Draft Speech Balkan Constitutional Forum

I. Introduction

Dear host President Panova, dear President Lenaerts, dear Vice-President Jourova, dear Deputy Prime Minister Gabriel, dear Minister Slavov, dear other Presidents and high office holders of the superior courts from this part of Europe,

I would like to thank the organisers, and particularly President Panova, for this invitation to address the Balkan Constitutional Courts Forum. I am honoured to represent the European Court of Human Rights today and participate in this important instance of dialogue between courts.

Taking an active part in events like the one of today is a key priority for our Court. Justice no longer lives in an ivory tower detached from the environment that surrounds it. Long gone are the days when judges communicated with the outside world only through judgments and decisions they deliver. The rule of law, democracy and respect for human rights and fundamental freedoms which have been the pillars of peace and well-being in Europe for decades are our joint endeavour and shared responsibility. This common project can only be achieved by working together, with dialogue being fundamental for any form of fruitful cooperation.

In line with this stance, may I express my support to a new forum which is being created as a platform for collaboration between constitutional and some other apex courts in the region. The ECtHR itself established its Superior Courts Network in 2015 with the aim of reinforcing judicial dialogue. Our experience has shown that manifold interactions within the network are invaluable to foster better cooperation between courts, and regional initiatives like yours will hopefully bring about the same experience.

The topic of this years' forum is "Countries' experience with providing citizens access to constitutional justice"; a topic that is of particular interest also due to expected constitutional amendments in Bulgaria, the country which is hosting us today. In view of the expected introduction of a constitutional complaint procedure for individuals, exchanging and sharing experiences are of paramount importance.

Of course, such a major constitutional amendment raises many questions, such as how to best frame the individual complaint procedure, and what consequences can be expected for the work of the constitutional courts. Effects for the level of protection of human rights and fundamental freedoms are obviously a central consideration too.

But not all of these questions are national in nature: individual access to constitutional justice is also linked to the work of international institutions, such as the ECtHR. In line with the principle of subsidiarity, it is primarily the task of national legal systems of the High Contracting

Parties to safeguard the rights and freedoms guaranteed by the European Convention on Human Rights and additional Protocols thereto. Introducing a national legal remedy dedicated specifically to the protection of human rights is regularly expected to strengthen the respect for such rights domestically and reduce the strain on the ECtHR which needs to face tens of thousands of individual applications annually.

When discussing access to the constitutional court and other apex courts I would like to complement the various national contributions which we will hear today with some reflections from the perspective of the ECtHR.

Specifically, I will touch on a couple of cases in which the Strasbourg Court had the opportunity to deal with the right of access to court in the context of appeals to superior courts. These cases, all of which were brought under Article 6 of the Convention, illustrate the boundaries which the protection of human rights has set to rules framing access to justice.

However, before I begin, it strikes me as fitting to first reflect more generally on the relationship between the Strasbourg Court and constitutional courts.

II. Relationship between the ECtHR and constitutional courts

To understand this relationship, it seems appropriate to rewind to its beginnings, and recall the Statute of the Council of Europe.

The Statute requires its members to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and to collaborate sincerely and effectively in the realisation of the aim of the Council (Article 3 Council of Europe Statute). Since 1949, and up until today, this Statute and the common values it affirms still form the basis of our joint efforts.

More recently, at the 4thSummit of the Heads of State and Government of the Council of Europe earlier this year, the members restated their "deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems" (Reykjavik Declaration).

This political declaration also expresses the legal principle of shared responsibility, on which our Convention system is based. It is also the ideal starting point to elaborate on the relationship between the Strasbourg Court and national constitutional courts.

Shared responsibility means that the fundamental rights and freedoms which underpin our democracies are foremost safeguarded by the Convention Parties, and their national (constitutional) courts, but may be subject to external supervision by the ECtHR.

In light of this principle of shared responsibility, I wish to highlight two aspects of the relationship between the ECtHR and constitutional courts.

The first aspect is the **principle of subsidiarity**, which I have briefly addressed earlier, and the corresponding requirement for applicants to exhaust domestic remedies. This requirement allows the European Court to benefit from the careful examination of the substance of a case by national courts, up to the highest instance. As the Court has repeatedly highlighted, this gives domestic courts "the opportunity to strike the "complex and delicate" balance between the competing interests at stake [as they are] in principle better placed to make such an assessment."

At the same time, where a member state has observed the Convention in its assessment, it is not the role of the ECtHR to substitute its own assessment of the merits for that of the competent national authorities. It only does so where there have been shown strong reasons for doing so.

The second aspect of the relationship between the ECtHR and constitutional courts which I would like to highlight is the doctrine of the **margin of appreciation**, which is also a safeguard of diversity.

This doctrine reflects the fact that the Convention does not impose uniform standards in relation to a multitude of issues, including the organisation of justice systems, to name but an example.

This does not mean, however, that issues within the margin of appreciation escape supervision by the Strasbourg Court entirely: where it is alleged that a member state has overstepped its margin of appreciation to the detriment of the protection of an individual's human rights and freedoms, the Court can be called upon to scrutinise the action (or inaction) of this state against the standards of the Convention. The strictness of the Court's scrutiny will depend on whether in a given situation the margin of appreciation is wide or narrow, this in turn depending largely on the nature of the right at stake and of the corresponding obligation of the contracting State.

Furthermore, when the Court is called upon to interpret the Convention in the light of present-day circumstances, it regularly considers the existence of a European consensus on the legal issue at stake. It will look for common ground between national laws and practices of the Contracting States, as well as on EU and international level. The jurisprudence of the domestic constitutional courts will usefully inform the ECtHR on the standpoint of national legal systems. Even in absence of a European consensus, considerations of national constitutional courts, like those of our sister Luxembourg Court, serve as most valuable source of inspiration in our adjudication.

With this in mind, I will now return to the topic of today's forum, which at the same time forms the core of my keynote: individual access to constitutional and superior courts in light of the Convention.

III. Right of access to constitutional justice in the context of Article 6 ECHR

Let me start with some general considerations.

As I already hinted at during the introduction of this keynote, the Court deals with the right of access to a court in the context of Article 6 of the Convention. This right of access was first defined in the seminal judgment of *Golder v. the United Kingdom*, (1975, §§ 28-36). In this case, the Court held that the access to a court constitutes an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention (idem §§ 28-36). Referring to the rule of law and the avoidance of arbitrary power, the Court found that the right of access to a court constituted an inherent aspect of the safeguards enshrined in Article 6.

However, the Court has itself acknowledged that the right of access to a court is not absolute and may be subject to limitations, as long as these do not touch on the very essence of this right. What is more, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of

proportionality between the means employed and the aim sought to be achieved (see, for example, *Baka*, § 120).

Now, what does this mean in relation to the access of individuals to constitutional justice?

The Convention does not lay down any general requirements as to how member states should organise their justice systems; it merely provides for a right of appeal in criminal matters (Article 2 of Protocol No. 7). Accordingly, there is no general requirement for member states to set up courts dealing with the constitutional complaints by individuals.

Nevertheless, if such courts *are* part of the judicial organisation of a member state, this means that they must comply with Article 6 of the Convention. The right of access to constitutional and other superior courts is thus part of a broader right to access to a court under Article 6.

Consequently, the same general principles as regards restrictions apply. When a person complains that his/her access to constitutional justice has been restricted, the ECtHR will first consider whether there is a legitimate aim for doing so, and whether the restriction is proportionate to that aim. As I already mentioned, this restriction must not deny the very essence of the right to access to a court.

Of course, in doing so, the ECtHR acknowledges the 'special role' of superior courts, namely, to only deal with matters of utmost

significance. In practice, this often means that like the Strasbourg Court, they are battling a high case load and are working under the constant pressure of their backlogs.

Superior courts have therefore implemented strategies to restrict access, filter out the most important cases, and perform their judicial work in the most efficient way. I will now turn to a few cases which illustrate such strategies, and how the ECtHR has assessed them against the standard of Article 6. Not all of the cases concern constitutional courts specifically, they mostly concern other superior courts. As you will see, however, the legal assessment of the ECtHR as regards access restrictions remains largely the same.

IV. Case examples

a.) Admissibility criteria and excessive formalism

The first example concerns admissibility criteria, which sometimes include *ratione valoris* requirement. In order to restrict access to superior courts, member states may set a financial or similar threshold. The ECtHR has accepted that such thresholds are, in principle, a legitimate procedural requirement in light of the 'special role' that the highest courts fulfil.

In *Zubac v. Croatia* (2018), the Grand Chamber had the opportunity to assess a complaint of an alleged excessive formalism unduly restricting access to the supreme court in application of a *ratione valoris* requirement.

The facts concerned a civil action, the subject matter of which was first evaluated at around 1400 euros, but at a later hearing re-evaluated to be around ten times higher. Although it was no longer possible to amend the value of the civil claim at this point in the proceedings, the trial courts used the new figure to calculate related court fees. When the applicant later wanted to appeal on points of law, the Supreme Court relied on the initial evaluation and declared the action inadmissible *ratione valoris*.

The applicant alleged that this amounted to excessive formalism which had prevented them from having access to the Supreme Court in breach of Article 6 § 1 of the Convention.

This case illustrates well how the Court assesses whether a restriction of access is proportionate to the aim it pursues. The Court considered three criteria: i) whether the restriction was foreseeable; ii) whether the applicant had to bear the consequences of the errors committed and iii) whether the restriction amounted to excessive formalism.

As regards foreseeability, the Court concluded that the procedure was regulated in a coherent and foreseeable manner (§ 113). As regards the second criterion, the Court considered that the applicant had failed to

use the necessary due diligence to change the claim before the court of first instance, in accordance with domestic law.

Finally, with regard to the criterion of excessive formalism, the Court considered that "it would be difficult to accept that the Supreme Court, in a situation where the relevant domestic law allowed it to filter cases coming before it, should be bound by the errors of the lower courts when determining whether or not to grant someone access to it." (§ 122).

Ultimately, the Croatian Supreme Court's decision merely ensured legal certainty and proper administration of justice (§ 123) in connection with an erroneous procedural step. The Court considered that, in such circumstances, no issue of excessive formalism should arise (§ 123).

The Court unanimously held that there had been no violation of Article 6 of the Convention.

b.) Strict procedural rules

The second example which may be of interest to discuss is the case of *Arribas Anton v. Spain* (2015).

The facts of the case concerned an administrative sanction applied for serious misconduct. All appeals by the applicant were dismissed, and the *amparo* appeal was declared inadmissible by the Constitutional Court,

which considered that the appeal was not of "special constitutional importance".

The applicant complained that this ground for rejection amounted to excessive formalism and that its application constituted a breach of Article 6 ECHR, depriving them of access to constitutional justice.

In this case, again, the ECtHR considered the aim of the restrictive measure. The ground for refusal in question had indeed been introduced to prevent the Constitutional Court from being overloaded with cases of lesser importance, and hence to ultimately strengthen the protection of fundamental rights in cases that did meet this threshold. This constituted a legitimate aim and was not, as such, disproportionate or contrary to the right of access to court.

Furthermore, the Strasbourg Court also recalled that it was permissible for the procedure before superior courts to be more formalised. It also noted that the Constitutional Court had applied this ground in a flexible manner (§§ 23 and 50). Moreover, the applicant was heard by a court of first instance and a court of appeal, both of which had delivered reasoned opinions which were free of arbitrariness.

c.) Limited Reasoning

The final type of restriction which I would like to discuss is limited reasoning. Superior courts may refer to general legal provisions when

rejecting appeals to filter out requests that do not have any prospect of success or where the issue raised does not meet a specific threshold of importance. The ECtHR has accepted these as not being contrary to the Convention.

Let us consider the case of *Talmane v. Latvia* (2016) as an example. The facts of the case concerned a criminal conviction for a traffic offence. The applicant complained about the evaluation of evidence and deficiencies in the investigation up to the Latvian Supreme Court. The latter did not admit the appeal, citing a general legal provision defining its competence – particularly, that it was not competent to re-assess the evidence –, and noting that the appeal did not point to a fundamental breach of criminal law.

Although according to the Court's case law, judgments should adequately state the reasons on which they are based, the extent to which this duty applies may vary according to the nature of the decision. In particular, it has held that this duty cannot be understood as requiring a detailed answer to every argument (see *García Ruiz v. Spain* § 26).

The Court has held that courts of cassation comply with their duty when they base themselves on a specific legal provision without further reasoning in dismissing cassation appeals which do not have any prospects of success (see *Sale v. France* § 17). It takes the same approach with regard to constitutional court practice (see *Wildgruber v. Germany*).

In order to determine whether the requirements of fairness in Article 6 were met, the Court has considered matters such as the nature of the filtering procedure and its significance in the context of the proceedings as a whole, the scope of the powers of the superior court, and the manner in which the applicant's interests were actually presented and protected before that court (*Hansen v. Norway* § 73).

In the case at hand, the Court especially considered the nature of the complaint, which related to the establishment of evidence. The Court highlighted that the evidence had been examined by two courts which had provided proper reasoning, and that the Supreme Court was not able to re-examine the existing evidence or to obtain new evidence, as highlighted in its letter. In these circumstances, the Court was satisfied that the grounds of the applicant's appeal had been duly examined and that the reasoning had been sufficient.

Accordingly, it held that there had been no violation of Article 6 of the Convention.

V. Concluding remarks

However, this is not a regular outcome of proceedings in Strasbourg. In the more recent case of *Xavier Lucas v. France* (2022), for example, the Court found a violation of Article 6 due to a procedural rule which had been excessively formal.

The French Court of Cassation had rejected an appeal because it had not been submitted electronically due to several practical obstacles which the applicant had faced. The Court held that the applicant should not have to bear the consequences of this mistake, and the rejection of the appeal was thus considered to be excessively formal.

Indeed, case law on restrictions of access to justice abound. Within its broader case law on Article 6, the ECtHR has had the opportunity to deal with many more elements restricting access to justice, such as high court fees, lack of legal aid, formal application of deadlines for submitting appeals, and the exclusion of certain subjects from taking court proceedings.

What transpires from the cases I have presented today?

First of all, these cases illustrate the relationship between the ECtHR and constitutional or other superior courts. It is not the task of the ECtHR to express its view on the policy choices made by member states. Instead, its task consists of determining whether the restriction of access in a particular case – and with due regard for the proceedings as a whole – produces consequences which are in conformity with the Convention.

As the case examples have shown, the ECtHR is mindful of the special role of superior courts. It will always take into account the

domestic law and case law, as well as the domestic proceedings seen as whole.

Secondly, filtering mechanisms and other rules limiting access to superior courts are not contrary to the Convention *per se*, as long as they pursue a legitimate aim and are not disproportionate to this aim. In any case, such access restrictions should never deny the essence of the right of access to court in the relevant domestic proceedings viewed as a whole.

Finally, when rejecting appeals, superior courts should always make sure that the grounds are clear and their application compatible with the Convention.

Hopefully this address sheds some light on how the ECtHR approaches its assessment when dealing with the right of access to superior courts, and thereby contribute to this important dialogue on constitutional justice. In all, I am looking forward to a fruitful exchange, congratulate you on the launching of the Forum and wish it every success in the many years to come.

Thank you for your attention.