

Lost, “in the Twilight Zone” *Rebutting the Court’s Blunder*

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**LOST, “IN THE TWILIGHT ZONE”
REBUTTING THE COURT’S BLUNDER**

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Lost, “in the Twilight Zone”¹

Rebutting the Court’s Blunder

EXECUTIVE SUMMARY

The present paper analyzes the nexus between compensatory remedies and the Kosovo Constitutional Court. Drawing from its relevant caselaw, the inquiry commences with a descriptive layout of the Court’s pronouncement on the issue of compensatory jurisdiction. From there arises the query on the validity of the Court’s reckoning, adjoined with a snippet of comparative considerations. Afterwards ensues the centerpiece of this work; rebutting the Court’s line of reasoning, and providing the proper interpretative approach that the Court ought to have employed. In what constitutes an interpretative string, the present work crafts a normative blueprint emanating from a systematic reading of the Constitution and the auxiliary. To this end, it reaches the conclusion that the Constitutional Court does have the authority to decide on whether to afford compensation when adjudicating claims falling within the ambit of the Constitution’s 113.7-integrand.

ROADMAP

The paper opens up with a narrative tone on the Constitutional Court’s caselaw concerning its refusal of compensatory jurisdiction (I); continuing thereafter with a conceptual mulling, and a brief comparative display (II). Afterwards follows the development of an interpretative schema that provides a solution to what the author considers to be the Court’s blunder (III).

¹ Excised from Rod Serling’s iconic prologue in: Rod Serling, “The Twilight Zone.” Cayuga Productions, Inc. & CBS Productions, TV Series, United States of America, 1995-1964; The term “twilight zone” is defined as “an ill-defined area between two distinct conditions, categories, etc., usually comprising certain features of both; an indefinite boundary”: Collins Dictionary, “Twilight Zone,” available at: <https://www.collinsdictionary.com/dictionary/english/twilight-zone#:~:text=in%20American%20English-.1.,zone%20between%20right%20and%20wrong>, last accessed on: 03/13/2024;

*As it will be argued throughout, Kosovo’s Constitutional Court has come to find itself lost in the twilight zone: between its 113.7-jurisdiction and its *but-for* (on the CC’s jurisdictional facets, see *infra* note 54 in its entirety); (*Also consider: Kosovo’s Constitutional Court, Case KI48/18, *infra* note 36, para. 183); ***Also, especially** consider this allegorical reference with regards to the quoted passage in: Hasani (citing: Guerra, Luis Lopez), *infra* note 33, and as a theme behind the arguments throughout the present paper.

I. The Cluster

September 2023 saw Kosovo's Constitutional Court ("the Court"/"CC") return to a familiar topic. In Case KI64/23, the Court was seized with the issue of lengthy court proceedings stemming from the applicant's decade and a half-old civil-law claim that has/d yet to conclude at the first instance court.² Ultimately, and quite naturally so, the Court found infringements of both: Kosovo's Constitution, and of the European Convention on Human Rights.³ As a corollary, it obliged the first instance court where the lengthy proceedings rest, ". . . to notify the Constitutional Court as soon as possible, but no later than 6 (six) months . . . regarding the measures taken to implement [the CC's decision] . . ."⁴ However, the importance of this case lies not in what the Constitutional Court did, but in what it claimed to lack: compensatory jurisdiction.⁵ It was not the first time either, with the Court *recurrently* citing a lack of authority to do so in a cluster of cases.⁶ Pertinently, the Court's salient articulation of its stance, is to be found in the following passage:

" . . . Article 41 of the ECHR . . . cannot serve as a basis for seeking "just satisfaction" or compensation for non-pecuniary damage before the Constitutional Court, as this Article refers to the competences of the ECtHR and not to the competencies of the domestic courts which are part of the protection mechanism guaranteed by the ECHR . . . Despite the fact that the ECtHR has specific authorization to award "just satisfaction", this Court is bound and conditioned to act only on the basis of the legal and procedural regulations governing its work. None of the documents governing the scope and proceedings before this Court and the actions that the latter may take, provide an equivalent authorization to award "just satisfaction" in the manner in which such competence is clearly ascribed to the ECtHR . . ."⁷

It follows, that the foremost consideration and the question presenting itself, is whether the CC's reliance on a lack of authorization to award compensation is valid.

II. The Premier Peculiarity

As Canguilhem counseled, "[t]o act, it is necessary at least to localize"⁸ and thus ". . . what precedes the question . . ."⁹ on validity is: where does the authority to compensate stem from?

² The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI64/23, No. ref.: AGJ 2281/23, 26 September 2023, pg. 3, 12, 17 & overall/in Passim.

³ Kosovo's Constitutional Court, Case KI64/23, id., para. 103, 106 & point II of the dispositive.

⁴ Kosovo's Constitutional Court, Case KI64/23, id., point III of the dispositive.

⁵ Kosovo's Constitutional Court, Case KI64/23, id., para. 104 (internal citation/reference to cases omitted);

*Note that the present paper's use of the terms 'authority to award damages/compensatory authority' refers to the same authority that ECtHR has through the ECHR's Article 41 (on the ECtHR's authority per Article 41: Shelton, infra note 78, pg. 321; also consider infra note 80 in its entirety; also consider especially VENICE REV. 2021, infra note 20, pg. 54 (internal citation omitted) (the relevant passage quoted in infra note 79).

*As it will be presented, the argument **is not** that the CC's compensatory authority flows from Article 41 of the ECHR (infra note 82), **rather**, the arguments on **the CC's basis for this authority are provided in Section III** of this paper (see infra note 84).

⁶ Kosovo's Constitutional Court, Case KI64/23, id., para. 104 (citing CC's cases': para. 119 of KI10/18; para. 197 of KI108/18; para. 115 of KI19/21; and KI06/21); The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI108/18, ref. no.: RK 1433/19, 30 September 2019, para. 198 (citing CC's case: para. 44 of case KI177/14).

⁷ Kosovo's Constitutional Court, Case KI108/18, id., paras. 195-196 (internal references to the ECHR omitted).

⁸ Georges Canguilhem (*with an introduction by Michel Foucault*), "The Normal and the Pathological." Translated by Carolyn R. Fawcett in collaboration with Robert S. Cohen, Zone Books, New York, 1991, pg. 39.

⁹ *The excised quote flows from a non-legal context*: Interview of Jacques Derrida, "Derrida: "What Comes Before The Question?" Youtube.com, published on 12/27/2007, available at: <https://www.youtube.com/watch?v=Z2bPTs8fspk&t=308s>, last accessed on: 03/06/2024.

Namely, was the Court's *in abstracto* refusal of compensatory claims, grounded in the lack of individuals' substantive rights or the boundaries of the CC's jurisdiction?¹⁰ The answer requires no sweat, with the Court's refusal emanating from its jurisdictional considerations as deduced from the earlier indented passage,¹¹ and its *dicta* that persons could pursue the claim(s) on damages through ordinary courts.¹² Hence, the Court was acknowledging the possibility of the applicant's right to damages,¹³ but then relying on (and refrained by) what it considers to be *its* lack of jurisdictional entitlement to entertain the compensation request.¹⁴

Now, -and briefly- the right to remedies flows from substantive rights¹⁵ but the latter is in turn ". . . controlled, limited, and, in practice, significantly defined by, the procedures that govern access to the remedies for any breach of that right."¹⁶ Calibrating this consideration to our case, it could be argued that the *premier peculiarity* (to all the appearances¹⁷) rests on the nature of Kosovo's Constitutional Court as a non-ordinary one¹⁸ – a confluence to which we later return in this paper.¹⁹

But in the interval then, let us offer a brief showcase of selected comparative examples, illustrating that furnishing Constitutional Courts with the authority to award compensation, is *not* unprecedented.²⁰

¹⁰ See Halberstam, *infra* notes 15 & 16; see later on, the discussion in *infra* section III ("The Interpretative String") together with its subsections; again, consider *infra* notes 77 & 78 in their entirety.

¹¹ Kosovo's Constitutional Court, Case KI108/18, *supra* note 6, paras. 195-196 (internal references to the ECHR omitted).

¹² Kosovo's Constitutional Court, Case No. KI64/23, *supra* note 2, para. 105 (" . . . individuals may seek compensation from public authorities in case of violation of their constitutional rights and freedoms.") (" . . . where only the finding of the violation is not sufficient and monetary compensation is necessary, individuals have the right to use the legal remedies available to exercise their rights, including compensation for material and non-material damage before regular courts.") (citing: CC's cases, KI113/21, Applicant *Bukurije Haxhimurati*, Judgment of 20 December 2021, paras. 145-151; KI10/18, Applicant *Fahri Deqani*; KI108/18, Applicant *Blerta Morina*; KI06/21, Applicant *Dragan Mihajlović*).

¹³ See Kosovo's Constitutional Court, Case No. KI64/23, *id.*

¹⁴ Kosovo's Constitutional Court, Case No. KI64/23, *id.*, para. 104 (internal citations omitted); Kosovo's Constitutional Court, Case KI108/18, *supra* note 6, paras. 195-196 (internal references to the ECHR omitted); *contra infra* note 77; *On the concept of remedies, see *infra* note 78 in its entirety.

¹⁵ Daniel Halberstam, "Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach." Cambridge Yearbook of European Legal Studies, Vol. 23, 128-158, 2011, pg. 149.

¹⁶ Halberstam, *id.*, pg. 150; again, see *infra* note 78 in its entirety.

¹⁷ Consider the Court's pronouncement per compensation claims through ordinary courts: Kosovo's Constitutional Court, Case No. KI64/23, *supra* note 2, para. 105 (internal citations omitted).

¹⁸ See *infra* note 32 in its entirety.

¹⁹ *Infra* Section III ("The Interpretative String") and its subsections.

²⁰ See Council of Europe, European Commission for Democracy through Law (Venice Commission), "Revised Report on Study on Individual Access to Constitutional Justice." Adopted by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020) on the basis of comments by Mr. Gagik Harutyunyan, Ms. Angelika Nussberger & Mr. Peter Paczolay. Opinion No. 1004 / 2020, CDL-AD(2021)001, Strasbourg, 22 February 2021, pg. 48, para. 185 (**hereinafter "VENICE REV. 2021"**) (***The report notes, however, that Constitutional Courts that provide compensation to individuals represent a point of departure from the lion's share: *id.*, pg. 52, para. 199);**

***The Venice Commission has in the past provided a compilation of jurisdictions in which one can find instances of Constitutional Courts equipped with the authority to prescribe compensation to the applicants:** Council of Europe, European Commission for Democracy through Law (Venice Commission), "Study on Individual Access to Constitutional Justice." Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), on the basis of comments by Mr. Gagik Harutyunyan, Ms. Angelika Nussberger & Mr. Peter Paczolay, Study N° 538 / 2009, CDL-AD(2010)039rev., Strasbourg, 27 January 2011, pg. 110-111 ("1.1.17 Table: Capacity of constitutional courts to attribute damages") (**hereinafter "VENICE 2011"**).

A. A Caveat in this Comparative Snippet

To begin with this laconic display²¹, a not-so-distant example from Kosovo's purview is to be found in Croatia, with the latter's Constitutional Court possessing the authority to award damages in relation to lengthy court proceedings, as rooted in the "Croatia's Act on the Constitutional Court."²² Albeit in a peculiar context, a -rather constricted- compensatory authority is likewise afforded to the Constitutional Court of Albania,²³ whereas further away, Slovakia represents another case in point, having constitutionally-provided the authority to compensate to its Constitutional Court.²⁴ Broadening the horizon, these instances are not exclusive to the Old Continent as we encounter a compensatory feature also within the authority of South Africa's Constitutional Court.²⁵

When extrapolating from the above, and recalling the Kosovo's Constitutional Court's reliance on the lack of authorization when dismissing compensation claims²⁶; it would then appear that *to some extent*, the foregoing comparative snippet does lend support to the CC's rationale, for, *predominantly* in these comparative examples, the authority to compensate stems from *specific* and *explicit* norms.²⁷

B. Plucking the Lotus

In line with the foregoing, and mindful of Constitutional Courts' non-ordinary feature,²⁸ then one would not be mistaken to derive an *inverted* analogy to the "the Lotus Principle," the ". . . implicit corollary . . ." of which (as duplicated from the domain of international law): ". . . permits all

²¹ *It is *laconic*, as it is *functional* to the ensuing parts of this paper, and as such it is not intended to have a panoptic scope.

²² VENICE 2011, *supra* note 20, pg. 110 (quoting Article 31 para. 5 & Article 63 para. 3 of Croatia's "Constitutional Act on the Constitution Court").

²³ *See* Law No. 8577, dated 10/02/2000, (amended by law no. 99/2016 on the Organization and Functioning of the Constitutional Court of the Republic of Albania, Article 71/ç (*added by law no. 99/2016, article 66*) paras. 1-4, available at: https://www.gjk.gov.al/web/constitutional_court_law_1855.pdf, last accessed on: 02/09/2024;

*Whereas on developments in Albania's constitutional system regarding individual complaints: *see* Aurela Anastasi & Erind Merkuri, "The Reform of Justice in Albania and the Extension of the Access of the Individual in the Constitutional Court." *In*: Ersi Bozhaku, Giorgio Spangher & Anila Hoxha (editors), "La Riforma Costituzionale ("strutturale") del Sistema della Giustizia Nella Repubblica d'Albania: Riflessioni e Confronti con il Sistema Italiano." *Jus, International Law & Economics, History & Society, Nuova Cultura, Anno II, n. 2, La Sapienza, 2017.*

²⁴ VENICE 2011, *supra* note 20, pg. 110 (quoting Article 127 para. 3 of Slovakia's Constitution).

²⁵ VENICE REV. 2021, *supra* note 20, pg. 48-49 (citing: *Fose v Minister of Safety and Security*, CCT14/96, 05/06/1997, ZACC 6, in CODICES); *see also* Donald Dinnie, "When Constitutional Damages Are Claimable." *Financial Institutions Legal Snapshot Blog*, 9 November 2021, (referencing/discussing: *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37) available at: <https://www.financialinstitutionslegalsnapshot.com/2021/11/when-constitutional-damages-are-claimable/>, last accessed on: 03/11/2024.

²⁶ Kosovo's Constitutional Court, Case No. KI108/18, *supra* note 6, paras. 195-196 (internal references to the ECHR omitted).

²⁷ *See supra* notes 22, 23 & 24; Compare with the model of South Africa, *supra* note 25; Compare also with the CC's pronouncement: Kosovo's Constitutional Court, Case KI108/18, *id.*

²⁸ Generally, on "ordinary courts": *see* Council of Europe, European Commission for Democracy through Law (Venice Commission) in co-operation with the Constitutional Court of the Czech Republic, "The Limits of Constitutional Review of the Ordinary Court's Decisions in Constitutional Complaint Proceedings." Brno, Czech Republic, 14-15 November 2005. Report: "Limits of Fact, Law and Remedies: Myths and Realities of Constitutional Review of Judicial Decisions - Constitutional Court of Spain Experience," by Ignacio Borraro Iniesta. CCS 2005/11, CDL-JU(2005)068, Strasbourg, 20 December 2005, pg. 3-4, 9 (**abbreviated reference: "Iniesta"**); *see also* Michelman, *infra* note 35.

that it does not forbid.”²⁹ That is, extrapolating the *analogical underpinnings* of this principle’s *inverted form* to the domestic-constitutional terrain, it appears that it resembles -and is more closely aligned to- the CC’s peculiar nature.³⁰ Hence, *in relation* to ordinary courts, nothing is permitted for the Constitutional Court unless authorized in the first place.

However, and crucially, it is the author’s contention that the above is controlling *but-for* Article 113.7-jurisdictional ground embedded in Kosovo’s Constitution.³¹

III. The Interpretative String

The foregoing propels us to elucidate the proper interpretative approach; developed through a conceptual, and systematic interpretation of the relevant constitutional prescriptions on constitutional rights and those on the CC’s jurisdictional tenets. As such, the following provides an analytical framework that is exclusionary (displacing the Court’s approach) and at the same time establishing the proper interpretative diagram.

A. Thread #1 – Origins

Au fond, Kosovo’s CC finds itself outside of the ordinary courts’ territory,³² but a duality comes into play, when triggered through/by the 113.7-unit, whence it *transiently* morphs into an ordinary-like one.³³ Notwithstanding, it is well established that “. . . the Constitutional Court cannot

²⁹ Lori Fisler Damrosch & Sean D. Murphy, “International Law, Cases and Materials.” 7th Edition, West Academic Publishing, American Casebook Series, 2019, pg. 72; see An Hertogen, “Letting Lotus Bloom.” *European Journal of International Law*, Vol. 26, Iss. 4, 901-926, 2015, pg. 902 (internal quotations omitted) (*Scholar Hertogen argues that the Lotus Principle *is not* the correct interpretation of the SS Lotus Case: id., pg. 903 and overall/in Passim); *However, this does not affect its extrapolation here, as the reference to the Lotus Principle in the present paper is solely based on its content in order to convey an analogical reasoning ; whereas for those curious on “the SS Lotus Case”: The Case of the S.S. “Lotus” Judgment of 7 September 1927. Publications of the Permanent Court of International Justice, Serie A - No. 10, Series A: Collection of Judgments (1923-1930).

³⁰ *On the CC’s nature: see infra notes 32, 34 & 35; *Note that Constitutional Courts are to be considered as a standalone branch of power in relation to the conventional three: European Commission for Democracy Through Law (Venice Commission), Luis López Guerra, “The Judiciary and the Separation of Powers.” Conference for Constitutional and Supreme Court Judges from the Southern African Region, Strasbourg, 22 March 2000, CDL-JU (2000) 21, pg. 2-3 & 12; *As per Kosovo’s case this is evident, and flows from: K-Constitution, infra note 32, Article 4 para. 6.

³¹ See discussion in infra Section III (subsections A & B); Consider, Hasani (citing: Guerra, Luis Lopez), infra note 33.

³² Visar Morina, “Constitutional Jurisprudence: (Theoretical and Comparative Reviews).” Institute for Constitutional and Parliamentary Studies, 2013, pg. 110-111 (internal citations omitted); see the Constitution of the Republic of Kosovo, available at: https://gjk-ks.org/wp-content/uploads/2021/11/gjkk_kushtetuta_e_republikes_se_kosoves_shq.pdf, last accessed on: 03/11/2024, Article 103 para. 2 (inferred when considering the supremacy of Kosovo’s Supreme Court in the judicial system) (**abbreviated reference: “K-Constitution”**); Also see Kosovo’s Constitutional Court, Case KI56/19, infra note 35; *Generally, on the nature of Constitutional Courts: see Michelman, infra note 35, pg. 278-279 (internal citations/quotations omitted) & overall/in Passim;

³³ See Enver Hasani *In*: Enver Hasani & Ivan Čukalović, “Commentary - Constitution of the Republic of Kosovo.” GIZ, 2015, pg. 590 (“Under [Kosovo’s Constitution, Article 113 para. 7] jurisdiction, the constitutional courts become judges of regular judges, and exceed the traditional limit of constitutional judiciary established by Kelzen”) (citing: Guerra, Luis Lopez (1994) ‘The Role and Competences of the Constitutional Court, in The Role of the Constitutional Court in the Consolidation of the Rule of Law.’ European Commission for Democracy Through Law (Venice Commission), UniDem Seminar Bucharest, 8-10 June 1994, CDLSTD (1994) 010, [http://www.venice.coe.int/docs/1994/CDLSTD\(1994\)010_e.asp](http://www.venice.coe.int/docs/1994/CDLSTD(1994)010_e.asp)); *The forgoing passage, forms part of the theme of some arguments in the present paper as it influences/inspires the mode of thought per this matter, and thus is represented frequently throughout. *this specific reference: hereinafter as “Hasani (citing: Guerra, Luis Lopez).”*; *consider also infra note 36 in its entirety.

act as “a fourth instance court” in relation to the decisions of the regular courts³⁴; as the CC is precluded from embarking on undertakings to solve issues outside the four corners of constitutional issues.³⁵ However, the CC *does* become such one re to the 113.7-span of control³⁶ – because the latter’s glint constitutes a “*corpus specialis*.”

B. Thread #2 – “Corpus Specialis” & Returning the Lotus

The phrase “*corpus specialis*” is alien to any lexicon and as such, it is the author’s linguistic improvisation in an attempt to convey the idea intelligibly. The reluctance to use the proverbial “*lex specialis*” comes from the fact, that the matter at hand does not concern the situation of one norm concretizing another.³⁷ On the other hand, the established “*corpus juris*” is likewise deficient, as it serves the sole purpose of something akin to a legal nomenclature.³⁸ Instead, and in line with the transformative nature of 113.7,³⁹ *corpus specialis* should be understood to connote a body of law that is specific *on its own*, unaligned with *external* aspects (such as *lex specialis* is with *lex generalis*).⁴⁰ Yet, in lieu of being merely descriptive,⁴¹ *corpus specialis* has a *modifying* effect as exemplified in the 113.7-triggered jurisdiction, *within the confines* of which, the CC’s tenor *transiently morphs* into an ordinary-like one.⁴²

Hence, even within the *mise-en-scène* of one legal matter, the Court’s traits mutate (in a pendular inflection) between the special/ordinary divide,⁴³ because, although the CC is not “. . . a fourth instance court . . .” due to its jurisdictional contours⁴⁴; it nevertheless does become *one*

³⁴ The Constitutional Court of the Republic of Kosovo, Resolution on Inadmissibility in Case No. KI41/16, Ref. No.: RK 1072/17, 1 June 2017, para. 68 (citing: Akdivar v. Turkey, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; case KI86/u, Applicant Milaim Berisha, Resolution on Inadmissibility of 5 April 2012).

³⁵ Kosovo’s Constitutional Court, Case KI41/16, *id.*, para. 68; The Constitutional Court of the Republic of Kosovo, Resolution on Inadmissibility in Case No. KI56/19, No. ref.:RK 1576/20, 15 June 2020, para. 45 (internal references/citations omitted);

*Outside of Kosovo’s context: *see* Arne Marjan Mavčič, “Individual Complaint as a Domestic Remedy To Be Exhausted or Effective Within the Meaning of the Echr - Comparative and Slovenian Aspect.” 2011, available at: <https://www.concourts.net/lecture/constitutional%20complaint1.pdf>, last accessed on: 03/06/2024, pg. 6; *see* Frank I. Michelman, “The Interplay of Constitutional and Ordinary Jurisdiction,” pg. 278 *In*: Tom Ginsburg, Leo Spitz & Rosalind Dixon (editors), “Comparative Constitutional Law.” Research Handbooks in Comparative Law series, Edward Elgar Publishing, 2011; Also, in the context of Albania: *see* Anastasi & Mercuri, *supra* note 23, pg. 50 (citing: Decision No. 106, dated 1.8.2001 of the Constitutional Court); *see also infra* note 46 in its entirety.

³⁶ *See* Mavčič, *id.*, pg. 6 (not in the context of Kosovo); *Whereas in the context of Kosovo, consider and compare the Court’s pronouncement in: The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI48/18, No. ref.: AGJ 1322/19, 4 February 2019, para. 183; *Consider also in general: “. . . constitutional courts with individual complaints procedures and prior exhaustion of judicial remedies sit on appeal from other courts Judgments . . .”: Iniesta, *supra* note 28, pg. 5; *Generally, also *see* Lech Garlicki, “Constitutional Courts Versus Supreme Courts.” *International Journal of Constitutional Law*, Vol. 5, Iss. 1, 44–68, 2007, pg. 46-47 (internal citation/reference omitted); *The argument in the main text, is also provided later on (*see in infra* note 45)*

³⁷ On *lex specialis*: Trans-Lex.org, Commentary to Trans-Lex Principle, available at: <https://www.trans-lex.org/910000>, last accessed on: 17/01/2024.

³⁸ *See* Legal Information Institute, Cornell Law School, the definition of “Corpus Juris.” Available at: https://www.law.cornell.edu/wex/corpus_juris, last accessed on: 03/06/2024 (hereinafter: ‘corpus juris’).

³⁹ Again, *see* Hasani (citing: Guerra, Luis Lopez), *supra* note 33.

⁴⁰ Again, on *lex specialis*: Trans-Lex.org, *supra* note 37.

⁴¹ Consider again ‘corpus juris,’ *supra* note 38.

⁴² *See* Hasani (citing: Guerra, Luis Lopez), *supra* note 33; *Passing through a “twilight zone”! : for which let us recall the allegory in *supra* note 1.

⁴³ Again, *see id.*; *Whereas, generally, on the interaction between constitutional/special and ordinary jurisdiction (including the characteristics of different Constitutional Courts) and the notion of “acoustic separation”: Michelman, *supra* note 35, overall/in *Passim* (internal citations/quotations omitted); *But consider Iniesta’s take as per these two forms of jurisdictions: Iniesta, *supra* note 28, pg. 5.

⁴⁴ Kosovo’s Constitutional Court, Case KI41/16, *supra* note 34; *see also supra* notes 34 & 35 in their entireties.

such, but *only when* adjudicating a claim(s) raising the question of a public authority violating the individual's rights⁴⁵ – hence, a constitutional question.⁴⁶

Along these lines, whereas confines are constructed by the CC's *limits* to avert encroaching upon ordinary courts' jurisdictional terrain⁴⁷; the compensatory prong on the other hand (within the 113.7-sweep), is *merely* a protrusion/extremity of this jurisdictional locale.⁴⁸ The Court's surgical incision to divorce the two (*and with that its jurisdictional authority*) is therefore, artificial and a relinquishment of its vested powers. As a corollary, in the *corpus specialis* of 113.7, the analogy to the Lotus Principle⁴⁹ *need not* be turned on its head – as everything permitted to ordinary courts is likewise afforded to the Constitutional Court,⁵⁰ barring any restriction or alteration of some sort. Importantly, there is nothing in Kosovo's positive law stipulating nor suggesting a cutback on the CC's jurisdictional property concerning compensatory authorizations.

A contrario, if the ordinary Courts can entertain compensatory claims in cases of public authorities violating the individual's constitutional rights,⁵¹ it would lead to an absurd outcome if the Constitutional Court (as “the final interpreter” of the latter⁵²) could not.⁵³

⁴⁵ *One such claim that would could for instance when it is claimed that “[o]nly one of the two key witnesses was permitted to be heard”: Council of Europe, European Court of Human Rights, “Guide on Article 6 of the Convention – Right to a Fair Trial (Civil Limb).” 2022, available at: https://www.echr.coe.int/documents/d/echr/guide_Art_6_eng, last accessed on: 01/26/2024, pg. 91, (citing: *Dombo Beheer B.V. v. the Netherlands*, 1993, §§ 34-35); *Also, compare with Kosovo's Constitutional Court, Case No. KI48/18, *supra* note 36.

⁴⁶ *See* Fruzsina Gárdos-Orosz, “The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint.” *Acta Juridica Hungarica*, Vol. 53, No. 4, 302-315, 2012, pg. 310 (internal citations/quotations omitted) (addressing the concept of “special constitutional issue” with reference to the German legal system); *see also* again *back* to *supra* note 35 in its entirety.

⁴⁷ *See* The Constitutional Court of the Republic of Kosovo, Resolution on Inadmissibility in Case No. KI30/13, Ref. No.: RK443/13, 8 July 2013, paras. 25 & 30 (internal reference omitted); *Consider, Iniesta, *supra* note 28, pg. 13 (“Only ancillary attention is devoted to fashioning adequate remedies to restore the perturbed constitutional order. One of the reasons to explain this situation is the idea that “constitutional jurisdiction” is drastically limited in the field of remedies: it is for “ordinary courts” to adopt all measures necessary to restore and compensate any breach of fundamental rights that the constitutional court judgment might declare.”); *see* Kosovo's Constitutional Court, Case KI41/16, *supra* note 34, para. 68 (internal references/citations omitted); *see* Anastasi & Merkuri, *supra* note 23.

⁴⁸ It is difficult not to think of (*in analogical terms to*) the “implied powers” notion pertaining to the “Necessary and Proper Clause” in the U.S. legal system, as explained (in an easy-to-digest manner and in order not to exhaust the reader) here: Legal Information Institute, Cornell Law School, “Necessary and Proper Clause,” available at: https://www.law.cornell.edu/wex/necessary_and_proper_clause, last accessed on: 02/09/2024, (also citing: U.S. Reports: *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). *Here the analogy consists in that, the authority to compensate is *at the very least* an “implied power” for Kosovo's Constitutional Court;

*Also, by analogy *see* David, *infra* note 53; *Also, consider this in analogy to the ECtHR where “. . . the awarding of sums of money to applicants by way of just satisfaction is not one of the [ECtHR's] main duties but is incidental to its task of ensuring the observance by States of their obligations under the Convention”: Veronika Fikfak, “Changing State Behaviour: Damages before the European Court of Human Rights.” *The European Journal of International Law*, Vol. 29, Iss. 4, (published by Oxford University Press on behalf of EJIL Ltd., 2019), 1091–1125, 2018, pg. 1103, (quoting: ECtHR, *Salah v. The Netherlands*, Appl. no. 8196/02, Judgment of 8 March 2007, para. 70) *although* “[the ECtHR] does not provide a mechanism for compensation in a manner comparable to domestic court systems”: Fikfak, *id.* (quoting: ECtHR, *Varnava v. Turkey*, Appl. nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 10 January 2008, para. 156); “[b]efore the national jurisdictions, a claim for damages on account of a violation of human rights is incidental to the enforcement of human rights . . .”: Quézel-Ambrunaz, *infra* note 74, pg. 191.

*On the other hand, *contra* Iniesta, *supra* note 28, pg. 13 (*the first two relevant passages quoted in Iniesta, *infra* note 53*); *contra* Bundesverfassungsgericht.de, *infra* note 53; *contra* VENICE 2011, *supra* note 20, pg. 5 para. 10 & pg. 41 para. 148.

⁴⁹ *Supra* note 29 and discussion in Section II.B of this paper (“Plucking the Lotus”).

⁵⁰ *See id.*; Compare to (and consider) *supra* note 36

⁵¹ As the CC contends: Kosovo's Constitutional Court, Case No. KI64/23, *supra* note 2, para. 105 (*as discussed in *supra* note 12*) (internal citations omitted).

⁵² K-Constitution, *supra* note 32, Article 4 para. 6 & Article 112 para. 1; Consider also Hasani *In: Hasani & Čkalović*, *supra* note 33, pg. 566 (commenting on Article 112 para. 1 of Kosovo's Constitution).

⁵³ It goes against the very nature of a court (*with the caveat that author David is using the term “courts” with reference to international ones*) to have jurisdiction to settle an issue but not its corresponding element of

C. Thread #3 – Through the Jurisdictional Current

Pursuing the jurisdictional current, Article 113 of Kosovo's Constitution delineates the CC's jurisdictional triggers in an exhaustive list of grounds⁵⁴; albeit its last paragraph provides the possibility to dilate the Court's jurisdiction by law.⁵⁵ Importantly, these grounds on the CC's jurisdiction (including the foregoing) have been particularized by "the Law on the Constitutional Court,"⁵⁶ and as such (while being mindful of constitutional norms' supremacy⁵⁷) are to be read *in pari materia*.⁵⁸

Vital to our discussion here is 113's ground number 7, stipulating that "[i]ndividuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."⁵⁹ The LCC complements this constitutional provision⁶⁰ by providing in its relevant part that "[e]very individual is entitled to request from the Constitutional Court *legal protection* when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority"⁶¹ (emphasis added).

Here the language is telling and furnished with a bidirectional bent, as it "entitles" the applicant to "request" *that which* it impinges upon the Constitutional Court to *deliver*: "legal

compensation: Valeska David, "Reparations at the Human Rights Committee: Legal Basis, Practice and Challenges." Netherlands Quarterly of Human Rights, Vol. 32, Iss. 1, Netherlands Institute of Human Rights (SIM), 8-43, 2014, pg. 16-17 (internal citations omitted);

**contra* Iniesta, *supra* note 28, pg. 13 ("... the idea that "constitutional jurisdiction" is drastically limited in the field of remedies: it is for "ordinary courts" to adopt all measures necessary to restore and compensate any breach of fundamental rights that the constitutional court judgment might declare.") & also, *contra* Iniesta, *id.*, pg. 14 ("[s]ince the decision rendered in the Unión Alimentaria Sanders case (STC 5/1985 of 23 January), the court held that damages are awarded by "ordinary courts"") (citing: STC 5/1985 of 23 January). (*Iniesta however notes that "[o]nly in exceptional circumstances has the Spanish constitutional court awarded damages" (Iniesta, *id.*, pg. 14) and goes on to reference Spanish caselaw where "[t]he constitutional court, in its second *Preysler* ruling (Judgment 186/2001 of 17 September), declared that [. . .] the amount was clearly inadequate to compensate the breach of a fundamental right. And . . . that the court would grant compensation directly, without a second remand to the civil court, awarding the same amount [. . .] that had been granted earlier by a lower court." (Iniesta, *id.*, pg. 14-15, referencing Judgment 186/2001 of 17 September))*; *contra* also with the model of the Federal Constitutional Court of Germany: Bundesverfassungsgericht.de, "Constitutional Complaints." ("It falls to the ordinary courts to render subsequent decisions where necessary – the Federal Constitutional Court does not award damages or order law enforcement measures"), available at: https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html#:~:text=It%20falls%20to%20the%20ordinary,or%20order%20law%20enforcement%20measures.&text=In%20exceptional%20cases%2C%20statutes%2C%20ordinances,challenge%20with%20a%20constitutional%20complaint, last accessed on: 03/11/2024.

⁵⁴ K-Constitution, *supra* note 32, Article 113 paras. 2-9; *It goes well beyond the scope of this paper, but an important facet alongside Article 113 jurisdictional grounds, is also the interplay between Article 84 para. 9 and Article 112 para 1 of the Constitution: *see* The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KO130/15, No. ref.: AGJ 877/15, 23 December 2015, para 87-104 (internal citations/quotations omitted); On a commentary on Article 84.9 of Kosovo's Constitution: Hasani *In*: Hasani & Čukalović, *supra* note 33, pg. 400-403 (internal citations/quotations omitted).

⁵⁵ K-Constitution, *id.*, Article 113 para. 10.

⁵⁶ Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2614>, last accessed on: 03/11/2024 (**hereinafter "LCC"**).

⁵⁷ K-Constitution, *supra* note 32, Article 16 para. 1.

⁵⁸ *See* Visar Morina *In*: Gjyljeta Mushkolaj, Visar Morina & Johan van Lamoen, "Commentary on Law on the Constitutional Court of the Republic of Kosovo." Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2014, *pg. 47-48 of the Albanian version of Mushkolaj et al.* (internal citations/quotations omitted); also, it is contended that the LCC's relevant provisions pertaining to the CC's jurisdiction do not supplant further jurisdictional powers from those already embedded in the Constitution: Morina, *id.*, pg. 49.

⁵⁹ K-Constitution, *supra* note 32, Article 113 para. 7; For a commentary on Article 113.7: Hasani *In*: Hasani & Čukalović, *supra* note 33, pg. 590-596 (internal citations/references omitted).

⁶⁰ Consider again, Morina *In*: Mushkolaj et al., *supra* note 58, pg. 49 (the *in pari materia* facet); For a commentary on Article 47 of the LCC: van Lamoen *In*: Mushkolaj et al., *id.*, pg. 345-358 (internal quotations/citations omitted) (*immediately on *id.*, pg. 345, the commentary on LCC's 47 makes a comparison to Article 113.7 of Kosovo's Constitution*).

⁶¹ LCC, *supra* note 56, Article 47 para. 1.

protection.”⁶² The vernacular employed is broad, hence the reach of “legal protection”: expansive – indicating a blanket-conferral of jurisdiction upon the CC when adjudicating through the 113.7-integrand. Moreover, we have Article 54 of the Constitution, which establishes that “[e]veryone enjoys the right of *judicial protection* if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an *effective legal remedy* if found that such right has been violated”⁶³ (emphasis added). It follows, that per the CC’s scrutiny, Article 54’s prongs of “judicial protection” & “effective remedy” apply just as they do in proceedings before the ordinary courts; with the only difference being that the CC is able to *both*: find a breach of Article 54,⁶⁴ and *at the same time* (*ultimately*, being the “final” authority⁶⁵) remedy this very violation.⁶⁶

Additionally, this “effective legal remedy” provision has a striking resemblance to the ECHR’s Article 13,⁶⁷ with the ECtHR having interpreted the ambit of this notion as inclusive of

⁶² See *id.*

⁶³ K-Constitution, *supra* note 32, Article 54; *Putting the emphasis on the terms “judicial protection” and “effective legal remedy” tracks the CC’s understanding of Article 54 as comprising these two prongs, where “judicial protection” goes hand in hand with K-Constitution’s Article 32, while “effective legal remedy” with the ECHR’s Article 13: Kosovo’s Constitutional Court, Case No. KI48/18, *supra* note 36, paras. 195-198 (internal references/citations omitted); *see also van Lamoen *In: Mushkolaj et al.*, *supra* note 58, pg. 351 (*addressing Article 54 of Kosovo’s Constitution when commenting on LCC’s Article 47; and *id.*, highlighting Article 54 as similar to the ECHR’s Article 13, with the latter point presented also in *infra* note 67) (internal quotations/citations omitted)*;

*The implicit argument in the main text of the present paper to which this footnote corresponds, is reading Article 54 and LCC’s Article 47.1 jointly (for which, again consider the sources in the present footnote, and also *infra* note 73) and to this end also, compare K-Constitution, *id.*, Article 54 to that of LCC, *supra* note 56, Article 47 para 1 (keeping in mind the *paria materia* aspect between the LCC and Kosovo’s Constitution: see Morina, *In: Mushkolaj et al.*, *supra* note 58); consider also *infra* note 66 in its entirety;* For a commentary on Article 54: Čukalović *In: Hasani & Čukalović*, *supra* note 33, pg. 203-210 (internal citations/references omitted).

⁶⁴ See Kosovo’s Constitutional Court, Case No. KI48/18, *id.*, para. 199 (internal citations omitted).

⁶⁵ *Supra* note 52.

⁶⁶ See in analogy: *Aksoy v. Turkey*, no. 21987/93, ECtHR, Judgment of 18 December 1996, para. 95 (“[t]he effect of . . . Article [13 of ECHR] is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under [. . . Article 13]”) (citing/referencing: *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports 1996-V, pp. 1869-70, para. 145); consider, ECtHR, *Kudla v. Poland*, *infra* note 68; consider again *supra* note 63 (where Article 54 of Kosovo’s Constitution is discussed).

⁶⁷ van Lamoen *In: Mushkolaj et al.*, *supra* note 58, pg. 351 (internal quotation/reference omitted); *Kosovo’s Constitutional Court, Case No. KI48/18, *supra* note 36, paras. 196-198 (internal references to ECHR omitted); *Compare K-Constitution, *supra* note 32, Article 54 with: Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms,” as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. Council of Europe Treaty Series 005, Council of Europe, 1950, Article 13 (**abbreviated reference: “ECHR”**); see The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI56/18, No. ref.: AGJ 1595/20, 3 August 2020, para. 131 (citing: Kosovo’s Constitutional Court Judgment in Case No. KI48/18, para. 195);*; *For a streamlined digest on the ECHR’s Article 13: Prepared by the Registry, Council of Europe, “Guide on Article 13 of the European Convention on Human Rights: Right to an Effective Remedy.” Updated on 31 August 2022, available at: https://www.echr.coe.int/documents/d/echr/guide_art_13_eng, last accessed on: 03/16/2024; (*needles to say, but, Article 13 is one of the articles in: ECHR, *supra* note 67);

*Also, generally, on “effective remedy” in the context of the ECHR & ECtHR see Lado Chanturia, “Right to an Effective Remedy in the European Convention on Human Rights.” *Journal of Law*, no. 1 (June):9-25 (Geo) 9, 2023; also generally, see Saba Khujadze & Toma Birmontienė, “Constitutional Court as a Legal Remedy, Is It an Instrument or an Alternative? Comparative Analysis of the ECtHR’s Case Law” 2022, available at SSRN: <https://ssrn.com/abstract=4380832> or <http://dx.doi.org/10.2139/ssrn.4380832>, last accessed on: 03/18/2024; *for a commentary on Article 13: William Schabas, “The European Convention on Human Rights: A Commentary.” Oxford Scholarly Authorities on International Law - TRIAL Oxford commentaries on international law, Oxford University Press, 2015, pg. 546-554 (internal citations/quotations omitted); *Generally, and briefly on the ECtHR (including Article 13 and 41 of the ECHR): Luiz Wildhaber, “The European Court of Human Rights in Action.” R.L.R., pg. 83 & 90 (internal quotations/references omitted), available at: <https://www.ritsumei.ac.jp/acd/cg/law/lex/r/r21/wildhaber.pdf>, last accessed on: 03/20/2024.

monetary compensation.⁶⁸

The dots are then, not difficult to connect: **(i)** Article 54 of the Constitution establishes the individuals' right to "effective legal remedy,"⁶⁹ **(ii)** which the ECtHR considered (through Article 54's twin, the ECHR's Article 13⁷⁰) to incorporate the compensational prong;⁷¹ and then we have **(iii)** ". . . Article 53 of [Kosovo's] Constitution oblig[ing] the Constitutional Court . . ." to follow the ECtHR's jurisprudence.⁷² Moreover, the **(iv)** bidirectional flow of the LCC's Article 54 of Kosovo's Constitution in connection with that of the LCC's "legal protection"⁷³ further reinforce this avenue, providing an adjuvant to the CC's compensatory authority⁷⁴; and the nail in the coffin, must have

⁶⁸ *Z and Others v. The United Kingdom*, no. 29392/95, ECtHR, Judgment of 10 May 2001, para. 109 (citing: *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 330-31, § 107); see *Kudla v. Poland*, no. 30210/96, ECtHR, Judgment of 26 October 2000, para. 159 (" . . . relief – either preventive or compensatory . . .") (internal reference omitted); consider, Octavian Ichim, "Just Satisfaction under the European Convention on Human Rights." Cambridge University Press, 2015, pg. 248 (on Article 13's "vague[ness]");

*Somers posits that "[the ECtHR's] jurisprudence [on the interaction between Article 13 to Articles 2, 6 and 8] illustrates . . . that where a state cannot prevent a human rights violation from occurring, it must provide the possibility for human right victims to receive financial redress for moral damages in a national procedure. These cases however only relate to some substantive rights. So, one cannot easily draw conclusions about the necessity to enact mechanisms of state liability for human rights violations in general.": Somers, infra note 74, pg. 42 (internal citation omitted). *However, Somers does contend that ". . . since the jurisprudence of the Court always evolves, it seems that in practice, Art. 13 does require states to enact a general clause for governmental liability for human rights violations.": Somers, id., pg. 43 (internal citations omitted); *And in lieu of such legal basis, then see Swedish example in the extricated passages from: Somers, infra note 74; (and see infra note 74 in its entirety); *But compare/contrast this (and in the context of Sweden and Article 13 of the ECHR generally): David Kron, "Tort as Remedial Action Against Breaches of the ECHR - A Study of Constitutional Rights Using the Impact of the ECHR in Swedish Constitutional and Tort Law." JURM02 Graduate Thesis, Master of Laws, Lund University, 2016, pg. 50-54 (internal citations/references omitted) (*also, the relevant passage to compare/contrast from this source, is in infra note 74, pg. 52 & 58 (with internal citations/references omitted*); *Moving on from Sweden's context, consider also this doctoral project: Ole-Gunnar Nordhus, *Doctoral Project,* "Compensation for Violations of Fundamental Human Rights." Research group for Tort Law and Insurance Law, University of Bergen, available at: <https://www.uib.no/en/rg/tort/136093/compensation-violations-fundamental-human-rights>, last accessed on: 03/18/2024.

⁶⁹ K-Constitution, supra note 32, Article 54.

⁷⁰ Kosovo's Constitutional Court, Case No. KI48/18, supra note 36, paras. 195-198 (internal references/citations omitted) (discussed in supra note 63); and supra note 67 in its entirety (*sources cited there, up until: *the Guide to Article 13**)

⁷¹ ECtHR, *Z and Others v. The United Kingdom*, supra note 68; see ECtHR, *Kudla v. Poland*, supra note 68; consider also generally the Guide to Article 13, supra note 67.

⁷² The Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI22/16, No. ref.: AGJ 1083/17, 9 June 2017, para. 30; K-Constitution, supra note 32, Article 53; see also Kosovo's Constitutional Court, Case No. KI48/18, supra note 36, para. 196 & paras. 200-203 (internal quotations/citations omitted);

". . . based on [the ECtHR's jurisprudence] . . . [the CC] according to Article 53 . . . of [Kosovo's] Constitution, interprets the fundamental rights and freedoms guaranteed by the Constitution . . ." & ". . . the ECHR . . . is . . . directly applicable in the legal order of the Republic of Kosovo based on Article 22 [Direct Implementation of International Agreements and Instruments] of [Kosovo's] Constitution . . .": The Constitutional Court of the Republic of Kosovo, Resolution on Non-Enforcement related to the Judgement of the Constitutional Court of the Republic of Kosovo of February 3, 2021 in Case No. K186/18, No. Ref.: VMSP 2410/24, para. 34 (internal references/citations omitted); For a commentary on Article 53: Čukalović *In: Hasani & Čukalović*, supra note 33, pg. 201-203 (internal citations/references omitted).

⁷³ Consider supra note 63 in its entirety; consider also supra note 62.

⁷⁴ The notion of "appropriate relief" is incorporated in the ECHR's Article 13: ECtHR, *Aksoy v. Turkey*, supra note 66; consider also ECtHR, *Kudla v. Poland*, supra note 68; *And Article 13 is to be read in pari materia with Kosovo's Constitution Article 54: Kosovo's Constitutional Court, Case No. KI48/18, supra note 36, paras. 195-198 (internal references/citations omitted); *Afterwards, then, consider how "appropriate relief" has been treated by South Africa's Constitutional Court: VENICE REV. 2021, supra note 20, pg. 48-49 (citing: *Fose v Minister of Safety and Security*, CCT14/96, 05/06/1997, ZACC 6, in CODICES) & see supra note 25 in its entirety; see also Christophe Quézel-Ambrunaz, "Compensation and Human Rights (from a French perspective)." NUJS Law Review, Vol. 4, Iss. 3, 189-203, 2011, pg. 191 (internal citation/quotation omitted);

*see Stefan Somers, "Articles 13 and 41 ECHR and State Liability." Chapter 2 *In: "The European Convention on Human Rights as an Instrument of Tort Law,"* pages of Chapter 2: 33-44, Intersentia, 2018, pg. 44 *("Swedish law did not provide a legal basis for . . . compensation [re "immaterial damages"] in [a] concrete case." (citing:

become familiar by now: (v) the Constitutional Court metamorphoses through the 113.7-unit,⁷⁵ whereas a relinquishment of jurisdiction to compensate (vi) upsets the very fabric of the CC's *raison d'être*.⁷⁶

Accordingly, the foregoing grounds (*i* to *vi*): underpin the CC as an authorized *forum* with “subject matter jurisdiction”⁷⁷ to adjudicate compensatory claims per 113.7; furnish individuals with a basis to request such “relief” from the CC,⁷⁸ and provide the latter with a path on how to discharge this authority, such as extrapolating from the ECtHR's jurisprudence on the ECHR's Article 41.⁷⁹

Now, as “[t]he [ECtHR] can award monetary compensation pursuant to ECHR Article 41 ‘if necessary’ and does so for pecuniary losses, non-pecuniary damage, and costs and expenses”⁸⁰

M. Schultz, ‘Rights Through Torts: The Rise of a Rights Discourse in Swedish Tort Law’, *European Review of Private Law* 2009, p305 at 323; other internal citations omitted) “Thus, the Swedish Supreme Court *appealed directly to Art. 13 to provide financial redress for human right victims.*”: Somers, *id.*) (emphasis added)*; *see also: *Eriksson v. Sweden*, no. 60437/08, ECtHR, Judgment of date 12 April 2012 (final as of 12 July 2012), para. 50 (citing: [the Swedish] Supreme Court judgment of December 2009 (NJA 2009 N 70)); see also: Johan Karlsson Schaffer, Malcolm Langford & Mikael Rask Madsen, “An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s.” *Nordic Journal of Human Rights*, Vol. 42, No. 1, 11-31, 2024 pg. 27 (citing: Mårten Schultz, ‘Rights Through Torts: The Rise of a Rights Discourse in Swedish Tort Law’ (2009) 17 *European Review of Private Law* 305); *but compare/contrast with: Kron, supra note 68, pg. 52 (citing: NJA 2007 s. 295 (p. 302)) & pg. 58 (“The Swedish Supreme Court first concluded in the case of NJA 2005 s. 462 that the ECHR can provide an independent basis for liability of public authorities. This was later confirmed in NJA 2007 s. 295, with an added statement clarifying that article 13 ECHR does not entail a conclusive right to damages”); *Generally also see back to the discussion in supra note 67.

⁷⁵ See Hasani (citing: Guerra, Luis Lopez), supra note 33; consider also both: Mavčič, supra note 35, pg. 6 & Kosovo's Constitutional Court, Case No. KI48/18, supra note 36.

⁷⁶ See supra note 53 in its entirety; see Legal Information Institute, supra note 48 (re the analogy to “implied powers”).

⁷⁷ “Subject matter jurisdiction” is defined as: “The power of a court to adjudicate a particular type of matter and provide the remedy demanded”: Legal Information Institute, Cornell Law School, the definition of “Subject Matter Jurisdiction.” Available at: https://www.law.cornell.edu/wex/subject_matter_jurisdiction, last accessed on: 03/15/2024; *For a general take on the notion of “jurisdiction” (albeit within the context of the U.S. legal system): see Evan Tsen Lee, “The Dubious Concept of Jurisdiction.” 54 *Hastings Law Journal* 1613, 2003, pg. 1613, fn. 1 (internal citation omitted).

⁷⁸ *On remedies* consider, Halberstam, supra note 15, especially, pg. 149 (“Remedies (such as whether you may bring a cause of action for damages, whether you get damages or equitable relief, or whether you can appeal an adverse judgment to a higher court) . . .”) and *id.*, pg. 149 (internal citations omitted); *Consider, Dinah Shelton, “Remedies in International Human Rights Law.” 3rd Edition, Oxford University Press, 2000, pg. 16 (“In the [procedural] sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts . . . or other competent bodies. The [substantive] notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant.”) (internal citation omitted); Consider, Szilvia Altwicker-Hámori et al., infra note 87, pg. 8-9 (“Reparation” [in the context of ECHR] mostly denotes the substantive claim while “remedy” is primarily understood to be a procedural claim to legal protection, but the terminology is not consistent”) (internal citation omitted).

⁷⁹ Consider author Somers' take on Article 13 and Article 41 of the ECHR, in the backdrop of the ECtHR's jurisprudence: Somers, supra note 74, pg. 37 & fn. 21 (citing: *Eskilsson v. Sweden*, 24 January 2012 (Decision), appl. no. 14628/08); also on the juncture of the ECHR's Article 13 and 41, especially in the Swedish context: Kron, supra note 68, pg. 52 (internal citation omitted); *Consider, VENICE REV. 2021, supra note 20, pg. 54 (“In . . . cases [“of alleged excessive procedural length”], *the constitutional court should be able to provide compensation equivalent to what the applicant would receive at the ECtHR.*”) (citing: ECtHR, *Cocchiarella v. Italy* [GC], 29.03.2006, no. 64886/01, paras. 76-80 and 93 to 97) (emphasis added) (**van Lamoen In: Mushkolaj et al.*, supra note 58, quotes the same when commenting on the LCC's Article 53 (but quoting from VENICE 2011, supra note 20), pg. 388-389, fn. 716 & 717 (internal quotations omitted)**But, van Lamoen's page citation in fn. 716 appears to be incorrect*)*.

⁸⁰ Shelton, supra note 78, pg. 321; see also Practice Direction, “Just Satisfaction Claims.” (Article 41 of the Convention) - ECHR, issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 and amended on 9 June 2022, pg. 66, available at:

then, Kosovo's CC could follow the same⁸¹ (*not as a legal basis* which even the CC has rejected⁸²) but as a blueprint⁸³ in order to discharge its compensatory jurisdiction *which instead flows from elsewhere* as presented concisely through grounds (i) to (vi) of the present paper.⁸⁴ To this end, it is my contention that this compensatory authority of Kosovo's Constitutional Court applies for constitutional rights' violations blanketly⁸⁵ as opposed to only on "excessive length of proceedings."⁸⁶

Thus, the Court's serenity when consistently dismissing compensatory claims,⁸⁷ suggests that its chronic misconstruction of law remains asymptomatic.

Hence, the present work's interpretative string as a vital remedy.

https://www.echr.coe.int/documents/d/echr/pd_satisfaction_claims_eng, last accessed on: 03/16/2024); For a commentary on Article 41: Schabas, *supra* note 67, pg. 830-840 (internal citations/quotations omitted).

⁸¹ Article 53 of Kosovo's Constitution comes to mind, on which: see *infra* note 72 in its entirety; consider also, VENICE REV. 2021, *supra* note 20, pg. 54 (citing: ECtHR, *Cocchiarella v. Italy* [GC], 29.03.2006, no. 64886/01, paras. 76-80 and 93 to 97); consider again, *supra* note 79 in its entirety.

⁸² Kosovo's Constitutional Court, Case KII08/18, *supra* note 6, paras. 195-196 (internal references to the ECHR omitted).

⁸³ *One must note that blueprints on the ECtHR's jurisprudence on Article 41 are challenging, given the "[t]he unpredictable outcome of litigation [which] has led to several suggestions to improve the Court's practice on remedies": Shelton, *supra* note 78, pg. 325; and there was a "recommend[ation] [for the ECtHR to] publish guidelines on rates of compensation in order to 'assist and encourage Parties to resolve cases domestically.'": Shelton, *id.*, (citing & quoting: The Right Honourable The Lord Woolf et al., Review of the Working Methods of the European Court of Human Rights, available at <http://www.echr.coe.int/LibraryDocs/Lord%20Woolf-2005-EN1587818.PDF>, 68.); **contra* the latter to Altwicker-Hámori et al., *infra* note 87, pg. 3, whom when pointing to the others' criticism on the ECtHR's lack of blueprint on "non-pecuniary damages," (Altwicker-Hámori et al., *id.*, pg. 3, internal citations omitted) *acknowledge* that "[t]he [the ECtHR] has not disclosed the exact principles guiding its awards made in respect of non-pecuniary damage . . . and . . . that "just satisfaction" is the least reasoned part in the [ECtHR's] jurisprudence."; **but** through an empirical study, come to the conclusion that ". . . there is a "pattern" in the awards made in respect of non-pecuniary damage by the [the ECtHR].": Altwicker-Hámori et al., *id.*, pg. 32; *Also, consider, Shelton, *supra* note 78, pg. 326 (quoting: European Court of Human Rights, *Guiso-Gallisay v. Italy* (Just Satisfaction) (2009) Application No. 58858/00, para. 85); *Not constricted to the ECtHR, but more in general consider also Shelton, *supra* note 78, pg. 90-91 (internal citations omitted).

⁸⁴ *Supra* notes 69-79; also overall Section III of the present paper with its subsections.

⁸⁵ Akin to: VENICE REV. 2021 *supra* note 20, pg. 48-49 ("In South Africa, the individual is even entitled to the award of so-called "constitutional damages", based solely on the infringement of a constitutional right. [Its] Constitutional Court is competent to grant such damages under the court's jurisdiction to grant "appropriate relief") (citing: *Fose v Minister of Safety and Security*, CCT14/96, 05/06/1997, ZACC 6, in CODICES) & *supra* note 25 in its entirety; *consider also Somers, *supra* note 74, pg. 43 (internal citations omitted) (the relevant passage quoted in *supra* note 68); (Somewhat outside the context, but one could find interesting in general (from the U.S. legal context), the following sources: Christina B. Whitman, "Constitutional Torts." *Michigan Law Review*, 79, 5-71, 1980; Jean C. Love, "Damages: A Remedy for the Violation of Constitutional Rights." *California Law Review*, Vol. 67, No. 6, Rev. 1242, 1979).

⁸⁶ Comparing here to the reference in: VENICE REV. 2021, *supra* note 20, pg. 54 (citing: ECtHR, *Cocchiarella v. Italy* [GC], 29.03.2006, no. 64886/01, paras. 76-80 and 93 to 97) (the relevant passage quoted in *supra* note 79).

⁸⁷ See *supra* note 6 in its entirety;

*One must also consider that "Art. 41 does not require [the ECtHR] to award "just satisfaction" in the form of money. In many cases in which a victim suffered non-pecuniary damage, the Court merely finds and states a human rights' violation. It could be said that such a declaration in itself also constitutes some kind of "satisfaction" for any non-pecuniary damage suffered.": Szilvia Altwicker-Hámori, Tilmann Altwicker & Anne Peters "Measuring Violations of Human Rights An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL)*, Conference paper, Vol. 76, 1-51, 2016, available at: https://www.zaoerv.de/76_2016/76_2016_1_a_1_52.pdf, last accessed on: 03/16/2024, pg. 12 (internal citation/references omitted); *On this see also Kosovo's Constitutional Court, Case KII08/18, *supra* note 6, para. 197 (referencing/citing: "the operative part of ECtHR's case," *Roman Zaharov v. Russia*, Judgment of 4 December 2015).

CONCLUSION

The analytical inquiry into the validity of the Kosovo Constitutional Court's pronouncements revealed that the CC has erred by failing to craft the correct interpretative schema per compensatory jurisdiction. Therefore, the linchpin of this paper consisted in elucidating an interpretative string that is corrective in relation to the Court's stance. This string, built upon systematic interpretative-threads of the applicable law and flowed through conceptual considerations on the Court's jurisdictional tenets. As a result, the present work has imprinted an alternative approach per the Court's jurisdictional authorizations emanating from Article 113.7 of the Constitution.

Policy Analysis

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