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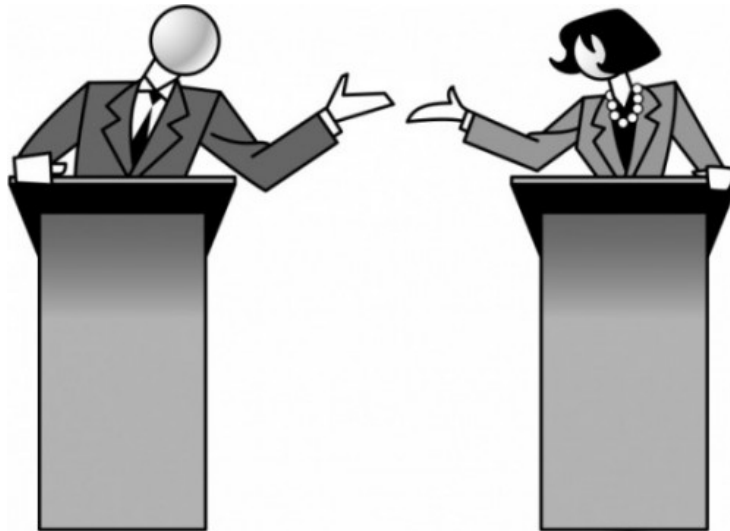
Kosovo Constitutional Court debate: 'Instead of a Reply – Comparing Apples and Oranges'

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We receive and publish the third contribution to the [debate surrounding Kosovo's Constitutional Court](#) and the extension of the mandate of its foreign judges: **Donikë Qerimi** replies back to Andrea Lorenzo Capussela. The levels the discussion has taken place on, she argues, are fundamentally different. Further reactions to the debate are encouraged as comments to the blog posts.

Read all the posts concerning the Kosovo Constitutional Court debate [here](#).



from idahodems.org

[My analysis](#) of the mandates of the EU judges in Kosovo's Constitutional Court triggered a [lengthy response](#) by Andrea Capussela. Although I was flattered by his post, I am not sure whether I could qualify it as a reaction to my arguments. Thus, I'm not calling this post a reply either; I just thought of clarifying some basic misunderstandings, for the sake of the audience.

First of all, unlike Capussela claims, he and I disagree on the facts. The decree of the President of Kosovo of September 1, 2014, did not "extend [the judges' mandate] by two years" as he puts it. I reiterate that it was a complex legal setting, including an International Agreement ratified by the Kosovo Assembly that led to the decree of the President. The President merely confirmed these extensions. While Capussela tends to continuously minimise this factor, it is, indeed, the determining one. And as any lawyer knows, getting the facts straight is the fundament of a good argument.

It also happens that we disagree on what an international agreement is; quite a fundamental disagreement this one. While I base my arguments on the international instruments that regulate the principles of treaty-making, Capussella's approach is entirely based on political circumstances that have no legal significance, such as the political act of (or the absence of) recognition of Kosovo's independence by the EU. Recognition is a political act, with legal consequences, which does not affect the conclusion of an international treaty like the one in subject. As pointed out in my original post, the importance is whether that agreement constitutes an international agreement in the eyes of Kosovo law, which, besides the principles of Public International Law, is the only test that this question should pass. Since the author pointed out himself, he is no expert of Kosovo law, thus should not be blamed for not understanding my analysis on it.

We also disagree on whether the Agreement overrides the Kosovo Constitution in this area. There is no need for further examination of this debate, given that the Constitution provides the final words in article 19, which reads: "ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo". Another

point that does not deserve more dwelling into is Capussela insistence that the exchange of letters does not mention the Constitutional Court Judges apart from confirming their mandates. I call his attention, once again, on the paragraph where the President delegates the powers of article 65 – the proposal of Constitutional Court Judges – to EULEX. Ditto.

The author's frequent misquotation of my legal conclusions is quite baffling. In one such instance he claims that since the EULEX has been empowered with appointing judges of the Constitutional Court, like judges of other levels, the Kosovo Assembly now does not retain any piece of that power. This conclusion is not mine and is definitely not true. Nothing in the Agreement suggests that the power is given *exclusively* to EULEX and that the Kosovo institutions are no longer entitled to exercise the same powers. That would be like saying that since EULEX enjoys the power to name some judges of other levels, the entire Kosovo Judicial Council should be fired and sent home. The Agreement does not have a zero-sum nature and the Constitution does not condition such a clause. Capussela's claim that Kosovo MPs did not understand what they were voting for when they ratified this agreement, all 2/3 of them, is both naïve and offensive and does not require further elaboration.

Throughout his 2000-word post, Capussela mixes legal and political arguments and even refers to eventual procedural violation of the Kosovo Assembly, just so he can argue one thing: the extension of the mandate was unconstitutional. These frantic claims allow me to conclude that he is no fan of the legal arrangements around the extension of EULEX's mandate in Kosovo and their empowerment with appointing Constitutional Court Judges. As a Kosovar who was a member of the negotiating team in the first exchange of letters between my country and the EU, I made it very clear, in many circumstances, that I'm not a fan either. But as a lawyer, I know that not liking an arrangement does not make it any less legal, and here again I must refer to my initial post in this blog.

The one argument that merits more thought is Capussela's questioning whether the EU *should* have had this power, since the Joint Action of the Council of EU does not mention assistance of EULEX to Constitutional Court. To respond to this, I suggest we go back to the very basics of contract law or public international law: there is an agreement once there is an offer and an acceptance to that offer. The President's letter is an offer to EULEX to empower them with appointing Constitutional Court judges, whereas EU's HR Catherine Ashton replied by saying "I accept the invitation contained in your letter". Thus, an Agreement is reached on *all* elements of the letter, including EULEX's future power to propose and appoint these judges. I could even illustrate this 'meeting of the minds' approach by referring to our last blog posts: they would never be able to be considered as an agreement, simply because Capussela's post does not mirror mine. Our posts are a mere comparison between apples and oranges and would, therefore, never be considered as a meeting of our minds at any point – even in those where he mistakenly seem to think we do. To twist his words, and not arguments, the Queen cannot choose between two knights, as one is an apple and the other an orange.

Note: This article gives the views of the author, and not the position of LSEE Research on SEE, nor of the London School of Economics.

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