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**“Evolutions in Contemporary Constitutional Justice:
The Example of the Balkan Region”**

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

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

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

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

The dominant model of liberal democracy defines constitutionalism by the ability of constitutional courts to restrain politics (the authorities), emphasising the protection of human rights and the supremacy of law over politics. It is no coincidence that an anecdote about a fishing net is often retold—a net in which only the small and weak fish are trapped, while the larger ones manage to tear through it. This net symbolizes a handicapped legal system that lacks robust mechanisms to curtail the injustices resulting from the disregard of the principle of the “separation of powers.” The concept of “neo constitutionalism” views the Constitution as the “law above all laws,” as a “law created by the people to regulate and limit the governments.” As a result, this dominant model

understandably assigns the privilege of interpreting the Constitution, its values, principles, and norms to constitutional courts, which are the supreme and authoritative interpreters. Meanwhile, all other bodies of state power are obligated to comply with the Constitution and the decisions of the Constitutional Court.

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

For this reason, we must view constitutional courts as the subject of ongoing constitutional tension, their institutional constitutional design involves inevitable compromises, because to maximize certain values, others must – at least to partially weaken. However, these compromises should not be made with just anyone, especially not with politics. I am referring to compromises between the aforementioned four essential goals, as a direct consequence of this tension is that it is logically impossible to design a perfect constitutional court. This impossibility, along with potential poor compromises, naturally results in the fact that constitutional courts generate unmet societal and political expectations. That is the case in my country as well. The adoption of the Constitution from 1991 created enormous expectations. Given the historical context, there was enthusiasm and great energy, which naturally generated expectations that the transition to democracy would stabilize and improve the overall socio-political landscape, or simply bring about a better life. The Constitution from 1991 was meant to serve as the foundation upon which the new constitutional legal, and the new social order would be built, ensuring the transition to democracy and the establishment of democratic institutions whose essential goal was to protect human freedoms and rights. Around the new Constitution, its foundational values, principles and norms, the citizens built their expectations for a better near future. Unfortunately, it is an objective assessment that these expectations were disappointed. It is undeniable that we transitioned into democracy, and it is undeniable that we had periods of stability, but we have yet to make the necessary leap toward a mature democracy.

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

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

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

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

In confronting this anomaly in our constitutional reality, as the Constitutional Court, we are prepared to uncompromisingly protect, against frequent violations, the fundamental value of the separation of powers. Without hesitation, we must limit the predominance and usurpation of the executive over the legislative and judicial authorities through our decisions and judicial activism,

and thereby restore the disrupted system of checks and balances. We must, to the greatest extent possible, prevent the domination of politics over law, placing it within constitutional boundaries, because it creates a climate of uncertainty and makes it impossible for citizens to fully exercise their rights and freedoms. If we remain uncompromising in this resolve, without a doubt, the result, over a reasonable period of time, will be the enhancement of constitutional and legal culture, the absence of which has caused the consequences we have witnessed. Constitutional courts must bear this responsibility!

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

Mature democracy implies a high level of constitutional and political culture, genuine, and not false dedication to the rule of law, stable and independent institutions, institutions that have withstood the test of time and can effectively address challenges such as political crises, economic, health, or any other downturns, deeply integrated democratic norms that respect fundamental freedoms and rights, and uncompromising constitutional courts that act as guarantors of the rule of law. Will it be easy? Certainly not, but even the longest journey begins with the first step. What might that initial step be? In my view, it is a proper understanding of politics and law. For a correct understanding of politics and its actors, it is essential to recall the attributes Max Weber¹ identified as necessary for a politician—passion, responsibility, and moderation. For a real understanding of the rule of law, judicial authorities, especially constitutional judges should possess the following key qualities —conscience, independence, and uncompromising integrity. The absence of loyalty to these qualities is not only a “mortal sin,” as Weber claimed for politicians, I would say the same applies to judges, it will also keep us trapped in a cycle of uncertainty, instability, and permanent crises will persist, distorted values will be accepted as a way of life, the erosion of the legal order will continue, and the credibility of institutions will

¹ Max Weber, Politics as a Vocation. "Politics as a Vocation" is an essay by German economist and sociologist Max Weber. It originated in the second lecture of a series he gave in Munich to the "Free Students Union" of Bavaria on 28 January 1919.

further deteriorate. The success and pace of this process, which will encounter obstacles of various kinds (politicisation, the ethnicization of court proceedings, nationalism, populism, etc.), will depend on that first step, which will begin to shift the mentality and awareness of the citizens, and new standards will gradually be established, under which no future will fall below. No one is saying it will be easy or quick. But it must begin!

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

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

Thank you.

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

leads to a violation of the principle of the rule of law but also the principle of separation of powers.²

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

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

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

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

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

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

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

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

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

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