

## **SPEECH OF PRESIDENT GRESA CAKA - NIMANI**

Honorable President, Ms. Panova,  
Honorable President Začaj,  
Counsellor of State Kalogeropoulou and Judge Stoilov,  
Dear Professor Mihailova,  
Honorable Vice-President of the European Court of Human Rights,  
Honorable participants,  
Ladies and Gentlemen,

I would like to begin this discussion by emphasizing the symbolic importance of this day. Establishing the Balkan Forum of Constitutional Courts – is a tremendous step forward for the countries of the region in terms of their commitment to the fundamental values of democracy, rule of law and human rights and fundamental freedoms.

It reflects the deep commitment of the Constitutional Courts – the guardians of the respective constitutional orders of the participating states – to play an active and substantial role in advancing and protecting our common values, and while working together, to contribute to the establishment of a coherent system for the protection of common values and fundamental rights in the European continent.

While the participating countries do not necessarily have the same status in terms of membership in the European Union and/or the Council of Europe yet – they all unconditionally share the commitment to embrace and apply the values that derive from the case-law of the Court of Justice of the European Union and the European Court of Human Rights. The presence of President Lenaerts and Vice President Bošnjak here today, equally reflects their commitment to supporting this Forum and our Courts, as we strengthen the cooperation and advance the constitutional justice in the Balkan region.

As the youngest Constitutional Court represented in the Forum, our Court tremendously values the opportunity to benefit from the cooperation with its peers and to provide its contribution to the Forum. The Constitutional Court of the Republic of Kosovo just marked the 14<sup>th</sup> anniversary of its establishment this week through a solemn ceremony and an international conference, in which we had the honor to welcome some of the delegations present here today. Its establishment in 2009, marked a significant milestone for our young nation. The Court was tasked with the responsibility and given the honor to interpret a newly adopted Constitution, which reflects the best international standards in terms of division and balance of power as well as the human rights and fundamental freedoms.

Taking into account the lack of a previous constitutional tradition however, the provisions of a new Constitution were interpreted (i) based on the case-law of the European Court of Human Rights – a constitutional obligation under the Kosovo constitutional order; (ii) based on the case-law of the Court of Justice of the European Union – the aspiration for the membership to which is clearly stipulated in our Constitution; (iii) the relevant opinions of the Venice Commission; and (iv) when applicable, the common denominator deriving from the case-law of the Constitutional Courts across the continent.

Based on these principles and values, the Constitutional Court has contributed to shaping the functioning of democracy in the Republic of Kosovo. It has contributed to shaping its state and international identity. It has managed, within an extremely short period of time, to stand dignified

among the Constitutional Courts that are members of the World Conference on Constitutional Justice, the Venice Commission and as of today, the Balkan Forum of Constitutional Courts.

The role of the Constitutional Court of Kosovo has been tremendous particularly in establishing an effective system for the protection of fundamental rights and freedoms. The case-law of the Constitutional Court set the example of an institution and a country at the outset, demonstrating that it is truly and genuinely committed to adhering to the best international standards pertaining to human rights as outlined in the European Convention on Human Rights, the Charter of Fundamental Rights, including the Framework Convention for Protection of National Minorities.

Through the mechanism of individual control, the Constitutional Court, has laid a very strong foundation for the advancement of human rights, including but not limited to (i) the right to life and the positive obligations of the state in this respect; (ii) gender equality; (iii) active and passive electoral rights; (iv) freedom of expression; (v) property rights; (vi) the right to liberty and security; (vi) privacy; and (vii) non-discrimination. Our Court has already applied Protocol 12 of the European Convention on Human Rights and might be the first in the region to have already applied and found violations of the positive obligations of the state under the Istanbul Convention.

Its most significant case-law, nevertheless, derives from article 6 of the European Convention on Human Rights pertaining to the right to a fair and impartial trial, including access to justice. In respect to the latter, the Court incorporated the principles deriving from the case-law of the European Court of Human Rights, based on which, where there is no effective access to an independent and impartial court, the question of compliance with the rule of law will always arise. Thus, in reviewing the constitutionality of contested acts, the Court continuously applied the proportionality principle between excessive formalism and excessive flexibility in determining the compatibility with the rule of law principles enshrined in the Constitution and the European Convention on Human Rights.

More specifically, there are three primary categories of cases that the Court has dealt with to date in terms of access to justice, namely (i) excessive court fees and/or excessive formalism in interpreting the procedural rules pertaining to court fees; (ii) application and interpretation of time-limits for the initiation of civil disputes and/or lodging appeals; and (iii) *ratione valoris* admissibility threshold in determining the jurisdiction of a higher court. Whether the Constitutional Court found a violation or not through reviewing the abovementioned categories of cases, it clearly incorporated the principles deriving from the common denominator of the relevant European Court of Human Rights case-law, importantly establishing a standard and sending a clear message to the regular courts and/or the relevant public authorities in this respect.

Having said this, the individual cases that might have had the most impact on the rule of law system in Kosovo in terms of access to justice principles, are related to our Court's decision making which concluded that (i) the sub-legal acts; and (ii) the Presidential decrees – are subject to the legality control by the regular courts, as the alternative would constitute a denial of the respective rights to access to justice.

More precisely, the first case is related to a sub-legal act that was adopted by the Ministry of Justice and which allegedly violated the rights of a number of employees of the Forensics Institute. The latter, in its capacity of a legal person, had contested the legality of the respective act before the regular courts. However, the courts, in essence maintained that the legality of the government's sub-legal acts cannot be subject to their review. The Constitutional Court, annulled the decision-making of the regular courts, maintaining, among others, that (i) based on the applicable laws, the regular courts had the uncontested competence to review the legality of such acts; and (ii) the refusal to do so, denies individuals their right to "*access to the court*".

Whereas the second case is related to an Ambassador that was dismissed by the President of the Republic and who initiated contested procedures before the regular courts alleging the illegality of the respective presidential decree. The regular courts had all dismissed his allegations, by maintaining that the Presidential decrees cannot be subject to the review of legality by the regular courts. The Constitutional Court, annulled the decision-making of the regular courts, maintaining that the non-treatment of the applicant's claims regarding the legality of his dismissal from the position of Ambassador violated his constitutional rights and more importantly, established the standard that the legality of Presidential decrees is subject to the legality review by the regular courts. In this respect, the Court also elaborated the principles deriving from *Eskelinen and Others v. Finland*, establishing the standard based on which public officials must always have access to a legal remedy unless it has been explicitly excluded and even in that case – the exclusion must have followed a legitimate aim and be proportional to the aim sought.

I must also add that these principles have also been applied by the Constitutional Court in terms of preventive and abstract control. Just recently, the Court has reviewed the constitutionality of two laws adopted by the Assembly of the Republic, declaring them unconstitutional, including but not limited on the grounds of denial of an effective legal remedy and access to justice. Both laws, namely the Law on Kosovo Prosecutorial Council and Law on Public Service – entailing significant reforms of the prosecutorial system but also of the entire civil service system, had among others, proposed mechanisms for the dismissal of Prosecutorial Council members and/or civil servants without the respective availability of an effective legal remedy. The Constitutional Court maintained that the respective reforms were not compatible with the Constitution and the European Convention on Human Rights, including on the account of denial of the rights to a legal remedy and access to justice.

Throughout this case-law, the Constitutional Court ensured that the constitutional guarantees for fundamental rights and freedoms are not *“theoretical and illusory”*, but rather *“practical and effective”*, also reflecting the commitment of the Court to precisely abide by the European Court of Human Rights case-law, not only in terms of protecting the fundamental rights and freedoms, but also in establishing a standard which will enhance the performance of other public authorities in the Republic of Kosovo.

Establishing these standards in parallel with the gradual process of establishing and/or developing the constitutional justice, has not gone without challenges. In facing the latter, beyond relying on the case-law of the European Court of Human Rights, the Court has also analyzed and/or referenced the case-law of other Constitutional Courts in the region and beyond. This approach that our Constitutional Court has consistently used, sheds a light on the importance of the cooperation among Constitutional Courts and days like today. Exchange of experiences and/or know-how not only on substantive areas of law, but also management related issues and/or communication with the public, including critically important areas such as judicial reputation – is tremendously valuable not only for the enhanced operations of our Courts, but for the strengthening of rule of law and democracy in the entire region.

The Constitutional Courts – as guardians of Constitutions – occupy a central place in addressing the challenges facing the region, through contributing to the constitutionalization of the rule of law principles deriving from each of our constitutional systems and gradually establishing a unified system of protection of fundamental rights and freedoms in the entire European continent. Such an objective bypasses our common goals and fully aligns with the ones of the European Union and Council of Europe.

This because, in a world order characterized by conditional and inter-dependent sovereignties – the common European heritage can only be protected and cultivated through a commitment to interstate solidarity and deep cooperation. Exchanging experiences and benefiting from the respective constitutional traditions enriches the perspectives of us all and enables us to advance our traditions of constitutional justice.

Finally, despite the fact that discussions this afternoon are thematic, the solemnity of the day – the importance of the establishment of the Balkan Forum of Constitutional Courts – obliges me to note the symbolism of this occasion for our Constitutional Court in particular. While our Court is a member of the World Conference on Constitutional Justice and the Venice Commission, it has continuously struggled to become a member of the European Conference of Constitutional Courts – due to political obstacles – which should under no circumstance prevent the cooperation among the Constitutional Courts in advancing the principles of constitutional justice.

Signing the agreement establishing the Balkan Forum of Constitutional Courts – is a step forward for our Court to expanding its partnerships and contributing in equal terms with partner Constitutional Courts to the stability and prosperity of the region and beyond. To this end, I must express my deepest gratitude to the Constitutional Courts of Albania, Montenegro, North Macedonia and the Republic of Türkiye. Equal gratitude goes to the Constitutional Courts of Bosnia and Hercegovina, Croatia, Romania and Greece – represented by my panelist Counsellor of State Kalogeropoulou. However, my deepest gratitude and appreciation goes to the Constitutional Court of Bulgaria and its President Panova who has started and brought to a successful closure this important initiative and who has been a continuous partner and friend of our Court.

Together, in solidarity and in partnership, we will foster an environment of mutual learning and growth. We will enhance rule of law through constitutional justice in the Balkans and only together can we counterbalance any force and occurrence that threatens to undermine our common values – freedom, peace and democracy.

Thank you for your attention.