutës, viti 1991.

ta Kushtetuese konstaton shkelje të dispozitave kushtetuese duke përfshirë edhe sundimin e së drejtës, bën anulimin e aktit ose të veprimit individual. Pra, me vendimin e Gjykatës konstatohet shkelja e të drejtave të njeriut. Me të njëjtin vendim Gjykata Kushtetuese e obligon organin konkret që të mos përsëritet një shkelje e tillë.

4.2 Disa nga karakteristikat e vendimeve të gjykatave kushtetuese

Siç ndodh me çdo organ tjetër, Gjykata Kushtetuese për çështjet nga kompetenca e saj sjellë vendime konkretë. Vendimet e gjykatave kushtetuese posedojnë karakteristika të veçanta, në kuptimin e tërësisë të vetive konform të cilave i dallojnë nga vendimet e organeve tjerë shtetërorë.

Në rrumbullakësimin e këtij punimi veçojmë disa nga karakteristikat më të vërejtura të vendimeve të gjykatave kushtetuese. Ato janë:

Nën një, vendimet e gjykatave kushtetuese janë të formës përfundimtare dhe të ekzekutueshme. Kjo do të thotë se kundër vendimeve të gjykatave kushtetuese nuk mund të ushtrohen mjete të rregullta ose të jash137tzakonshme juridike.[24]

Nën dy, vendimet e Gjykatës Kushtetuese posedojnë forcën kasatore. Me vendimet e saj bëhet anulimi ose abrogimi i akteve ose veprimeve ndaj të cilave është ushtruar kontrolli kushtetues.

Nën tre, në krahasim me ligjet për të cilat shpeshherë ndodh që organi ligjvënës të parashikon në dispozitat e fundit dhe kalimtare, institucionin e njohur "ligji në pritje" – *vocatio legis*, për vendimet e gjykatave kushtetuese ky institucion nuk vjen në shprehje. Vendimet e Gjykatës Kushtetuese zbatohen menjëherë pas botimit (shpalljes) të tyre në "Gazetën Zyrtare" të vendit.

Nën katër, veti e veçantë e vendimeve të Gjykatës Kushtetuese ka të bëjë me faktin se vendimet e saj janë "të veshura me tesha të pajisura me pushtet juridik". Kjo shprehje figurative nënkupton se pas vendimeve të Gjykatës Kushtetuese dhe për zbatimin e tyre qëndron shteti dhe aparati shtetëror me forcën shtrënguese të tij. Në instancë të fundit, për zbatimin e vendimeve të Gjykatës Kushtetuese përgjigjet Qeveria e vendit.

Dhe në fund, duke marrë parasysh këto veti të vendimeve të gjykatave kushtetuese, në Ligjin për Gjykatën Kushtetuese të Gjermanisë, përveç të tjerash, me dispozitë konkrete theksohet: "vendimet e gjykatës kushtetuese kanë forcën e ligjit".

[24] Për këtë, edhe neni 112 dispozita 2 e Kushtetutës së Maqedonisë së Veriut, viti 1991.

Contribution by Ms. Christie S. Warren, Professor of the Practice of International and Comparative Law (United States Government Advisor throughout the drafting of the Constitution of the Republic of Kosovo)

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THE CONSTITUTIONAL COURT OF KOSOVO IN COMPARATIVE PERSPECTIVE

Established in 2009 pursuant to Chapter 8 of the 2008 Constitution, the Constitutional Court of Kosovo is the newest constitutional court in the Balkan region and one of the most recently created in the world. Directly linked to the Comprehensive Proposal for the Kosovo Status Settlement, also known as the Ahtisaari Plan,[1] the Court is a post-conflict institution by nature.

All post-conflict institutions, including constitutional courts, face unique challenges that set them apart from institutions operating in other contexts. These challenges include establishing and maintaining institutional legitimacy, especially when acting contrary to popular opinion; carving out powers and jurisdiction in relation to other institutions, including other apex courts; and functioning in post-conflict environments that may remain fragile, chaotic and divided.

Post-conflict constitutional courts in particular face a number of unique challenges. They are called upon to establish and embed respect for the Rule of Law and address thorny post-conflict issues at the risk of being labeled activist. Along with other courts, they must demonstrate their role as protectors of human and minority rights, particularly in multi-ethnic societies in which conflict was related to ethnicity. A key responsibility of the judicial branch in general, and of constitutional courts specifically, is to serve as role models for delivering equal justice,

[1] The blueprint for the Constitutional Court was initially set out in Article 6 of Annex 1 of the Comprehensive Proposal for the Kosovo Status Settlement.

not victor's justice, immediately following conflict.

The Court's Legacy

In Kosovo's immediate post-conflict phase, the Constitutional Court stepped up to the plate and met its obligations with resolve and purpose.

From its inception, the Court has handled more than 2400 cases[2] and issued more than 200 opinions. 151 of the cases were filed by individuals seeking constitutional review of judgments from the Supreme Court;[3] 57 opinions were issued in cases referred by various state actors.[4]

The Court has also exercised discipline and restraint, important qualities when establishing institutional legitimacy. More than 1500 resolutions have been issued in which cases and issues were found to be inadmissible.[5]

As compared to other constitutional courts in the region, the Court has fared well. It has benefitted from strong constitutional rigidity, a concept supporting finality of its opinions and a high level of difficulty in overturning them by way of constitutional or legislative amendment or popular vote. Possessing jurisdictional power in thirteen types of cases, Kosovo's Constitutional Court enjoys wider jurisdiction than other constitutional courts in the Balkan region.

The Court has exhibited courage in granting jurisdiction in cases that might be considered overly political by other courts. Dissenting opinions are not uncommon, a sign of intellectual depth among the justices, who are aware that preserving strands of reasoning that may be unpopular in transitional contexts can nevertheless provide the basis for evolving jurisprudence in the future when legacies of conflict are less prominent.

During its first fourteen years, Kosovo's Constitutional Court has established itself as the strongest protector of minority rights in the Balkan region. Significantly, in the 2010 Prizren Municipality Case, the Court invalidated regional symbols that did not represent minority groups in a multi-ethnic society, as required by Article 113 of the Constitution and Article 3g of Annex II of the Comprehensive Proposal for the Kosovo Status Settlement.

The Role of International Law

The Court has also made its mark with respect to the application of international law, mandated by Articles 19 and 22 of the Constitution, which state that eight international agreements and instruments are directly applicable and

[2] Data contained in this article were accumulated from the Constitutional Court's website and were current as of October 2023.

[3] The right of individual petition for review is provided for in Article 113(7) of the Constitution. It was initially required by Article 2.4 of Annex 1 of the Comprehensive Proposal for the Kosovo Status Settlement, which stated "The Constitution shall provide for the right for individuals claiming that the rights and freedoms granted to them under the Constitution have been violated by a public authority to introduce a claim to the Constitutional Court, following the exhaustion of all other remedies."

[4] Parties authorized to refer matters to the Constitutional Court are enumerated in Article 113 of the Constitution.

[5] See, for example, Constitutional Court of the Republic of Kosovo, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo, Constitutional Review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of This Agreement, Judgment in Case No. KO 95/13, 9 September 2013 www.gjk-ks.org/repository/docs/gjkk_ko_95_13_ang.pdf

have priority over all other laws.[6] It follows and applies the jurisprudence of the European Court of Human Rights, but it has also demonstrated its commitment to highest international judicial standards by following and applying international law even when not required to. The Court has demonstrated its willingness to seek guidance when facing issues of first impression; it has sought and received advice from the Venice Commission in at least thirteen cases, demonstrating a willingness to conform its evolving jurisprudence to the highest international standards. Its use of advisory opinions,[7] although not expressly permitted by the Constitution itself, distinguishes its work from that of a number of other, more well-established apex courts.

The Constitutional Court's website (https://gjk-ks.org/en/) makes an important contribution to the growth of international and comparative law. Since the website was created, it has published its opinions in five languages, thereby making its jurisprudence freely and transparently available to the global community. In this way, the Court not only reflects the application of highest international standards but also contributes to their development through its own work.

The Constitutional Court as a Transformative Institution

As a transformative institution operating in the context of transitioning from conflict to peace, the Constitutional Court has approached its work without reservation, rarely sidestepping issues that might be considered too political by other courts. A few examples include:

Removal of two presidents and the dissolution of two National Assemblies.[8]

An opinion holding that the election of the Speaker of the Assembly was unconstitutional, resulting in his resignation.[9]

[6] These international laws, which are guaranteed by the Constitution and automatically applicable, are the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the International Covenant on Civil and Political Rights and its Protocols; the Council of Europe Framework Convention for the Protection of National Minorities; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. Additionally, Article 19 specifies that any other international agreements ratified by the Republic of Kosovo become part of the internal legal system and are directly applied unless their application requires the promulgation of a law.

[7] See, for example, the opinion in the case of The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of Article 84 (14) (Competencies of the President) with Article 95 (Election of the Government) of the Constitution of the Republic of Kosovo; Case No. KO 103/14, 1 July 2014. www.gjk-ks.org/repository/docs/gjkk_ko_103_14_ang.pdf.

[8] See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu Case No. KI 47/10, 12 October 2010. www.gjk-ks.org/repository/docs and Constitutional Court of the Republic of Kosovo, Sabri Hamiti and Other Deputies, Judgment in Case No. KO 29/11, 22 February 2011 www.gjk-ks.org/repository/docs

[9] See Constitutional Court of the Republic of Kosovo, Applicants Xhavit Haliti and 29 other Deputies of the Assembly of the Republic of Kosovo. Constitutional Review of Decision No. 05-V-001 votes by 83 Deputies of the Assembly of the Republic of Kosovo on the Election of the President of the Assembly of the Republic of Kosovo, Dated 17 July 2014, Judgment in Case No. KO119/14 26 August2014 www.gjk-ks.org/repository/docs/gjk_ko_119_14_ang.pdf

Rulings on Cooperative Agreements on Association between Kosovo and Serbia, including principles intended to guide the Association of Serb Municipalities.[10]

Review of the 2009 Law on Amnesties.[11]

An opinion addressing whether constitutional amendments enacted to facilitate the establishment of the EU-designed Specialist Chambers for War Crimes complied with fundamental rights and freedoms guaranteed in the Constitution.[12]

The Court's impact has also been transformative in contexts not directly related to the conflict. In the Kastrati Family case, for example, the Court held that the failure of a municipal court to issue an emergency protective order amounted to a deliberate violation of the constitutional right to life and effective legal remedies. In another groundbreaking case, the Women's Quota Case, the Court invalidated a constitutional amendment proposed by the Speaker of the Assembly stating that all genders must be represented in positions of governmental ministers and deputy ministers by at least 40%, holding that the proposed amendment would have diminished rights and freedoms guaranteed in the Constitution.

Conclusion

Through its courageous jurisprudence and use of jurisdictional grants, the Constitutional Court of Kosovo has earned its place among the most influential post-conflict apex courts worldwide.

The Court's courage should be situated within the context of the hard work undertaken by those who laid the groundwork for its creation, both before and during the constitutional process. In particular, the clear blueprint provided by President Martti Ahtisaari in the Comprehensive Proposal for the Kosovo Status Settlement set forth guidelines for "constitutional, economic and security provisions aimed at contributing to the development of a multi-ethnic, democratic and prosperous Kosovo," including key elements required in the Constitution. The effort of all justices of the Court, including the current President, Honorable Gresa Caka-Nimani, throughout its first fourteen years must also be acknowledged; their commitment and resolve have contributed to the stature of the Court both regionally and internationally.

[10] See Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of the Principles Contained in the Document Entitled "*Association/Community of Serb majority municipalities in Kosovo general principles/main elements*" with the CRK, Judgment in Case No. Ko 130/15, 23 December 2015 www.gjk-ks.org/repository/docs/gjk_ko_130_15_ang.pdf

[11] See Constitutional Court of the Republic of Kosovo, Albulena Haxhiu and 12 other Deputies of the Assembly of the Republic of Kosovo; Constitutional review of the Law, No. 04/L-209, on Amnesty. https://gjk-ks.org/en/decision/constitutional-review-of-the-law-no-04l-209-on-amnesty/

[12] Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and Referred by the President of the Assembly of the Republic of Kosovo on 9 March 215 by Letter No. 05-433/DO-318, Judgment in Case No. Ko26/15, 15 April 2015 www.gjk-ks.org/repository/docs/KO26-15_ANG.pdf

In the process of bringing to life the Constitution and a court with final authority to enforce compliance of laws with it, credit must be given to the Constitution Working Group, whose members worked assiduously in internal thematic focus groups to create a document that reflected highest international legal and constitutional standards while remaining true to Kosovo's own history, values and aspirations. Although it is impossible to separately identify the individual efforts of each Working Group member, particular contributions during negotiations and drafting were instrumental in breaking impasses that threatened to derail the process. Deserving of special mention are the inputs of the Honorable Nekibe Kelmendi, independent Kosovo's first Minister of Justice, whose tragic family narrative of loss provided the moral authority to negotiate issues that appeared to be intractable.

The Constitution and Constitutional Court of Kosovo represent commendable achievements in the global pantheon of post-conflict institutions and will doubtless provide useful guidance to others participating in the arduous work of post-conflict reconstruction.

Contribution by Mr. Diego Solana, International Advisor of the World Jurist Association

World Jurist Association
Peace Through Law

THE CONCEPT OF RULE OF LAW AND THE CONSTITUTIONAL APPROACH IN SPAIN TO THE PANDEMIC

Welcoming regards and congratulations to the Constitutional Court of Kosovo during your anniversary. I am honored to participate in this international gathering and celebrate this special occasion with you.

Firstly, I feel that I must clarify that I am not a judge. I am a legal practitioner and represent the World Jurist Association, an NGO based in Washington that promotes peace through law, the rule of law as the only alternative to the rule of force. This organization was founded by two great men more than 60 years ago, Chief Justice of the Supreme Court of the United States, Earl Warren, and the President of the American Bar Association, Charles Rhyan. They had different meetings and discussions with Sir Winston Churchill during the Cold War Years when the total annihilation of the world was a real threat. They decided to mobilize the entire international legal community on a global campaign to promote the rule of law as the only alternative to the rule of force. During our last World Law Congress, held at the American Bar Association and United Nations headquarters in New York, some of the judges of this Constitutional Court came to this conversation of the global voice of the law with more than 2000 thousand attendants, including President of the European Union Von der Leyen, President from Canada Justin Trudeau, President of Ecuador, Guillermo Lasso, and Spanish King Felipe VI and 30 Chief Justices from Europe, Africa, Asia, New Zealand... Fortunately, this Constitutional Court was kindly to return the invitation to our organization.

Being the World Jurist Association an organization that promotes the rule of law, I should start my intervention by trying to define and

shape the full meaning of such a powerful concept. The rule of law needs to be anthropocentric, which means it must be oriented towards human beings in its content and goal. In other words, the reference of a constitution to human being is an anthropological axiom that recognizes the dignity as a basic value of the constitution. As Immanuel Kant said, dignity is a value in itself that never allows a human being to be made an instrument for another goal. Human dignity is necessarily connected with freedom and democracy; it belongs to all people who must live as equals in a political community. This means that restriction of freedom is necessary when regarding the rights of others only for a common public interest. Another important feature of the rule of law is that is subject to the principle of proportionality, meaning that it should assess whether the restriction of freedom is necessary and individually tolerable and adequate, and therefore legitimized. It is essential that freedom, which is by its nature linked to human dignity, is confirmed as a principle and the restriction of freedom is regarded as the exception that must be the legitimized based on the principle of the rule of law. This order of fundamental values transfers dignity, freedom, and equality into the sphere of action of state power into the sphere of institutions. All institutions must realize these values and public authorities are bound by all elements of the rule of law.

Legal ordinary orders are laws made by parliament or by people that must respect fundamental rights and legislators must enact clear and specific laws, that shall not be retroactive. The protection of legitimate expectations must be guaranteed restrictions on freedom must be guided by the mentioned principle of proportionality and judicial review must be effective and comprehensive. The rule of law is also based on the principle of separation of powers and must be observed to safeguard freedom. Basically, we see that these core elements are present in all constitutional systems even if they are not always fully observed in political reality or euphemistically said.

These principles of the rule of law also apply outside the state level. For example, within the framework of the European Union, a supranational community, but also in the relation of states with each other under international law, therefore being universal. But it is also important that citizens, who are not lawyers, decide that they will abide the law and respect judge´s rulings, even if they disagree. Why do people obey the law? In my view, because they see the alternatives, such as an absence of law or reliance on force, are worse. Because they understand that in communities not based on the rule of law, they are governed by the rule of force, by a particular family, by an ideology... and, at the end, this confronts the dignity of the human being and the anthropocentric approach of any constitutional system. It is important to continue the path started by Charles Rhyan and Chief Justice Earl Warren, promote debate and explain the rule of law not only to the elites or the academia, but also to the regular citizen who ultimately will have to decide to follow rules against their individual interests. Without the support of the people on the rule of law as a common value in our society, countries would be impossible to govern.

Secondly, I would also like to enrich this enlightening discussion about individual rights and freedom with a quite recent decision of Spanish Constitutional Court. I refer to the Sentence

about the restriction measures adopted by the Government and the Spanish Congress during the pandemic, Sentence of July 14, 148/2021.

I would like to note that the states of emergency Spanish law were passed in 1981 and that it was quite a forgotten law, except for a very limited application during the air traffic controllers strike in 2010. When the pandemic began, all jurists reviewed our old books from college because it was a completely new situation. Now let me briefly explain the 3 states of emergency currently existing in Spain: (i) the state of alarm (applicable in natural catastrophes); (ii) the state of exception (applicable in severe and extraordinary alterations of public order); and (iii) the state of siege (for attacks against Spanish sovereignty). The difference between them is the intrusiveness of the Government. The degree of restrictions on individual rights and control of the Government by the Congress is higher in the state of siege or the state of exception than in the state of alarm.

Bearing this in mind, 50 Members of Parliament, which is the minimum required by Spanish law, challenged the constitutionality of the state of alarm declared by the Government before the Constitutional Court. The discussion was not whether the Government was entitled or able to declare a state of alarm, since Spanish Organic Law 4/1981 enables the government to declare a state of alarm during a pandemic but whether the extraordinary restrictive measures were constitutional, and particularly the severe lockdowns.

It is important to note that, although it was a decision of the Government, the legal norm used has the category of a law in our constitutional architecture, not just a regulation. That is the reason why the challenge of the declaration of state of alarm was not filed before the Administrative Chamber of the Spanish Supreme Court but directly before the Constitutional Court.

Particularly, the discussion focuses on the distinction between the state of alarm and the state of exception in the context of the pandemic for two reasons. The first one is that, according to Organic Law 4/1981, "*suspensions*" of fundamental rights are possible only under a state of exception or a state of siege, but not under a state of alarm, which just allows for "*restrictions*" of fundamental rights. The second reason is that, in accordance with its lower degree of intrusiveness, the state of alarm allows a broader margin for the Government than the state of exception. Indeed, the power to declare a state of alarm corresponds exclusively to the Spanish Government (whereas an *ex-ante* authorization by the Congress is needed for a state of exception). The declaration of a state of alarm can last for a maximum of 15 days and, after this term, the Congress shall be informed of the declaration and must meet immediately for this purpose. Congress' powers are exclusive when it comes to the authorization of an extension of a state of alarm beyond the period of the initial declaration whereas, in the state of exception Congress can also set the effects and scope of the restrictive measures and therefore its role is not to simply vote whether if they support or reject the state of alarm.

Most of the health measures challenged were declared constitutional. Limitations of education, freedom of religion, or the right of association were within the power of the Government and Congress in a state of alarm... In this context, a norm that banned the movement of all people, anywhere and at any time, except in cases expressly considered as justified, implied

a suspension of the right to freedom of movement (art. 20 Organic Law 4/1981), something not allowed under the state of alarm. Therefore, the Constitutional Court considered unconstitutional the restrictions, measures or lockdowns adopted by the Government and approved by the Congress not because the Government was not entitled to adopt the state of alarm in the event of the pandemic but because the restrictions adopted were really a suspension of individual freedom rights only allowed in the state of exception. In such a case, the lockdowns required an *ex-ante* authorization by the Congress and a discussion about the concrete measures adopted. Hence, the Government was not entitled to impose the lockdowns and should have also adopted, jointly with the Congress, the degree of the restrictions measures because Spain was really under a state of exception.

If we analyze the practical consequence of this Sentence of July 14, 2021, they were quite limited. The pandemic was already under control when the decision was adopted and somehow people worldwide were more interested in forgetting and getting over it. The declaration of unconstitutionality led to the revocation of the thousands of fines imposed on Spanish citizens for violating the lockdowns.

I wanted to share with my views regarding this Sentence because I think it is a very important because it created a jurisprudence about one of the backbone issues within our constitution and the rule of law. And in the future when a government is tempted to adopt restriction measures on fundamental constitutional rights, they will need to consider the legality of said measures while doing so. In the current debate about the balance between security and individual rights, my view is that this Sentence will be a leading case that will really work as a check against the abuse of power by governments. As a matter of fact, I had the opportunity to discuss privately with one of the judges who supported the unconstitutionality of the restrictions adopted. The judge was proposed to the Constitutional Court by the political party ruling the country and politicians expected his support to the Government, but it did not happen. The judge told me that it was one of the most difficult cases of his career. Like great leaders, this judge was not only concerned about this particular case, but about future events when Governments could be tempted to abuse the state of emergency and restrict individual fundamental rights during riots, public demonstrations going out of hand, crimes, or natural catastrophes.

In my view, this case is a good example of one of the missions of a constitutional court: to protect citizens from the abuse of power. That is why I chose this topic.

I do not want to finish my intervention without saluting again the President of the Constitutional Court of Kosovo for their kind invitation, all the judges, and all the team that has made this international summit possible to celebrate your 14 anniversary. Please let me also extend an invitation to the next World Law Congress organized by the World Jurist Association in May 2025. During these days, the Caribbean city of Santo Domingo will become the world capital of the law.

Thank you very much.


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