



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

Prishtina, on 31 January 2020
Ref. no.:RK 1507/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI90/18

Applicant

Nedvedete Ponosheci and Atdhe Ponosheci

Constitutional review of Judgment Pml. No. 89/2018 of the Supreme Court of the Republic of Kosovo of 8 May 2018, in conjunction with Decision PAKR. No. 397/17 of the Court of Appeals of Kosovo of 19 August 2017, and Judgment PKR. No. 61/14 of the Basic Court in Gjakova of 21 June 2017

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 Nedvedete Ponosheci and Atdhe Ponosheci residing in Gjakova (hereinafter: the Applicants), represented by Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The Applicants challenge Judgment [Pml. No. 89/2018] of the Supreme Court of Kosovo, of 8 May 2018, in conjunction with Decision [PAKR. No. 397/17] of the Court of Appeals of 19 September 2017 and Judgment [PKR. No. 61/2014] of the Basic Court in Gjakova, of 21 June 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly violate the Applicants' rights and freedoms guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), and Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR and Articles 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution.
4. The Applicants also submitted a request to hold a hearing.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the 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

6. On 3 July 2018, the Applicants submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 16 August 2018, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gerxhaliu-Krasniqi.
8. On 3 September 2018, the Court notified the Applicants about the registration of the Referral and requested them to complete the form. The Supreme Court was also notified about the registration of the Referral.
9. On 17 September 2018, the Applicants submitted the referral form requested by the Court. The form stated that they are represented by the lawyer Teki Bokshi, but they did not submit the relevant power of attorney. Consequently, the Court requested the Applicants to attach the power of attorney.

10. On 26 September 2018, the Applicants attached the power of attorney and also attached an additional document with citation of cases of the European Court of Human Rights (hereinafter: the ECtHR).
11. On 22 October 2018, the Court requested the Basic Court in Gjakova to submit the case file.
12. On 14 November 2018, the Basic Court in Gjakova sent the case file as requested by the Court on 22 October 2018.
13. On 15 January 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

Facts about the death of person F.P.

14. On 9 June 2013, F.P. - the spouse of Nedvedete Ponosheci and father of Atdhe Ponosheci (the Applicants) was physically assaulted by two persons, namely F.GJ. and B.N., at a premise in Gjakova in which F.P. worked.
15. On 28 June 2013, F.P. died from the sustained injuries.
16. Based on the case file, person B.N. turns out to be an escapee.

Filing of indictment, procedures for guilty plea agreement of person F.GJ.

17. On 24 March 2014, the Basic Prosecution in Gjakova filed the indictment [PP/I. No. 237/2013] against the accused B.N. and F.GJ. because in co-perpetration they have committed the criminal offense of robbery under Article 329, paragraph 5 in conjunction with paragraphs 3 and 1 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).
18. On 3 May 2016, the Basic Prosecution in Gjakova - Serious Crimes Department, namely the State Prosecutor (hereinafter: the case prosecutor), entered into a guilty plea agreement with person F.GJ. for the criminal offense of robbery in co-perpetration under Article 329, paragraph 5 in conjunction with paragraphs 3 and 1 in conjunction with Article 31 of the CCRK. The State Prosecutor after negotiating the agreement with F.GJ. reached the agreement on the requalification of the criminal offense where F.GJ. was charged with the criminal offense of assistance to robbery under Article 329, paragraph 5 in conjunction with paragraphs 3 and 1 in conjunction with Article 33 of the CCRK. Therefore, the parties to this proceeding (State Prosecutor F.GJ. and his lawyer) agreed that F.GJ. be sentenced to effective imprisonment of 5 years to 5 years and 6 months.

19. The plea agreement of 3 May 2016 was served on the Basic Court in Gjakova in order to take a decision on the acceptance or rejection of this agreement on the basis of the provisions of Article 233, paragraph 18 subparagraphs 1, 2, 3 and 4 of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: the CPCRK).
20. On 19 May 2016, the Applicants filed a Referral with the Basic Court in Gjakova, seeking (i) the postponement of the trial; (ii) the filing of the indictment because they had not been served with it; and (iii) to participate in the negotiation of a plea agreement.
21. On 7 June 2016, the Applicants submit a submission/letter to the Basic Court in Gjakova, declaring that they have received the indictment PP/I. No. 237/2013 of 24 March 2014 and request F.GJ. the amount of € 100,000 in the name of compensation, and request that the person F.GJ. be imposed more severe punishment.
22. On 10 June 2016, the case prosecutor at the Basic Prosecution compiles minutes on the receipt of the statement of the injured party in the pre-trial procedure, in which the Applicants (i) declare that they oppose the plea agreement because they consider that the negotiated sanction is very low, and (ii) at the same time they file a property claim. Consequently, the case prosecutor by a letter, on the same date, notifies the Presiding Judge about rejection of guilty plea agreement of 3 May 2016, because the case prosecutor withdrew from the agreement.
23. On 9 June 2017, the Basic Prosecution and the parties to the proceedings reached a guilty plea agreement. In this agreement, the prosecutor of the case made the requalification of the criminal offense from the criminal offense of co-perpetration to robbery pursuant to Article 329, paragraph 1 in conjunction with Article 31 of the CCRK, in the criminal offense of assistance to robbery under Article 329, paragraph 5 in conjunction with paragraphs 3 and 1 in conjunction with Article 33 of the CCRK. The Applicant's representative in this agreement stated that he opposes it because (i) the sentence is low and disproportionate to the actions of F.GJ. and (ii) sought to take into account the unresolved property and legal issue, namely compensation of damage of € 100 thousand.

The decisions of the regular courts

24. On 21 June 2017, the Basic Court in Gjakova - Department for Serious Crimes (hereinafter: the Basic Court), held a hearing on the review of the plea agreement, and the Applicants were also invited to seek compensation of damage of 100 thousand €. In the minutes of the hearing, the presiding judge renders a decision stating that the case prosecutor in the plea agreement also makes the legal requalification of the criminal offense from the criminal offense: "*Robbery in co-perpetration under Article 329, paragraph 3 with regard to par.1 and in conjunction with Article 31 of the CPCRK, **in the criminal offense of: assistance to robbery under Article 329***"

paragraphs 5, 3 in conjunction with paragraph 1 and in conjunction with Article 33 of the CCRK”.

25. On the same date, the Basic Court rendered Judgment PKR. No. 61/14 and decided on the proposal for guilty plea as per the proposal of the Basic Prosecution on 9 June 2017. The Basic Court found the person F.GJ. guilty for the commission of the criminal offense of assistance to robbery pursuant to Article 329, paragraph 5 in conjunction with paragraphs 3 and 1 in conjunction with Article 33 of the CCRK. The Basic Court reasoned that the factual situation was determined not only by the guilty plea by F.GJ. but also by the administered evidence.
26. Consequently, for the commission of the criminal offense, person F.GJ. was sentenced to imprisonment of 6 (six) years and 6 (six) months, while the Applicants were instructed to pursue a property claim in civil dispute as provided for in Article 463, paragraph 2, of the CPCRK..
27. On an unspecified date, the Applicants filed appeal with the Court of Appeals against the Judgment of the Basic Court, stating that *“The agreement was reached for the compensation of the amount of 100.000 €”*. According to the Applicants, the Basic Court should have determined in the Judgment that *“the accused is obliged to pay compensation of damage in the amount of 100.000 €”*. The Applicants therefore alleged that the Basic Court should not have instructed them in civil proceedings, as according to them, the claimed amount was indisputable. The Applicants also disagreed with the criminal sanction.
28. On 19 August 2017, the Court of Appeals of Kosovo, by Decision PAKR. No. 397/17, rejected the Applicants’ appeal as inadmissible. The Court of Appeals initially stated that the guilty plea agreement was reached on 9 June 2017 in the presence of the case prosecutor of the person F.GJ. and his defense counsel, as well as in the presence of the Applicants’ representative, while emphasizing that even at the hearing of 21 July 2017, the plea agreement was admitted by the presiding judge in the presence of all parties. The Court of Appeals further reasoned that *“[...] within the meaning of Article 381 paragraph 3 of the CPCCK, the injured party may appeal the judgment only in relation to the criminal sanction for the criminal offenses against life and body, against sexual integrity, against public traffic safety and for the costs of criminal proceedings, while with regard to compensation of damage, the first instance court instructed the injured party to civil dispute for the realization of the property-legal claim, which is also included in the plea agreement”*.
29. On an unspecified date, the Applicants submitted to the State Prosecutor a proposal to file a request for protection of legality against the decisions of the lower instance courts. Consequently, on 10 November 2017, the State Prosecutor filed a request for protection of legality, on the grounds of violation of the provisions of criminal procedure on the ground that the plea agreement was not implemented in respect of compensation for damage, and consider that based on Article 233, paragraph 12, sub-paragraph 12.4 of the CPCRK the courts were also obliged to decide on the property legal claim of the party. Concerning the rejection of the Applicants’ appeal, the State Prosecutor stated

that the criminal offense of robbery resulted in the death of the deceased F.P., therefore, the Court of Appeals should have decided in the criminal proceedings for compensation as well.

30. On 8 May 2018, the Supreme Court of Kosovo, by Judgment [Pml. No. 89/2018], rejected as ungrounded the request for protection of legality of the State Prosecutor. The Supreme Court reasoned that:

“[...] it is a fact that at the same hearing the representative of [the Applicants] filed a claim for compensation of damage in the amount of € 100,000 and at the same time stated that she joined the criminal prosecution and that the legal representative of the injured party Nevedete Ponosheci stated that she agreed with the claim filed by her authorized representative. It is also true that the convict F.GJ. before the hearing in the Basic Prosecution in Gjakova [...] reached a guilty plea agreement and that in that case the [Applicants'] representative filed a property legal claim in the amount of € 100,000 and that the defense counsel of [F.GJ.] stated that he did not object to the claim for compensation of damage”.

31. As to the allegation and reference to Article 233, paragraph 12, paragraph 12.4 of the CPCRK, the Supreme Court stated that we are dealing with *“the defendant's liability for compensation for the damages and confiscation of all property subject to confiscation under Chapter XVIII of the [CPCRK] and is one of the minimum requirements that a plea agreement must meet. In the present case we are dealing with the property-legal claim and not with the confiscation of the property and the rules to which the confiscation is subject and which served to compensate the injured party which renders the State Prosecutor's allegation ungrounded. Also in accordance with the provision of Article 233, paragraph 13 of the CPCRK, that party has the right to appeal against the decision on the sentence, when it is found that the court imposes a sentence outside of the agreed limits according to the agreement to the detriment of either party, and in the present case the court of the first instance has imposed the sentence within the agreed limits under the guilty plea agreement, so the Court of Appeals has rightly dismissed the appeal of the authorized representative and the legal representative of the injured party as inadmissible”.*
32. Regarding the Applicants' allegations relating to their claim for compensation of damage in the amount of € 100,000, the Supreme Court found it ungrounded because in the present case *“the first instance court approved the guilty plea agreement in which it was never stated that the convicted person should compensate the specified amount - the property legal claim of the injured party, although the defense counsel stated that he did not object the property legal claim, which does not mean that he agreed to compensate this claim, so the court of first instance rightly instructed the injured party in the realization of the property-legal claim in a regular civil dispute”.*

Applicant's allegations

33. The Court recalls that the Applicants allege that the challenged decisions violate their rights and freedoms guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, and Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR, and Articles 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution.
34. The Applicants initially state that they are dissatisfied with the actions taken by the prosecution and judicial authorities and claim that *"the violations have been committed in the basic prosecution and courts of all instances"*.
35. In relation to the abovementioned allegation, the Applicants emphasize that the right to a fair and impartial trial has been violated, because in their view the guilty plea agreement is a serious violation and they challenge the requalification of the criminal offence by the prosecution of the case, because allegedly this is not provided for by the legal provisions and hereby the person F.GJ. *"is privileged without basis"*. Furthermore, the Applicants emphasize that the guilty plea agreement with regard to the criminal sanction is in breach of Article 233, paragraphs 7.1 and 7.2 of the CPCRK
36. The Applicants allege that *"the principle of access to justice"* has also been violated, because the Court of Appeals *"has erroneously dismissed the appeal as inadmissible"* for which reason they have been denied the right of access to justice. According to the Applicants, the Court of Appeals dismissed the appeal with no clear reasons as to why it was impermissible and held that *"apparently the murder of a family member of the injured did not appear to the Court of Appeals as a criminal offense against life and body"*.
37. The Applicants allege that *"the principle of equality of arms"* has also been violated because person F.GJ. has obtained only the benefits of the plea agreement, while the obligations of that plea, namely the claim for compensation of damage, have not been imposed.
38. Concerning the claim for compensation of damage, the Applicants emphasize that the amount of € 100,000 was indisputable and explicitly is in the plea agreement of 9 June 2017 that *"[...] as an accused party we do not oppose that claim for compensation of damage"*. Therefore, the Applicants allege that the rejection of the property-legal claim constitutes a violation of the property right.
39. The Applicants, referring to several ECtHR judgments that have dealt with the issue of the reasoned decision, point out that the challenged decisions did not give the appropriate reasons and emphasize the case of the ECtHR, *Garcia Ruiz v. Spain*, citing paragraph 26 of this judgment which reads ***"in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision"***.

40. In conclusion, the Applicants request the Court: “[...] to annul and declare the court decisions unconstitutional”.

Relevant legal provisions

CODE No. 04/L-123 OF CRIMINAL PROCEDURE

(i) As to the guilty plea agreement

Article 233 [Negotiated Pleas of Guilty]

1. At any time prior to the filing of the indictment, the state prosecutor and the defense counsel may negotiate the terms of a written plea agreement under which the defendant and state prosecutor agree to the charges of an indictment and the defendant agrees to plead guilty in return for:

1.1. the state prosecutor’s agreement to recommend a more lenient punishment to the court, but not under one below the minimum provided for by law or the minimum set under paragraph 7 of this Article; or

1.2. other considerations in the interest of justice, such as the waiver of the

punishment as foreseen by Article 234 of the present Code.

2. At any time following the filing of the indictment and before the completion of the main trial, the state prosecutor and the defense counsel may negotiate the terms of a written plea agreement under which the defendant agrees to plead guilty in return for:

2.1. the state prosecutor’s agreement to recommend a more lenient punishment to the court, but not under one below the minimum provided for by law or the minimum set under paragraph 7 of this Article; or

2.2. other consideration in the interests of justice, such as the waver of the

punishment as foreseen by Article 234 of the present Code.

3. In cases when the defendant wishes to enter into a guilty plea agreement, the defendant’s counsel, or the defendant if not represented by counsel, shall request the state prosecutor for a preliminary meeting to commence negotiations for a plea agreement. At all such negotiations, a defendant must be represented by counsel, in accordance with paragraph 1 of this Article.

4. Upon receiving a request for a preliminary meeting, the state prosecutor shall inform the chief of his or her respective office, who shall give written authorization for such meeting for plea agreement discussions, at which the defendant’s statements will be given limited immunity as provided in paragraph 11 of this Article. All plea agreements must be in writing and cleared by the Chief of the respective state prosecutor’s office before being formally offered to the defendant.

5. In cases when the state prosecutor wishes to enter into a guilty plea agreement, the state prosecutor shall obtain the approval of the Chief of his or her respective office to commence negotiations for a plea

agreement. Upon the approval of the Chief of his or her respective office, the state prosecutor shall either:

5.1. send a letter to the defense counsel with a description of the offered plea agreement, including the terms required under paragraph 12 of this Article, or

5.2. meet with the defense counsel and defendant to negotiate the possibility of and terms for a plea agreement. paragraph 4 of this Article shall apply *mutatis mutandis*.

6. The written plea agreement may include a provision that the state prosecutor will make an application under Article 236 of the present Code, to the court to issue an order declaring the defendant be a "co-operative witness" as defined in Article 235 of the present Code. If such defendant provides assistance, as a co-operative witness, the state prosecutor shall recommend to the court more lenient punishment in accordance with paragraph 7 of this Article that reflects the extent of the assistance and cooperation provided by the defendant, while taking into account the severity of the criminal charges.

7. Pursuant to a written plea agreement, the state prosecutor may recommend more lenient punishment under paragraph 1 sub-paragraph 1.1, paragraph 2 sub-paragraph 2.1 and paragraph 6 of this Article, but only to the extent allowed under the following formulation:

[...]

8. The defendant and the defense counsel shall be present during the plea negotiations and must agree to the terms of any written plea agreement before it may be presented to the court. When the defendant is not participating as a cooperative witness, the following conditions apply. The state prosecutor shall inform the injured party of the negotiated plea agreement, once the agreement reaches its final form. When the injured party has a claim for damages arising from the criminal conduct that has been filed or is charged in the indictment, the plea agreement must address the injured party's claim, and the state prosecutor must inform the injured party that the defendant is seeking to negotiate a plea agreement. The injured party must be given an opportunity to present a statement to the court regarding such property claim prior to the court's acceptance of the plea agreement.

9. Where the defendant shall participate as a cooperative witness, the state prosecutor shall ensure that the injured party's claim for damages is treated by the plea agreement. When the injured party has a claim for damages arising from the criminal conduct that has been filed or is charged in the indictment, the plea agreement must treat the injured party's claim. The injured party must be given an opportunity to present a statement to the court regarding such property claim prior to the court's sentencing of the defendant pursuant to the plea agreement.

10. The court shall not participate in the plea negotiations, but may set a reasonable deadline not longer than three (3) months for the conclusion of the negotiations to prevent delay of the procedure.

11. At any time prior to acceptance of the plea agreement by the court, either the state prosecutor or the defendant may reject a plea agreement and the single trial judge or presiding trial judge shall schedule the court trial as provided for under Chapter XIX of this Code. If the state

prosecutor and the defense counsel or defendant fails to reach a guilty plea agreement, or if the plea agreement is not accepted by the court, any statements of the defendant made during the plea negotiations, as provided in paragraph 3, 4 and 5 of this Article, shall be inadmissible as evidence in the court trial or other related proceedings.

12. A written plea agreement must state every term of the agreement, must be signed by the chief prosecutor of the respective office, the defense counsel and the defendant, and shall be binding on each party. At a minimum, the plea agreement must specify:

12.1. the charges to which the defendant will plead guilty;

12.2. whether the defendant agrees to cooperate;

12.3. the rights that are waived;

12.4. defendant's liability for restitution to an injured party and confiscation of all assets subject to forfeiture under Chapter XVIII of the present Code.

13. The plea agreement may also include a provision in which the parties agree on a range of punishment to be proposed by the state prosecutor if the defendant cooperates substantially, whereas if the court imposes a sentence outside of this range to the detriment of one party, that party shall be entitled to appeal for the decision on the sentence.

[...]

18. In considering whether to accept the guilty plea agreement, the court must question the defendant, his or her defense counsel and the state prosecutor, and shall determine whether:

18.1. the defendant understands the nature and the consequences of the guilty plea;

18.2. the guilty plea is voluntarily made by the defendant after sufficient

consultation with defense counsel, if defendant has a defense counsel, and the defendant has not been forced to plead guilty or coerced in any way;

18.3. the guilty plea is supported by the facts and material proofs of the case that are contained in the indictment, by the materials presented by the prosecutor to supplement the indictment and accepted by the defendant, and any other evidence, such as the testimony of witnesses, presented by the prosecutor or defendant; and

18.4. none of the circumstances under Article 253, paragraphs 1 and 2 of this Code exists.

19. In considering the guilty plea agreement, the court must invite the views of the state prosecutor, the defense counsel and the injured party. If the defendant's agreement to cooperate and plead guilty is under seal pursuant to paragraph 17 of this Article, the court shall permit the injured party to make a statement at the end of defendant's cooperation, prior to sentencing.

20. If the court is not satisfied that all of the conditions set forth in paragraph 18 of the present Article are fulfilled, the court shall reject the guilty plea and the case shall proceed to trial as provided for by this Code.

[...]

(ii) As to the property-legal claim

Article 459

[Persons authorized to file a motion for realization of property claims]

1. *The motion to realize a property claim in criminal proceedings may be filed by the person authorized to pursue that claim in civil litigation. [...]*

Article 460

[Filing of Motion to Realize Property Claims]

1. *A motion to realize a property claim in criminal proceedings shall be filed with the competent body with which the criminal report is filed or the court before which proceedings are being conducted.*
2. *The motion may be filed no later than the end of the main trial before the Basic Court.*
3. *The person authorized to file the motion must state his or her claim specifically and submit evidence.[...]*

Article 463

[Decision on Motion to Realize Property Claims]

1. *The court shall decide on property claims.*
2. *In a judgment pronouncing the accused guilty the court may award the injured party the entire property claim or may award him or her part of the property claim and refer him or her to civil litigation for the remainder. If the data collected in the criminal proceedings do not provide a reliable basis for either a complete or a partial award, the court shall instruct the injured party that he or she may pursue the entire property claim in civil litigation.*
3. *If the court renders a judgment acquitting the accused of the charge or rejecting the charge or if it renders a ruling to dismiss criminal proceedings, it shall instruct the injured party that he or she may pursue the property claim in civil litigation. When a court is declared not competent for the criminal proceedings, it shall instruct the injured party that he or she may present his or her property claim in the criminal proceedings commenced or continued by the competent court.*

Article 466

[Amendment of the final judgment regarding the property claim]

1. *The court conducting criminal proceedings may amend a final judgment which contains a decision on a property claim only in connection with the reopening of criminal proceedings or a request for protection of legality. [...]*

Admissibility of the Referral

41. In this respect, The Court initially 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.

[...]”.

42. The Court further examines whether the Applicants have met the admissibility requirements as defined by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

“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.”

Article 48
[Accuracy of the Referral]

“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.

Article 49
[Deadlines]

“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision... ”.

43. The Court also refers to Rule 39 (1) (b) and (3) (b) of the Rules of Procedure, which provides:

Rule 39
[Admissibility Criteria]

“(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,

[...]

(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

[...]

(b) the Referral is incompatible razione materiae with the Constitution;”

44. Before assessing the aforementioned admissibility criteria, the Court first recalls that as a result of the commission of the criminal offense, the spouse of Nedvedete Ponosheci and father of Atdhe Ponosheci died. On 9 June 2017, a plea agreement was reached in the presence of the parties, namely the accused F.GJ., the lawyer of the accused and the family of the deceased F.P. (Applicants). Accordingly, on 21 June 2017, the Basic Court by Judgment PKR. No. 61/14 decided on the guilty plea proposal upon the proposal of the Basic Prosecution of 9 June 2017 and found the person F.GJ. guilty for the commission of the criminal offense of assisting in the robbery, for which F.GJ. was sentenced to relevant imprisonment, while the Applicants were instructed to pursue a property legal claim in civil dispute as provided for by the CPRK.
45. The Applicants filed appeal with the Court of Appeals and the latter dismissed the Applicants' appeal as inadmissible, reasoning that the injured party may appeal the Judgment only with regard to the criminal sanction for the criminal offenses against life and body, against sexual integrity, against public traffic safety and for the costs of criminal proceedings, and as regards compensation for damages, the first instance court instructed the injured party in civil litigation for the realization of the property-legal claim, which is included in the plea agreement. The State Prosecution filed a request for protection of legality, due to a violation of the criminal procedure provisions on the grounds that the plea agreement was not implemented with regard to compensation of damage, and that pursuant to the provisions of the CPRK, the courts were also obliged to rule on the property-legal claim of the party. Therefore, by Judgment [Pml. No. 89/2018] of 2 May 2018, the Supreme Court rejected as unfounded the request of the State Prosecutor for protection of legality and argued in substance that the first instance court had rightly instructed the injured party (the Applicants) in regular civil dispute for realization of the property-legal claim.
46. In proceedings before the regular courts, the Applicants have consistently alleged that (i) the criminal sanction imposed on the person F.GJ. is not proportional; (ii) the guilty plea agreement is unlawful; and that they (iii) have not been compensated under a plea agreement.
47. The Court notes that the Applicants, in the proceedings before the regular courts and in accordance with the provisions of the CPRK, are considered injured parties. In their allegations before the Court, the Applicants raised a violation of their constitutional rights to fair and impartial trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and reiterate their claims, as submitted to the regular courts.
48. As mentioned above, the Applicants in the proceedings before the regular courts have appeared in the capacity of the injured party. Criminal legislation

in the Republic of Kosovo recognizes the status of the injured and victim in criminal proceedings. The Court notes that under the definitions set out in Article 19 of the CPCRK, the injured party or the victim is a person whose personal or property rights have been violated or endangered by the criminal offense. The rights of the injured under the CPCRK *inter alia* consist in the reasonable compensation ordered by the court from defendant or defendants who have admitted or have been found guilty of material, physical and emotional damage caused by the commission of the criminal offense for which the defendant or defendants have been found guilty. According to the same article, the injured party has the capacity of a party to criminal proceedings. Furthermore, pursuant to paragraph 18 of Article 233 of the CPCRK, the court must hear the views of the defendant, his defense counsel and the State Prosecutor when considering the plea agreement.

49. The Court, in addressing the Applicants' allegations, must first consider in what circumstances the victims and the injured parties can benefit in the criminal proceedings, the right to fair and impartial trial and what guarantees they may benefit, namely the issues raised by the Applicants *ratione materiae* in accordance with the Constitution.
50. The Court first notes that based on the ECHR, there are no specific provisions addressing the rights of victims in criminal proceedings. However, the issue of victims has been dealt with in some cases by the ECtHR, as regards the right to fair and impartial trial. The ECtHR has also emphasized this in case *Perez v. France*, a case which has taken a new approach in terms of victims but in the civil field. In this case, the ECtHR emphasized:

"[...] Simply because the requirements inherent in the concept of a "fair trial" are not necessarily the same in disputes about civil rights and obligations as they are in cases involving criminal trials, as evidenced by the fact that for civil disputes there are no detailed provisions similar to those in Article 6, paragraph 2 and 3 ... does not mean that the Court can ignore the plight of victims and downgrade their rights " (see Perez v. France [GC], No. 47287/99, Judgment of 12 February 2004, paragraph 72).

51. To address the Applicants' allegations of (i) requalification of the criminal offense of negotiating a guilty plea agreement and criminal sanction imposed on the person F.G.J. as well as (ii) compensation of the amount required in the guilty plea agreement, the Court will first deal with how Article 6 of the ECHR applies to the criminal and civil aspects and deal with the Applicants' allegations, applying the case law of the ECtHR, in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the rights and freedoms guaranteed by the Constitution.

(i) As regards the applicability of Article 6 of the ECHR to the criminal aspect

52. The Court will first examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and Rule 39 (3) (b) of the Rules of Procedure.
53. As a fundamental issue in this Referral and in all the Referrals submitted to this Court, first it must be established whether the rights claimed by the Applicants are in accordance with the substantive jurisdiction (*ratione materiae*) of the Court. Thus, it must be established whether the alleged rights are guaranteed and protected by the Constitution and the ECHR (see in this context the case of the Court, KI174/18, Applicant *Bedri Gashi*, Resolution on Inadmissibility of 10 April 2019).
54. The Court first notes, that the Applicants allege that their right to fair and impartial trial has been violated on the grounds that according to them, the guilty plea agreement constitutes a serious violation due to the requalification of the criminal offence by the prosecutor of the case and they do not agree with the criminal sanction imposed on the person F.GJ.
55. Referring to the Applicants' allegations, the Court first recalls Article 6, paragraph 1, of the ECHR, which establishes:
- “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[...]”*
56. The Court notes that the very sentence of Article 6 of the ECHR itself (“*criminal charge*”), makes it clear that in criminal cases this article guarantees the protection of a person facing a criminal report (see, *mutatis mutandis*, ECtHR case, *Agosi v. the United Kingdom*, Judgment of 24 October 1986, paragraph 65; and *Đekić and others v. Serbia*, No. 32277/07, Judgment of 29 April 2014, paragraph 42).
57. In this regard, the Court also notes that neither the Constitution nor Article 6 of the ECHR confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. Therefore, the right to prosecution or sentence of the third parties, cannot be initiated independently. To fall within the scope of the Constitution, such right must be indissociable from the victim's exercise of a right to bring civil proceedings, even if only to secure symbolic reparation or to protect a civil right such as the right to a “*good reputation*” (See, case of the ECtHR, *Gorou v. Greece* (no. 2), application no. 12686/03, Judgment of 20 March 2009, paragraph 24, see also, *mutatis mutandis*, case of the ECtHR *Perez v. France*, cited above, paragraphs 70-71 and the cases of the Constitutional Court KI23/15, Applicant *Miladin Anđelković*, cited above, paragraph 32; and the case of Court KI52/18, Applicant *Zoran Stanišić*, Resolution on Inadmissibility of 16 January 2019, paragraph 50).
58. The Court accordingly notes that as regards the first allegation concerning the requalification of the criminal offense and the sanction against the person F.GJ. in the context of criminal proceedings, the Court initially reiterates that

the way the criminal proceedings is conducted or terminated, the way the perpetrators of the criminal offences are punished and discovered is a discretion and prerogative of the regular courts and of the prosecution, afforded to them by the law and the Constitution, therefore any interference by the Court in the discretion might constitute an infringement to their autonomy (See case of the Constitutional Court KI23/15, Applicant *Miladin Anđelković*, cited above, paragraph 36 and case No. KI98/12, Applicant *Ruzhdi Shala*, Resolution on Inadmissibility of 29 April 2013, paragraph 41).

59. Furthermore, the Court, recalling the case law of the ECtHR, notes that the latter has dealt with the question of the adequacy of criminal sanctions in some other areas, notably in the areas of Articles 3 and 8 of the ECHR, and mainly for certain sensitive categories of Applicants and with regard to the obligation to provide certain criminal offenses in the domestic legislation and relevant criminal sanctions which would affect the application of criminal law provisions effectively (see, *mutatis mutandis*, ECtHR case, *M and C v. Bulgaria*, No. 39272/98, Judgment of 4 December 2003, paragraph 153; and case *X and Y v. the Netherlands*, No. 8978/80, Judgment of 26 March 1985).
60. In the present case, the Applicants raised their allegations under their constitutional right to a fair and impartial trial and based on the ECtHR case law, the adequacy of criminal sanctions is not included in this right.
61. Therefore, the Court finds that the Applicant's allegation as to the requalification of the criminal offense and criminal sanction in conjunction with Article 31 of the Constitution and Article 6 of the ECHR is inadmissible as incompatible *ratione materiae* with the Constitution as set out in the Rule 39 (3) (b) of the Rules of Procedure.

(i) As to the application of Article 6 of the ECHR in civil aspect

62. In assessing the admissibility of the Applicants' Referrals, the Court reiterates that paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, *inter alia*, clearly determine the obligation of "*exhausting all the legal remedies provided by the law*", provided that a referral is declared admissible and its merits examined.
63. The Court recalls the Applicants' substantive allegation, namely the issue of compensation, which according to them is indisputable, and should have been compensated by the convict. (person F.GJ). Thereby, they claim that "*the principle of access to justice*" has been violated, because the Court of Appeals "*has erroneously dismissed the appeal as inadmissible*", and that "*the principle of equality of arms*" has been violated, because person F.GJ. has received only the benefits of the plea agreement, while the obligations of that agreement, namely the claim for compensation of damage, has not been imposed.
64. In view of this, the Court recalls that in the plea agreement of 9 June 2017, the Applicants were invited to participate in this agreement and also filed their property legal claim, namely the claim for compensation. Further, in the

proceedings before the Basic Court, the latter instructed the Applicants in civil dispute.

65. The ECtHR states that in cases where the Applicants do not file a civil claim in the context of criminal proceedings and when the criminal conviction is not an official precondition for obtaining compensation in civil proceedings, the outcome of the criminal proceedings has not been decisive for “the civil rights” of the Applicants, and in this way the civil limb of Article 6 of the ECHR was not applied (see case *Dekić and others v. Serbia*, cited above, paragraph 42). However, in contrast to the case *Perez v. France*, the ECtHR, applied Article 6 of the ECHR with regard to the civil limb because under French law, the procedures by which someone claims to be the victim of a criminal offense are crucial for his “civil rights” from the moment he joined as a civil party (see *Perez v. France*, cited above, paragraph 66).
66. The Court, based on the case law of the ECtHR, finds that the Applicants filed a claim for compensation for damage caused by the criminal offense during the criminal proceedings and exercised their right to seek compensation for the damage caused by the criminal offense for which they were the injured party. In this regard, the Court recalls that in order the right in question falls within the scope of the Constitution, it must be indissociable from the Applicant’s right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation” (see, citations above, in paragraph 57).
67. Therefore, the Court accordingly considers that this case falls within the scope of Article 6 paragraph 1 of the ECHR and accordingly Article 31 of the Constitution.
68. However, the Court recalls Rule 39 paragraph (1) (b) of the Rules of Procedure, which provides that “(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*”.
69. Based on the above, the Court recalls that Judgment Pml. No. 89/2018, of 8 May 2018 of the Supreme Court, Decision PAKR. No. 397/17, of 19 August 2017 of the Court of Appeals and Judgment PKR. No. 61/14, of 21 June 2017 of the Basic Court instructed the Applicants in civil contest to realize their property-legal claim. The Supreme Court further reasoned that:

“[...] the first instance court approved the guilty plea agreement in which it was never stated that the convicted person should compensate the specified amount - the property legal claim of the injured party, although the defense counsel stated that he did not object the property legal claim, which does not mean that he agreed to compensate this claim, so the court of first instance rightly instructed the injured party in the realization of the property-legal claim in a regular civil dispute”.
70. The Court recalls that Article 463, paragraph 1 of the CPCRK states that “*The court shall decide on property claims*. Whereas paragraph 2 of the same

Article establishes that “*In a judgment pronouncing the accused guilty the court may award the injured party the entire property claim or may award him or her part of the property claim and refer him or her to civil litigation for the remainder. If the data collected in the criminal proceedings do not provide a reliable basis for either a complete or a partial award, the court shall instruct the injured party that he or she may pursue the entire property claim in civil litigation*”.

71. 71. On the basis of the foregoing facts, the Court notes that the Applicants in their capacity as the injured party have filed a claim for compensation in the set of criminal proceedings. They were instructed by the regular courts to make the realization of the property claim in civil litigation. However, they did not seize the opportunity to pursue legal proceedings in the competent courts.
72. In this context, the Court also recalls the case of the ECtHR, *Nikolov v. Bulgaria* where the Applicant Mr. Nikolov was a victim/injured of two persons who committed a criminal offense against him. The relevant prosecutorial authority, and the perpetrators, entered into a plea agreement which was approved by the first instance court. The Applicant in that case complained to the ECtHR that the criminal sanction against the perpetrators was disproportionate and that the regular courts were not independent and impartial, as to the approval of the guilty plea agreement of the perpetrators of the criminal offenses and as a result his civil claim, namely the compensation was not examined. The ECtHR explained to the Applicant that the courts in civil proceedings will be able to deal with his claim for compensation, taking into account the fact that the plea agreement already existed and as a consequence he had an immediate alternative remedy, which did not infringe the Applicant’s right to court and was not disproportionate to the requirements of Article 6, paragraph 1 of the ECHR. *See the ECtHR case, Nikolov v. Bulgaria*, No. 39672/03, Decision of 28 September 2008).
73. On the other hand, similar to the case before us, with regard to the property-legal claim filed in criminal proceedings, the Court in its case KI52/18 decided that the Basic Court in that case dealt with the Applicant’s claim for compensation, stating that “*he may try to exercise the property claim in a regular civil procedure*”, and according to the Court the Applicant in that case did not exhaust all legal remedies provided by law because he did not specify in the Referral whether, in order to realize his claim, he has not exhausted the legal remedies available to him (see in this context, the case of Court KI52/18, Applicant *Zoran Stanišić*, cited above, paragraphs 55-56).
74. In illustrating the abovementioned cases, the Court notes that (i) the ECtHR considered the fact whether the Applicant had any alternative remedy and found that such an action did not result in a violation of the requirements of Article 6 paragraph 1 of the ECHR whereas (ii) the Court decided that the Applicant in case KI52/18 had not exhausted the legal remedies provided by law, thus referring to the property-legal claim filed in the criminal proceedings. In the case before us, it follows that the Applicants are able to pursue civil proceedings for their property claim.

75. Therefore, the Court considers that the Applicants have not exhausted the legal remedies available to them under applicable law (see, *mutatis mutandis*, ECtHR case, *Selmouni v. France*, no. 25803/94, Decision of 25 November 1996, the case of the Court KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 28-29).
76. The principle of subsidiarity requires that the Applicants should have exhausted all procedural possibilities in the regular proceedings in order to prevent a violation of the Constitution or, if any, to remedy such a violation of fundamental rights before addressing the Constitutional Court (See *mutatis mutandis*, ECHR case, *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, see cases of the Court KI120/11, *Ministry of Health*, Resolution on Inadmissibility of 4 December 2012, paragraph 32, KI118/15, *Dragiša Stojković*, Resolution on Inadmissibility of 17 May 2016, paragraph 34).
77. The rationale behind the requirement to exhaust the legal remedies or the exhaustion rule, is to afford the relevant authorities, primarily the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the presumption, reflected in Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR, that the Kosovo legal order provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See the ECtHR cases *Selmouni v. France*, Judgment of 28 July 1999, paragraph 74 and among others, see also the cases of the Court: KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; KI41/09, Applicant *AAB-RIINVEST University L.L.C*, Resolution on Inadmissibility of 3 February 2010, paragraph 16; and, KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).
78. Considering the circumstances of the case and the fact that the Applicants have not exhausted available legal remedies before the regular courts, the Court does not consider it necessary to assess whether Article 46 of the Constitution has also been violated in conjunction with Article 1 of Protocol 1 to the ECHR, which follows from the allegations of a violation of Article 31 of the Constitution. As to the allegations of violation of Articles 21, 22, 53 and 54 of the Constitution, the Court finds these allegations ungrounded, because the Applicants have only cited these Articles of the Constitution and have not provided any arguments or evidence to support and justify these alleged violations.
79. Therefore, having regard to the fact that the Applicants have not exhausted all legal remedies in the proceedings before the regular courts, before addressing the Constitutional Court, the Court finds that the Applicants' Referral does not meet the admissibility requirements established in Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure, and is to be declared inadmissible.

Conclusion

80. Finally, the Court holds that:

- (i) As to the alleged violation of the rights and freedoms guaranteed by Article 31 of the Constitution and Article 6 of the ECHR regarding the requalification of the criminal offense and the criminal sanction imposed on the third person, it is incompatible *ratione materiae* with the Constitution; and
- (ii) As to the Applicants' allegations of violation of the rights and freedoms guaranteed by Article 31 of the Constitution and Article 6 of the ECHR regarding the request for compensation of damage, it is inadmissible because the Applicants have not exhausted legal remedies.

Request for hearing

- 81. The Court recalls that the Applicants also requested the Court to schedule a hearing.
- 82. The Court recalls Rule 42 [Right to Hearing and Waiver] paragraph 2 of the Rules of Procedure, which establishes that "*The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law*".
- 83. The Court notes that the abovementioned Rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration. (See the case of the Constitutional Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 - which states that "*The Court considers that the documents contained in the Referral are sufficient to decide this case [...]*").
- 84. In the present case, the Court does not consider that there is any ambiguity about "*evidence or law*" and therefore, it does not consider necessary to hold a hearing. The documents contained in the Referral are sufficient to establish the merits of this case.
- 85. Therefore, the Court, unanimously, rejects the Applicants' request to schedule a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rules 39 (1) (b) and (3) (b), and 59 (2) of the Rules of Procedure, on 15 January 2020, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for a hearing;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.

