REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 1 April 2019
Ref. no.: RK 1343/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI138/18

Applicant

Gent Gjini

Constitutional review of Order, I. GJA. No. 1/2018-141, of the President of the Basic Court in Prizren, Mr. Ymer Hoxha, of 8 August 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Gent Gjini, a lawyer from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Order [I. GJA. No. 1/2018-141] of the President of the Basic Court in Prizren of 8 August 2018 (hereinafter: the Order).

Subject matter

3. The subject matter is the constitutional review of the challenged Order, which allegedly violated the Applicant's rights guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55 [Limitation on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant also alleges a violation of Article 41 of the Law on the Bar, of Article 25 of the Law on Courts, as well as a violation of Article 6.1 of the Statute of the Bar Association.

4. The Applicant also requests to impose the interim measure against the challenged Order on the grounds that *"leaving this Order in force, the consequences would be irreplaceable and irreparable"* and that there may be situations of escalation of *"physical and verbal violation by the court guards, who are authorized to use violence"*.

5. The Applicant also requests to schedule a hearing in which the circumstances of the case would be discussed *"verbally and entirely"* and where his Referral would be substantiated based on *"law and facts"*.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 14 September 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 September 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 26 September 2018, the Court notified the Applicant about the registration of the Referral and requested him to complete the remaining parts of the official form of the Court, namely to specify the challenged decision and to make a statement regarding the exhaustion of legal remedies, by responding to the question of whether he has taken any procedural step for challenging the Order of the President of the Basic Court in Prizren. The Court requested the Applicant to submit the completed form and the requested clarifications to the Court within fifteen (15) days of the receipt of the Court's letter.

10. On 8 October 2018, the Applicant submitted the requested clarifications to the Court. Regarding the exhaustion of legal remedies, the Applicant stated that the challenged order "*cannot be definitively challenged, namely, there is no legal remedy for the latter*". Along with the requested clarifications, the Applicant also filed a request for interim measure.

11. On 11 October 2018, the Court notified the President of the Basic Court in Prizren, Ymer Hoxha (hereinafter: the responding party) about the registration of the Referral and invited him to submit his comments, if any, within seven (7) days of the receipt of the Court's letter.

12. On 19 October 2018, the responding party submitted his comments to the Court.

13. On 22 October 2018, the Court notified the Applicant about the receipt of the comments by the responding party, and sent a copy of it.

14. On 23 October 2018, the Applicant sent an electronic letter in the Court electronic mail through which he repeated his request related to the need to impose an interim measure.

15. On 1 November 2018, the Applicant submitted additional comments in response to the comments submitted by the responding party.

16. On 19 November 2018, the Applicant also submitted another letter to the Court requesting that "*the constitutional referral be processed as promptly within a reasonable deadline*" because the challenged order is still in force.

17. On 27 November 2018, the Court notified the responding party about the receipt of additional comments by the Applicant in response to his comments, and sent a copy of them.

18. On the same date, the Court also notified the Kosovo Judicial Council about the registration of the Referral and invited it to submit comments, if any, within seven (7) days of receipt of the Court's letter. The Kosovo Judicial Council did not submit any comments.

19. On 4 December 2018, the Applicant submitted another additional letter by which he repeated the request that the case submitted to the Court to be considered urgently.

20. On 14 December 2018, the Applicant submitted another letter to the Court requesting it to decide on "*the interim measure because the situation is very sensitive*".

21. On 23 January 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts of the case

22. The Applicant is a lawyer from Prizren, who exercises his lawyer activity in the Municipality of Prizren.

23. On 8 August 2018, the President of the Basic Court in Prizren, Mr. Ymer Hoxha, issued an Order [I. GJA. No. 1/2018-141], by which it prohibited the entrance of lawyers and parties in the premises of the Basic Court in Prizren, without invitations or without prior verbal permission, except for access to the office for filing the documents. Specifically, the order in question, which constitutionality is being challenged before this Court, has the following content:

> *"BASIC COURT IN PRIZREN, President of the Court Ymer Hoxha, with the purpose of establishing order at the Court, on 8 August 2018, issues the following:*
>
> *ORDER*
>
> *The security employees and the receptionist are ordered not to allow the entrance of attorneys at law and parties in the building of the Court, without invitations or oral permits of the President of the Court, or judge, except at the office of submitting letters.*
>
> *If the attorneys at law or the parties do not apply the order then the security personal takes them away by force.*
>
> *If the security personnel or the receptionist do not apply the order, the disciplinary procedure will be initiated against them".*

Applicant's allegations

24. The Applicant alleges that the President of the Court in Prizren, Ymer Hoxha, by his Order [I. GJA. No. 1/2018-141 of 8 August 2018] violated the rights guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution. The Applicant also alleges violation of Article 41 of the Law on Bar, Article 25 of the Law on Courts and Article 6.1. of the Statute of the Bar Association.

25. The Applicant states that the order in question "*cannot be appealed, has no legal advice and there is no instance which assesses its legality*". Therefore, the Applicant states that the only remedy in this case is the submission of a Referral to the Constitutional Court.

26. As to the allegation of a violation of Article 23 of the Constitution, the Applicant states that this constitutional provision guarantees to each person to be treated with respect, to not be insulted, humiliated or underestimated. The challenged order, according to the Applicant, insults the lawyers with the word "*will be removed by force*". He further states that the lawyers from Prizren are professional and have conscience, that they know how to behave and it is

ridiculous to say that "*we can break the order in court*", and that violence against lawyers will not be tolerated.

27. As to the allegation of a violation of Article 24 of the Constitution, the Applicant states that this Order calls into question equality "*if it is about the mentality of* the *President of the Court* [Basic Court in Prizren]" for the reason why the Order presents red lines for lawyers and citizens regarding the breaking of law and order and is not valid as such for some judges and administrative staff who, according to the Applicant, cause noise in the corridors of the court with their conduct. Further, the Applicant considers that the challenged Order treats the court as the property of several judges and administrative staff, allowing them to enter and leave whenever they want - and forgetting that the court belongs "*to the state, society, citizens, and to us lawyers, who pay taxes to the state of Kosovo. We [the lawyers] are the ones who mostly maintain the court by correcting their actions almost every day*".

28. As to the allegation of a violation of Article 55 of the Constitution, the Applicant states that it is precisely this article that "*denies the Order*" because, according to him, only such an arbitrary Order of the responding party suffices to violate this constitutional principle. The latter, according to the Applicant, is violated as the Order does not have legal support and there is no law, article or statute in which the phrase "*forced removal of lawyers*" can be found because of disturbing peace and order. Paragraph 4 of Article 55, as stated by the Applicant, gives the legal authority only to the court to limit the freedom and within the limits of certain preconditions. The Applicant concludes by emphasizing that this Order is "*unconstitutional*", "*tendentious*" and as such is the most "*scandalous*" order in Kosovo justice.

29. With respect to other alleged violations, the Applicant states that this Order also violates Article 41 of the Law on Bar, as well as the Statute of the Bar Association, since the latter "*interferes with the independence of the activity of lawyers and regular performance of our work*". The Applicant further states that, pursuant to Article 25 of the Law on Courts, the challenged order also violates the Rules of Procedure of the Internal Organization of Courts, as this Order "*does not have the approval or permission by the Judicial Council of the Republic of Kosovo*". According to the Applicant, only the Kosovo Judicial Council may, by the vote of all members, grant approval "*for imposing a condition for the compulsory (forced) removal of lawyers from the courtroom by its guards*".

30. The Applicant also alleges that his response to this constitutional complaint "*is also supported by* the *civil society in Prizren and the intellectuals of the city of Prizren*" and that this response is in coordination with "*all intellectual actors*".

31. Finally, the Applicant requests the Constitutional Court to annul the challenged order because of its non-compliance with the aforementioned Articles of the Constitution and because of its unlawfulness.

Comments submitted by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, in the capacity of the responding party

32. Regarding the Applicant's Referral, the President of the Basic Court in Prizren, Mr. Ymer Hoxha, as a responding party in this case, in his comments stated that in the present case there is no violation of Articles 23, 24 or 55 of the Constitution.

33. Regarding Article 23 of the Constitution, the responding party stated that his Order does not affect the dignity of anyone, either of the court staff, the parties to the proceedings or of the lawyers representing their clients. According to him, the Applicant did not specify what dignity has been specifically violated, but merely raised hypothetical doubts. The order in question, the responding party continues, was issued for the purpose of establishing order in the court where the lawyers for the invitations for representation of their clients are given the opportunity to represent, and in certain cases, based on verbal permission can approach the office of the judge, and all this with a single purpose to create peace and order in court, where none of the citizens suffer because of the lack of peace and order.

34. With regard to Article 24 of the Constitution, the responding party alleges that the challenged order in its content and purpose embodies the equality before the law. According to him, this Order does not discriminate against any category of citizens or professionals, but it stipulates that no one can enter the court without invitations, not even the lawyers. The responding party states that no one in the court should enter without invitations because the communication of the court with the parties is impaired, which risks in having a unilateral *ex-parte* communication. To eliminate the risk of such communication, which would constitute a violation of the Code of Ethics of Judges, the Court by the Order prohibited the entrance of parties without invitations, including the lawyers. An exception is foreseen when the communication and verbal contact with the court is enabled when a judge asks or allows such a thing. According to the responding party, the question arises as to which of the lawyers is individually favored or harmed, while the Order applies the same to all parties, without privileging any and without questioning equality before the law.

35. Regarding Article 55 of the Constitution, the responding party states that the Applicant used an erroneous approach and interpretation in relation to the constitutional articles and what rights and freedoms are limited. According to him, no basic provision protected by domestic or international legislation has been violated by the challenged Order. In this regard, he asks *"if a person, who does not have any job is not allowed to enter the court only because he wants that"* can be considered a limitation of human rights and fundamental freedoms. According to him, not allowing access to the court without any work cannot be considered a violation because through this prohibition is maintained the order, peace, integrity and security of the court and its judges. Furthermore, the access to the court, he continues, is not limited, as everyone without exception has access to the administration service in order to realize their rights by submitting documents and receiving various certificates and evidence.

36. According to the responding party, all state institutions have peace and order and do not allow anarchy that would enable causing a chaos or questioning the independence of the court and thus losing confidence to the public. So, no one can freely enter, without any restrictions, certain institutions without being allowed by the respective officer. The order in question is not directed against lawyer Gent Gjini [the Applicant], but applies to lawyers, parties, prosecutors. The entrance of lawyers without invitations to court and the obstruction they cause in the work of judges have been considered also in the collegium of judges held on 5 September 2018, where all the judges unanimously supported the challenged Order. This was also because there existed the possibility of misuse and the transfer of inaccurate information to the parties that "*allegedly the matter was resolved with the judge.*"

37. As to the Applicant's request for interim measure, the responding party states that the latter should not be granted because it is ungrounded and there is no irreparable consequence that may be caused.

Additional comments submitted by the Applicant

38. In response to the comments submitted by the responding party, the Applicant submitted some additional comments.

39. In this regard, the Applicant states that the responding party is personally dealing with him and makes an attempt to justify, in the absence of facts, "*his order*", "*dealing with issues that are outside his referral*". The Applicant further states that in his Referral submitted to the Court he focuses on non-acceptance of using force-violence against lawyers, which allows guards and authorizes them to use violence against lawyers.

40. In addition, in his additional comments, the Applicant states that the responding party deals with him personally, despite the fact that by the Referral submitted to the Court, as he states "*I certainly represent the community of lawyers in Prizren* [...] *and not [only] myself*". This Order, according to the Applicant, was promulgated only in the Basic Court in Prizren and does not appear as such in the other basic courts in the Republic of Kosovo. The Applicant further states that he submitted the present Referral to the Court "*in the interests of the lawyers in Prizren*" and that "*all of us [lawyers] are affected by this Order*". He further continues, by claiming that: "*I have the support and also the solidarity of all lawyers, I say this under both professional and human responsibility*".

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Law No. 05/L-031 on General Administrative Procedure of 25 May 2016, promulgated by decree of the President of the Republic of Kosovo on 13 June 2016

Article 13
[The principle of the right to legal remedies]

1. Except when explicitly excluded by law, any person has the right to use the legal administrative and judicial remedies, as provided by law against any administrative action or omission, which affects his subjective right or legitimate interests.

Article 52
[Unlawfulness of an administrative act]

1 An administrative act is unlawful when:
1.1. it was issued without legal authorisation according to paragraph 2. Article 4, of this Law;
1.2. the issuing public organ acted without having the competence;
1.3. it came into being through the infringement of provisions regulating the proceeding;
1.4. it contradicts the provisions regulating the form or the statutory elements of the act;
1.5. it violates substantive law;
1.6 discretion was not lawfully exercised, or
1.7. it does not comply with the principle of proportionality.

Article 83
[Institution of administrative proceeding]

1. The administrative proceeding shall be instituted either on request of a party or ex officio. [...]

PART VII
ADMINISTRATIVE LEGAL REMEDIES
CHAPTER I GENERAL RULES ON ADMINISTRATIVE LEGAL REMEDIES

Article 124
[Locus standi and grounds to an administrative remedy]

1. A party shall have the right to legal remedy against every administrative action or inaction, if it claims that its right or legitimate interests are infringed by such action or inaction. [...]

2. Unless otherwise provided by law, administrative remedy may be filed on the grounds of unlawfulness of the action.

3. Ordinary administrative remedies shall be:

3.1. administrative appeal;;

3.2. administrative complaint;
4. Exceptional administrative remedies shall be the reopening of the proceeding.
5. A party is not entitled to a second ordinary administrative remedy on the same case.
6. The exhaustion of respective ordinary administrative remedy is a preliminary requirement for any dispute before a competent court for administrative disputes. Direct access to the court without preceded administrative remedy is allowed, when:
6.1. a superior organ does not exist;
6.2. a third party claims that its rights or legitimate interests are infringed by an administrative act resolving an administrative remedy; or
6.3 explicitly provided by law.

CHAPTER II
APPEAL
SECTION I
General rules and eligibility terms of the appeal

Article 125
[Administrative appeal]

1. Unless otherwise provided by law, an administrative appeal, may be submitted against an administrative act. It may also be submitted against administrative inaction, if the public organ has kept silent within the established deadline (hereinafter referred to as "appeal against administrative silence"). [...]

Admissibility of the Referral

41. The Court examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.

Regarding the authorized party and challenging decision of the public authority

42. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
(...)
7. Individuals 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.

43. As to the fulfillment of the requirements of Articles 113.1 and 113.7, the Court notes two important elements to be considered.

44. The first element concerns whether the Applicant is an authorized party to submit this constitutional referral in (i) his personal name as a natural person, and (ii) on behalf of all Prizren lawyers.

45. As to item (i) of the first element, the Court notes that the Applicant initially filed his referral in the capacity of a natural person, namely a lawyer practicing his profession of a lawyer, seeking protection of his rights and freedoms guaranteed by the Constitution, which he claims to have been violated. In this regard, the Court considers that he is an authorized party to submit this individual referral.

46. As to item (ii) of the first element, the Court recalls that the Applicant states that he has filed his Referral on behalf of all Prizren lawyers who are affected by this Order and that for this referral he has also the support of the intellectuals and civil society of Prizren. Regarding this part, the Court considers that the Applicant is not an authorized party to raise allegations on behalf of all Prizren lawyers and that such representation has not been proven to the Court in any way. Moreover, such requests are the requests of a character *actio popularis* for which the Court has already stated that it has no jurisdiction to deal with. (See the case of the Constitutional Court declared inadmissible in terms of *actio popularis* as the referral was filed on behalf of third persons and as a consequence they were not authorized parties to raise allegations for the third parties, KI03/11, *Organization Çohu*, Resolution on Inadmissibility of 19 May 2011, paragraphs 16-18).

47. Therefore, the Court will consider this referral only with regard to the Applicant as an individual, namely a natural person, and not as a representative of all Prizren lawyers. Therefore, the Court concludes that the first element of Article 113 with respect to individual referrals is partially met and only as regards item (i) above.

48. The second element concerns the determination of what decision is challenged before this Court and whether that decision is a decision of a public authority. In this regard, the Court finds that the Order [I. GJA. No. 1/2018-141 of 8 August 2018] issued by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, is the decision of a public authority. Therefore, the Court concludes that this element of Article 113 is fully met.

49. In sum of the fulfillment of the criteria for an authorized party and challenging a decision of a public authority, the requirements established in Article 113 of the Constitution, the Court concludes that the Applicant is an authorized party to submit this referral in his personal name and in terms of his rights guaranteed by the Constitution and that he challenges the decision of a public authority.

As to the exhaustion of legal remedies

50. The Court notes that in addition to the two above-mentioned elements, Article 113.7 of the Constitution also contains a very clear requirement, which is the exhaustion of all legal remedies "*established by law*".

51. In this respect, the Court also refers to Article 47 [Individual Requests] of the Law, which further specifies Article 113.7 of the Constitution regarding the exhaustion of legal remedies, providing the following:

> *"1. Every 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.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

52. In addition, the Court refers finally to paragraph (b) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *"(1) The Court may consider a referral as admissible if:*
>
> > *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,"*

53. Consequently, referring to the constitutional basis for the exhaustion of legal remedies provided by Article 113.7 of the Constitution; legal basis foreseen by Article 47.2 of the Law; and the regulatory basis specified in Rule 39 (1) (b) of the Rules of Procedure, the Court will answer the question whether the Applicant in the present case has exhausted all effective legal remedies available to him under the law, before submitting his individual referral to the Constitutional Court.

54. In order to reach this answer, the Court will also refer to the well-established case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution. In addition to the ECtHR case law, the Court will also refer to its own case law which can now be considered a consolidated case law as regards the exhaustion of legal remedies.

55. In this regard, the Court recalls that the Referral was submitted by lawyer Gent Gjini, in his capacity as an individual and a natural person, requesting constitutional review of the Order [I. GJA. No. 1/2018-141] of 8 August 2018] issued by the President of the Basic Court in Prizren, Mr. Ymer Hoxha.

56. The Court first recalls that in the part of the form asking for an explanation of whether all legal remedies have been exhausted, the Applicant stated that against the challenged order "*cannot be appealed, has no legal advice and there is no instance which assesses its legality*". Further, the Applicant emphasized that "*the legal remedy in this case is only the Constitutional Court of the Republic of Kosovo*".

57. Upon receipt of the Applicant's Referral, the Court, based on the regular proceedings for the review of individual referrals, notified the Applicant about

the registration of the Referral and, for the purpose of confirmation, asked *"whether he has taken any procedural step to challenge the Order"*. In his response submitted to the Court, the Applicant replied by stating that the challenged order *"definitely cannot be challenged, namely, there is no legal remedy against it."*

58. The Court therefore notes that the Applicant's final position is that there is no legal remedy under which the legality and constitutionality of this Order may be challenged.

59. In this regard, the Court recalls the relevant legal provisions (see the part of the constitutional and legal provisions cited between paragraphs 40-41 of this Resolution) applicable in the Republic of Kosovo, according to which the alleged unlawfulness of any administrative act issued by a public authority can be challenged. These legal provisions clearly state that *"any person has the right to use the legal administrative and judicial remedies [...] against an administrative action or omission of a public body which affects his subjective right or legitimate interests."* (See, *inter alia*, Articles 13, 52, 83, 124, 125 of the Law on General Administrative Procedure).

60. Therefore, the Court holds that the Applicant had the legal possibility, pursuant to the applicable law, to present all his allegations of violation of the law or of his constitutional rights guaranteed by Articles 23, 24 and 55 of the Constitution - the allegations that he is raising for the first time before this Court. Thus, he had the legal opportunity to challenge the *"action"* taken by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, which in this case is of administrative nature. He could also have submitted his complaints to the Kosovo Judicial Council. The challenging of administrative actions has clear legal ways and their challenge in administrative procedures is a legal right recognized to all parties who consider that their rights have been violated.

61. In addition, the challenging of such acts is also guaranteed by Article 32 [Right to Legal Remedies] of the Constitution, which provides that every person has the right to pursue legal remedies against *"judicial and administrative decisions which infringe on his/her rights or interests in the manner provided by law"*. The Constitution itself refers to "the law" to show that persons who claim a constitutional and legal violation should follow the foreseen legal procedures to seek protection of their rights.

62. Only after exhaustion of such legal remedies the Applicant could submit to the Constitutional Court an individual referral for constitutional review of the final decisions of the regular courts if he/she still remained unsatisfied with the way his allegations were reviewed or resolved. This could then be done in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

63. In the light of the foregoing facts, the Court concludes that the Applicant has not exhausted the legal remedies available to him, foreseen by the legislation in force in the Republic of Kosovo, and that he submitted a premature referral to this Court. (See similar cases of the Constitutional Court, No. KI84/17, Applicant *Bahri Maxhuni*, request for constitutional review of the Decision of

the Government of the Republic of Kosovo, Resolution on Inadmissibility of 19 April 2018, paragraphs 28-30; KI38/17, Applicant *Meleq Ymeri*, Request for constitutional review of the Decisions of the Ministry of Labor and Social Welfare, paragraphs 26-28).

64. The Court recalls that the rule of exhaustion of remedies is a reflection of the principle of subsidiarity as a fundamental principle in the constitutional judiciary, which aims to afford the regular courts or relevant public authorities the opportunity to prevent or put right the alleged constitutional violation. The rule is based on the assumption reflected in Article 32 of the Constitution and in Article 13 of the European Convention on Human Rights (hereinafter: ECHR) that the Kosovo legal order provides an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, paragraph 74 and, *inter alia*, cases of Constitutional Court, No. KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61, Case No. KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility, of 7 August 2017, paragraph 35, Case No. KI41/09, Applicant *University AAB-RIINVEST LLC*, Resolution on Inadmissibility, of 3 February 2010, paragraph 16, and Case No. KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

65. The Court has consistently adhered to the principle of subsidiarity, maintaining that all applicants are required to exhaust all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. The Court reiterates that this approach requires that, before addressing the Court, the Applicants must exhaust all procedural possibilities within the institutions which allegedly have infringed any right, in regular administrative or judicial proceedings, to prevent violations of human rights and freedoms guaranteed by the Constitution or, if any, to remedy such a violation of the rights guaranteed by the Constitution. (See: as the most recent authority, the case of the Constitutional Court of the Republic of Kosovo, No. KI84/17, Applicant *Bahri Maxhuni*, cited above, paragraphs 28-30, Case No. KI62/16, Applicant *Bekë Lajçi*, Resolution on Inadmissibility, of 10 February 2017, paragraphs 59-60, and also see Case No. KI07/09, Applicant: Demë *Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19, Case No. KI109/15, Applicant: *Milazim Nrecaj*, Resolution on Inadmissibility of 17 March 2016, paragraphs 27-28; KI148/15, Applicant: *Xhafer Selmani*, Resolution on Inadmissibility of 15 April 2016, paragraphs 27-28).

66. The Court further notes that the exhaustion of legal remedies is a procedural precondition which must be fulfilled in order for the Court to consider a referral. Although the responding party has not raised as an allegation the fact that this referral is inadmissible in procedural aspect, the Court *ex officio* assesses, in every instance and at any time, whether all admissibility requirements apply to a certain case. In principle, in addition to the regular exhaustion of legal remedies provided by law, the only other way to overcome this procedural requirement - without exhaustion - is that the Applicant proves that the legal remedies provided by law are ineffective.

67. In this regard, it is already a recognized position of the case law of this Court and of the ECtHR that the obligation to exhaust legal remedies is limited to making use of those remedies the existence of which is sufficiently certain, not only in theory, but also in practice; which are available, accessible and effective; and which are capable of redressing directly the alleged violation of the Convention. (See, *inter alia case cited above Selmouni v. France*, paragraphs 71 to 81, *Akdivar and Others v. Turkey*, paragraphs 55-77, *Demopolous and Others v. Turkey*, paragraphs 50-129; *Ocalan v. Turkey*, paragraphs 63-72; and *Kleyn and others v. the Netherland*, paragraphs 155-162). In addition, an Applicant cannot be considered to have exhausted legal remedies if he cannot demonstrate, by providing relevant case law or other appropriate evidence that a legal remedy available to him, which he has not used, would fail. (see: Case *Kleyn and Others v. The Netherlands*, paragraph 156 and references cited therein).

68. The Court notes that, in the present case, the Applicant did not provide any argument and evidence that he had used any legal remedy or if the legal remedies available to him were inadequate and ineffective by which he could argue that the rule of exhaustion of legal remedies should be considered fulfilled and waived in that specific case. (see: case of the Constitutional Court of the Republic of Kosovo, KI116/14, Applicant *Fadil Selmanaj*, Resolution on Inadmissibility of 26 January 2015, paragraphs 45-46 and references cited in that decision). He simply maintained the view that there is no legal remedy and that the Constitutional Court is the only legal remedy – a position which, for the reasons mentioned above, does not prove to be correct.

69. In conclusion, the Court finds that the Referral was submitted before the Applicant exhausted all legal remedies and as such is premature and is to be declared inadmissible in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

Request for interim measure

70. The Court recalls that the Applicant also requested the Court the following: "*Pursuant to Article 57 item (a), (b), (c) Decision on interim measure, of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, we, the lawyers in principle request to impose interim measure against this Order*". In addition to the request for interim measure, the Applicant submitted four additional documents which he called "*urgencies*" and in all these documents is reiterated the need, according to him, for the Court to decide on the present referral within the shortest time limit.

71. To support the request for interim measure, the Applicant states that "*leaving this Order in force, the consequences would be irreplaceable and irreparable and that there may be situations of escalation of physical and verbal violation by the court guards, who are authorized to use violence*".

72. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible because he filed a premature referral, and as a result, he did not exhaust all legal remedies.

73. Therefore, in accordance with the foregoing findings and in accordance with Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 57 (1) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

Request to hold a hearing

74. The Court recalls that the Applicant also requested the Court to hold a hearing in which the facts of the case would be discussed "*verbally and completely*" and his referral would be substantiated, according to him, as being grounded on "*the law and the facts.*

75. The Court recalls that, pursuant to paragraph (2) of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, the Court may order a hearing only *"if it believes a hearing is necessary to clarify issues of fact or of law"*

76. The Court reiterates the finding that the Applicant's Referral was declared inadmissible because he did not exhaust all legal remedies. In this regard, and since there is no issue of evidence or law to clarify, the Court rejects the request for scheduling a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 23 January 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

III. TO REJECT the request for a hearing;

IV. TO NOTIFY this Decision to the Parties;

V. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and

VI. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Nexhmi Rexhepi Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.