THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Newsletter

July — December 2020

CONTENT:

Constitution of Kosovo - Chapter VIII

Constitutional Court

Article 112

[General Principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

2. The Constitutional Court is fully independent in the performance of its responsibilities.

Composition of the Constitutional Court

The Constitutional Court of the Republic of Kosovo is composed of 9 (nine) Judges.

The Judges of the Constitutional Court of the Republic of Kosovo are appointed in accordance with Article 114 [*Composition and Mandate of the Constitutional Court*] of the Constitution and Articles 6 and 7 of the Law on the Constitutional Court of the Republic of Kosovo.

Following the establishment of the Constitutional Court in 2009 and in accordance with the former Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution, 6 (six) out of 9 (nine) judges were appointed by the President of the Republic of Kosovo on the proposal of the Assembly.

Of the 6 (six) national judges 2 (two) judges served for a non-renewable term of 3 (three) years, 2 (two) judges served for a non-renewable term of 6 (six) years and 2 (two) judges served for a non-renewable term of 9 (nine) years.

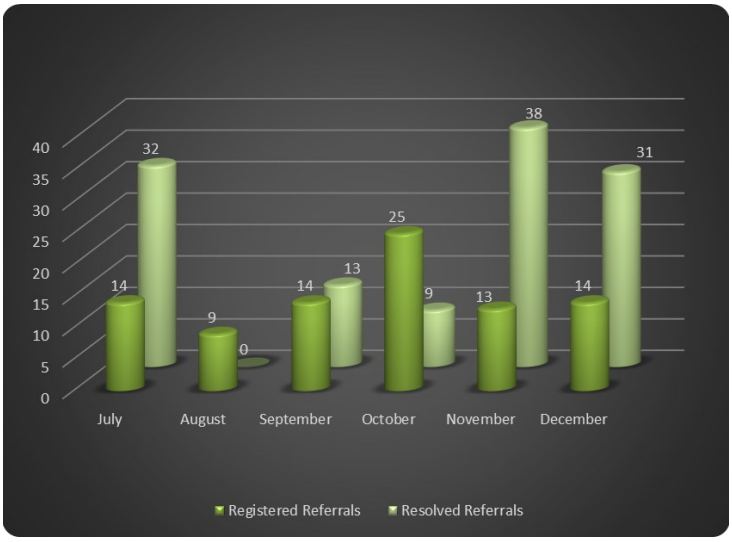
Pursuant to the abovementioned Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution 3 (three) international judges were appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights.

The Court is currently composed of 9 (nine) national judges.

Status of cases

During the six-month period: 1 July – 31 December 2020, the Court has received 89 Referrals and has processed a total of 320 Referrals/Cases. A total of 123 Referrals were decided or 38.44% of all available cases. During this period, 105 decisions were published on the Court's webpage.

The dynamics of received referrals by month (1 July - 31 December 2020)



The following are 12 judgments that the Court rendered during the six month period, 1 July - 31 December 2020:

- Judgment in Case KO 203/19, submitted by: The Ombudsperson. The filed referral requested the constitutional review of specific Articles of Law No. 06/L-114 on Public Officials.
- Judgment in Case KO 219/19, submitted by: The Ombudsperson. The filed referral requested the constitutional review of Law No. 06/L-111 on Salaries in Public Sector.
- Judgment in Case KI 38/19, submitted by: "Avdi Mujaj. The filed referral requested the constitutional review of Judgment Rev. no. 285/2018 of the Supreme Court of the Republic of Kosovo of 1 October 2018.
- Judgment in Case KI 56/18, submitted by: Ahmet Frangu. The filed referral requested the constitutional review of Judgment ARJ. UZVP. No. 67/2017 of the Supreme Court of 22 December 2017.
- Judgment in Case KI 214/19, submitted by: Murteza Koka. The filed referral requested the constitutional review of Decision Rev. No. 195/2019 of the Supreme Court of Kosovo of 23 July 2019.
- Judgment in Case KI 27/20, submitted by: Vetëvendosje! Movement. The filed referral requested the constitutional review of Judgment [A.A-U.ZH. No. 16.2019] of the Supreme Court of Kosovo of 10 October 2019.
- Judgment in Case KI 209/19, submitted by: Memli Krasniqi. The filed referral requested the constitutional review of Judgment Ka. No.664/2019 of the Court of Appeals of Kosovo of 5 August 2019.
- Judgment in Case KI 80/19, submitted by: Radomir Dimitrijević. The filed referral requested the constitutional review of Decision AC-I-18-0547 -A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 21 February 2019.
- Judgment in Case KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, submitted by: Et-hem Bokshi and Others. The filed referral requested the constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters of 29 August 2019.
- Judgment in Case KI 224/19, submitted by: Islam Krasniqi. The filed referral requested the constitutional review of Decision AC-I-19-0114 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 19 September 2019.
- Judgment in Case KI 227/19, submitted by: N.T. "Spahia Petrol". The filed referral requested the constitutional review of Judgment ARJ. UZVP. No. 94/2019 of the Supreme Court of Kosovo of 1 August 2019.
- Judgment in Case KI 139/19, submitted by: Salih Mekaj. The filed referral requested the constitutional review of Judgment Pml.no.36/ 2019 of the Supreme Court of 5 June 2019.

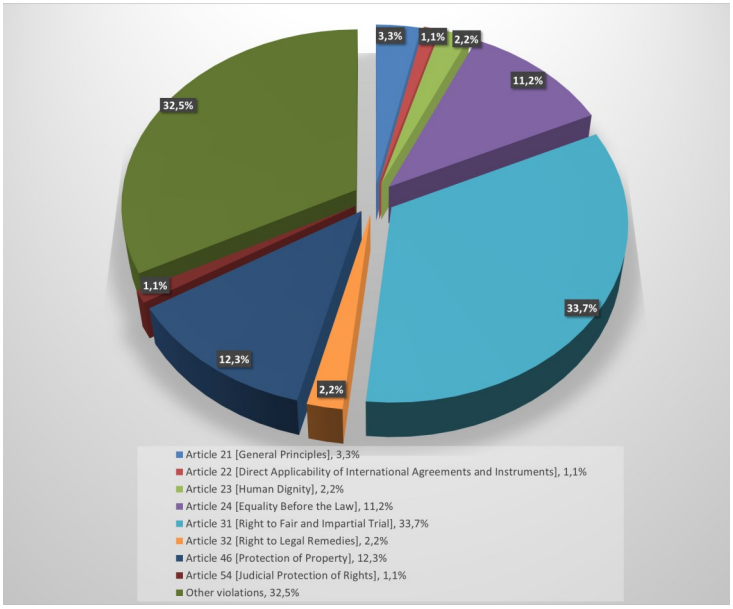
Types of alleged violations

The types of alleged violations in the 89 referrals received during the six-month period:

1 July - 31 December 2020, are the following:

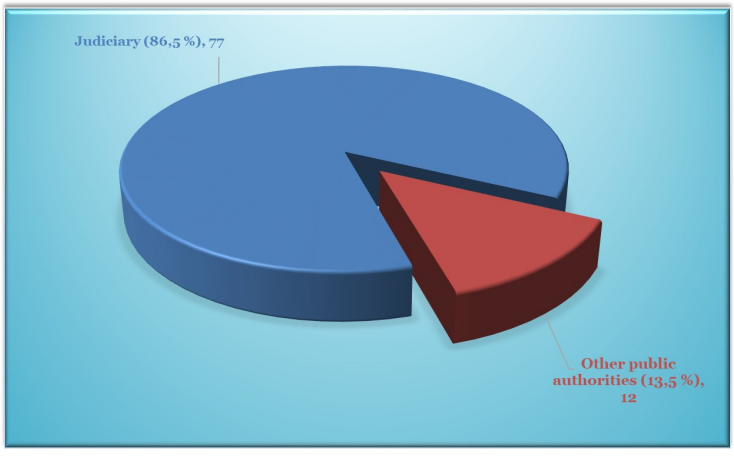
- Article 21 [General Principles], 3 cases or 3,3%;
- Article 22 [Direct Applicability of International Agreements and Instruments], 1 case or 1,1%;
- Article 23 [Human Dignity], 2 cases or 2,2%;
- Article 24 [Equality Before the Law], 10 cases or 11,2%;
- Article 31 [Right to Fair and Impartial Trial], 30 cases or 33,7 %;
- Article 32 [Right to Legal Remedies], 2 cases or 2,2%;
- Article 46 [Protection of Property], 11 cases or 12,3%;
- Article 54 [Judicial Protection of Rights], 1 case or 1,1%;
- Other violations, 29 cases or 32,5%;

Alleged violations by type
(1 July - 31 December 2020)



Alleged violators of rights

Alleged violators of rights
(1 July - 31 December 2020)



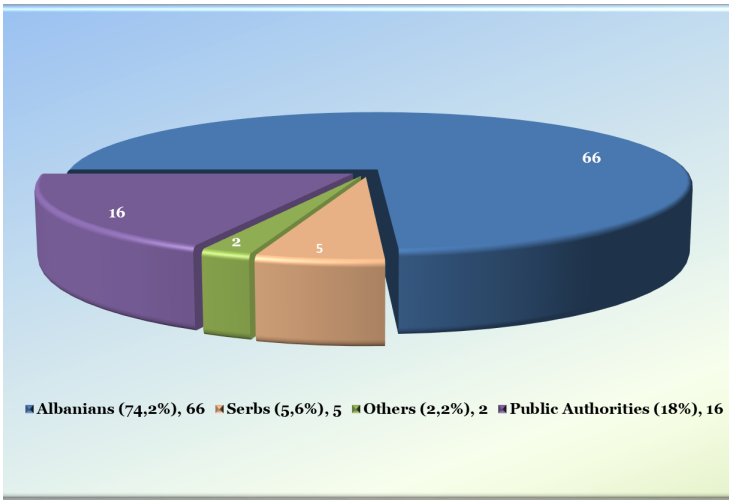
- 77 Referrals or 86,5 % of Referrals refers to violations allegedly committed by court's decisions;
- 12 Referrals or 13,5 % of Referrals refers to decisions of other public authorities;

Access to the Court

The access of individuals to the Court is the following:

- 66 Referrals were filed by Albanians, or 74,2%;
- 5 Referrals were filed by Serbs, or 5,6%;
- 2 Referrals were filed by other communities, or 2,2%;
- 16 Referrals were filed by other public authorities, or 18%;

Ethnic structure of the Applicants
(1 July - 31 December 2020)



Sessions and Review Panels

During the six-month period: 1 July - 31 December 2020, the Constitutional Court held 20 plenary sessions, 87 Review Panels and 1 Public Hearing, in which the cases were resolved by decisions, resolutions and judgments.
During this period, the Constitutional Court has published 105 decisions.

The structure of the published decisions is the following:

- 12 Judgments (11,4%);
- 79 Resolutions on Inadmissibility (75,2%);
- 13 Decisions to summarily reject the Referral (12,4%);
- 1 Decision to strike the application out of the list (1,1%);

7 December 2020

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Arta Rama-Hajrizi, received the new Ambassador of the Swiss Confederation to Kosovo, Mr. Thomas Kolly, who was accompanied by the Deputy Ambassador, Ms. Pauline Menthonnex-Gacaferri.
After expressing her welcome, President Rama-Hajrizi briefed Ambassador Kolly on the latest achievements of Kosovo in the field of constitutional justice, as well as the challenges that the Constitutional Court has faced in its work this year, taking into account the circumstances created as a result of the COVID-19 pandemic.
She emphasized the excellent reports and ongoing support that the Swiss Embassy has provided to the Constitutional Court over the years, especially in building the professional capacity of its support staff, through various projects and study visits to the European Court of Human Rights.
Ambassador Kolly pledged that Switzerland will continue to be an unreserved supporter of strengthening the rule of law and economic development in Kosovo, noting that the co-operation and support for the Constitutional Court will not be lacking in the future either.

24 December 2020

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Arta Rama-Hajrizi, received the newly appointed Ambassador of the Republic of North Macedonia to Kosovo, Ms. Shpresa Jusufi.
Current challenges in the justice system of both countries, respect for human rights and freedoms in times of pandemic and the necessity of advancing the legal infrastructure in line with European standards, were just some of the topics discussed at the joint meeting.
During the conversation, President Rama-Hajrizi emphasized the relations of good cooperation that the Constitutional Court of Kosovo and the Constitutional Court of North Macedonia have had over the years, on which occasion she expressed confidence that this cooperation will continue to further intensify with joint commitment.

Ambassador Jusufi highly praised the achievements so far in the constitutional judiciary of our country and confirmed her commitment to further contribute to the deepening of good relations of cooperation between the Republic of Kosovo and the Republic of North Macedonia at all levels.

Judgment

KO 203/19

Applicant

The Ombudsperson

Request for constitutional review of specific Articles of Law No. 06/L-114 on Public Officials

The Referral was based on paragraph 2, subparagraph 1, of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court, and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court. The subject matter of the Referral was the constitutional review of Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of Law No. 06/L-114 on Public Officials, published in the Official Gazette of the Republic of Kosovo, on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette. The Applicant alleged that the challenged Articles are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo, and other constitutional provisions governing the status of independent constitutional institutions.

In his Referral, the Applicant also requested the Constitutional Court to impose interim measure for immediate suspension of the challenged provisions, which the Court approved after the first hearing on 19 November 2019, for a period until 28 February 2020, and which extended it for another two times, until 28 April and 30 June 2020 respectively.

In assessing the constitutionality of the Law No. 06/ L-114 on Public Officials the Court, unanimously decided: (i) that the referral is admissible for review on merits; (ii) that Articles 2 (paragraph 3), 4 (paragraphs 3 and 4), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 7), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the Law no. 06/L-114 on Public Officials, are not in compliance with Articles 4, 7, 102, 108, 109, 110, 110, 115, 132, 136, 139, 140 and 141 of the Constitution; (iii) the challenged Law does not apply in relation to: Kosovo Judicial Council; Kosovo Prosecutorial Council; the Constitutional Court; the Ombudsperson Institution; Auditor—General of Kosovo; Central Election Commission; the Central Bank of Kosovo and the Independent Media Commission, while it violates their functional and organizational independence guaranteed by the Constitution; (iv) the challenged Law does not infringe the provisions of the Constitution in relation to the Kosovo Forensic Agency and the Kosovo Police Civil Servants; (v) the Assembly of the Republic of Kosovo must take the necessary actions to supplement and amend the Law No. 06/L-114 on Public Officials in accordance with the findings of this Judgment, as regards the officials of the institutions indicated under point (iii); and (vi) in order to repeal the interim measure.

The constitutional matter involved in the said referral is the compliance with the Constitution of the challenged Law voted by the Assembly, respectively the assessment whether it is in accordance with the principle of “separation of powers”, “independence of independent constitutional institutions” and the principle of equality before the law, guaranteed by the above-mentioned articles of the Constitution. The Court examined the constitutionality of the challenged law only in relation to the above-mentioned state institutions as the Applicant did not challenge the constitutionality of the challenged Law in its entirety and in relation to all public officials regulated by the challenged Law.

With regard to the institutions of the justice system set out in Chapter VII [Justice System] of the Constitution, the Court found that the challenged Law gives the Government broad powers to manage and supervise civil servants of public administration, including civil servants of the institutions of the Judicial power, such as officials of the Kosovo Judicial Council and Kosovo Prosecutorial Council. Moreover, the challenged law gives the Government the power to issue a range of sub-legal acts to further

regulate important matters concerning civil servants such as recruitment, appointment, promotion, working hours, and classification of positions, disciplinary violations, which in essence also affect the functioning, classification of positions but also the systematization and organizational structure of the relevant institutions of the Judiciary and Independent Institutions. The Assembly, although through the challenged Law has given the Government the power to manage the civil service system in all institutions, including the Justice System, it has determined that the Presidency of the Assembly is entitled to issue sub-legal acts regarding the Assembly servants.

By this legislative solution it is ensured that the Government, respectively the Executive authority will not have "interference" competencies in the management of the employees of the Assembly, respectively the Legislature; whereas for the Judicial power and Independent Institutions no guarantee is foreseen to prevent "interferences" in the management of their employees. The Court has ascertained that the Assembly has failed to determine the same exception also for the employees of the Justice System so as to ensure the separation of powers not only in terms of judges and prosecutors but also in relation to their support staff, just as it had done for the servants of the Assembly and the Government.

Therefore, the Court assessed that, by not including civil servants of the institutions set out in Chapter VII [Justice System] in the exceptions of Article 4 [Civil Servants with Special Status], paragraphs 3 and 4 of the challenged Law, the challenged law violates the principle of the separation of powers guaranteed by Articles 4 and 7 of the Constitution as well as the independence of the institutions of the justice system set out in Chapter VII [Justice System] of the Constitution, namely the Kosovo Judicial Council and the Kosovo Prosecutorial Council. Consequently, the Court found that the challenged law is not in compliance with the Constitution in relation to these institutions and does not apply to these institutions while it violates their institutional and organizational independence guaranteed by the Constitution.

As regards the Applicant's allegations regarding the violation of the independence of independent constitutional institutions set out in Chapter VIII [Constitutional Court] and XII [Independent Institutions] of the Constitution, the Court refers to Independent Institutions expressly listed in Chapter XII [Independent Institutions], specifically in Articles 132-135 [Role and Competencies of the Ombudsperson], 136-138 [Auditor-General of Kosovo], 139 [Central Election Commission], 140 [Central Bank of Kosovo] and 141 [Independent Media Commission], as well as with respect to the Court as set out in Chapter VIII [Constitutional Court] of the Constitution. In this respect, the Independent Constitutional Institutions based on the Constitution are authorized to decide on their internal organization, including the regulation of certain specifics related to their personnel, in order to ensure their functional and organizational independence. Therefore, the Court emphasized that according to the Constitution and relevant laws, as well as the case law of this Court, elaborated in details in the Judgment, the personnel of independent constitutional institutions are subject to the rules of civil service as long as they do not violate their independence. The regulations which create direct "interference" in their functional and organizational independence are incompatible with the Constitution and the principles and values proclaimed therein.

In this respect, the Court assessed that the Assembly, authorizing the Government through the challenged Law to issue sub-legal acts which regulate the issue of employment, including the classification of positions, criteria for recruitment and other issues in the Independent Constitutional Institutions, without taking into account their independence – violates the essence of the independence of the Independent Constitutional Institutions guaranteed by Article 115 of Chapter VIII of the Constitution and Articles 132, 136, 139, 140, 141 of Chapter XII of the Constitution, as State public authorities separated from the Legislature, the Executive authority, and the regular Judiciary. Therefore, the Court finds that the above-mentioned violations make the challenged Law inconsistent with the Constitution in relation to the Judiciary and Independent Institutions and that it cannot be applied to them as long as it does not respect their institutional and organizational independence.

As to the other institutions in respect of which the Applicant filed a claim with the Court, namely KFA officers and Kosovo Police Civil Servants, the Court stated that the Independent Agencies established under Article 142 of the Constitution do not have the same status with that of the Independent Constitutional Institutions explicitly mentioned in Chapter XII of the Constitution. This is because unlike other institutions referred to in Chapter XII of the Constitution, "Independent Agencies" provided by Article 142 of the Constitution "*are institutions established by the Assembly, based on the respective laws, which regulate their establishment, operation and competencies*." So, unlike the fact that the Assembly can create and shut down "*by law*" Independent Agencies; The Assembly can never "*shut down*" by law any of the five independent institutions mentioned above. This constitutes the main difference between the Independent Institutions referred to in Chapter XII of the Constitution. In this respect, the Court found that both the employees of the Kosovo Forensic Agency and the civil servants of the Kosovo Police are not in an equivalent position with the KIA officials; police officers and the officers of the police inspectorate; and Kosovo customs officials, and consequently it is not necessary to treat them in the same way. This is due to the fact that the principle of unequal treatment is expressed only in cases where such treatment is done for the same or analogous situations. In the present case, we cannot talk about an

unequal treatment because the KFA officials and the civil servants of the Kosovo Police are not in the same or similar position, or analogous to the officials in relation to whom they are (self) compared. Consequently, the Court considers that the challenged law, including KFA employees and Kosovo Police civil servants in the field of application of the challenged Law, does not violate the principle of equality guaranteed by Article 24 of the Constitution in relation to Article 14 of the ECHR.

In the end, the Court concluded that it is not necessary for the challenged Law to be repealed in its entirety. In the circumstances of the present case, the analysis led to a conclusion that the non-implementation of the challenged Law in relation to the institutions mentioned above, does not make the Law unenforceable in practice. Consequently, the Court found that the Assembly is obliged to take the necessary actions to supplement and amend the Law No. 06/L-114 on Public Officials in accordance with the findings of the present Judgment, in relation to the employees of the institutions specifically defined in the Enacting Clause of the Judgment. Until the supplementation and amendment of the Law No. 06/L-114 on Public Officials by the Assembly, the provisions of this Law shall apply only insofar as it does not infringe the functional and organizational independence of the Independent Institutions specifically referred to in the Enacting Clause of this Judgment. While in relation to all other institutions, Law No. 06/L-114 on Public Officials shall apply from the entry into force of the Judgment.

Judgment

KO 219/19

Applicant

The Ombudsperson

Request for constitutional review of Law No. 06/L-111 on Salaries in Public Sector

The Referral was filed by the Institution of the Ombudsperson of the Republic of Kosovo, pursuant to Article 113 paragraph (1) subparagraph (1) of the Constitution. The subject matter of the Referral was the constitutional review of the challenged Law, which according to the Applicant's allegations is incompatible with paragraph 2 of Article 3 [Equality Before the Law], 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], 10 [Economy], 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 46 [Protection of Property], 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], 119 [General Principles] paragraphs 1 and 2 of Article 142 [Independent Agencies], 130 [Civilian Aviation Authority] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 1 of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR), and paragraph 2 of Article 23 of the Universal Declaration of Human Rights (hereinafter: UDHR).

In assessing the constitutionality of Law No. 06/L-111 on Salaries in Public Sector, the Court decided: (i) unanimously that the Referral is admissible for review of merits; (ii) by majority that the challenged Law, in its entirety, is not in compliance with Articles 4, 7, 102, 103, 108, 109, 110 of Chapter VII, Article 115 of Chapter VIII of the Constitution; as well as Articles 132, 136, 139 and 141 of Chapter XII of the Constitution; (iii) to hold that, it is not necessary to consider other Applicant's allegations after the declaration of the challenged Law in its entirety as unconstitutional in terms of violation of the principles of "separation of powers" and "legal certainty"; (iv) to repeal the interim measure.

The constitutional issue that the Judgment in question contained was the compliance with the Constitution of the challenged Law voted by the Assembly, namely the assessment whether the latter is in compliance with the principle of "separation of powers" and that of the "legal certainty" guaranteed by the abovementioned Articles of the Constitution.

The Court concluded that the challenged Law contained a number of serious problems at the constitutional level that could be summarized as follows: (i) the challenged Law itself contradicts its purpose to "*harmonize*" salaries at the level of the entire public sector – by making arbitrary and unreasonable exceptions for some institutions, among others the Kosovo Security Force, the Kosovo Intelligence Agency, the Privatization Agency of Kosovo, the Central Bank of Kosovo, and the Assembly itself; (ii) the challenged Law completely excludes the independence of the Judicial power, by not leaving any self-regulatory competence for issues related to the implementation of "functional, organizational and budgetary" independence; (iii) the challenged Law, although emphasizing that the salaries are regulated by this Law, has reduced the legal regulation for many issues at the level of sub-legal acts, giving the

possibility of sub-legal regulation only to the Executive and the Legislative; (iv) out of a total of eighteen (18) competencies to issue sub-legal acts, sixteen (16) are for the Government and two (2) for the Assembly, while no self-regulatory competence for the Judiciary or Independent Institutions; (v) the Judiciary and Independent Institutions have not been given any self-regulatory competence through which they could enjoy their "institutional, organizational, structural and budgetary" independence in relation to internal organization and their staff; (vi) only one (1) of the eighteen (18) sub-legal acts that had to be approved within the ninth (9) monthly period of *vacatio legis* has been approved, namely by 1 December 2019; (vii) as confirmed by the data of the Ministry of Finance and Transfers, for about 42% of the positions it is not possible to decipher the salary because the latter will finally be determined through the relevant classifications with sub-legal acts of the Government; (viii) as confirmed by the data of the Ministry of Finance and Transfers the "*additional budget cost*" of the challenged Law "*is not part of the budget projections 2019-2021*"; (ix) as confirmed by the data of the Ministry of Finance and Transfers, even if the challenged Law entered into force today, it could not be fully implemented in the absence of the sub-legal acts.

Regarding Article 1 of the challenged Law, which provided for the purpose of comprehensive harmonization of salaries of the entire public sector, the Court noted that the legislator, without any justification and in an arbitrary manner had excluded from this Law, among others, the KIA (Kosovo Intelligence Agency) and the KSF (Kosovo Security Force), CBK and PAK. In other parts of the Law, the legislator had granted other exceptions, direct or completely unstressed, for the employees of the Assembly, the political staff of the Assembly and the deputies of the Assembly. The Court concluded that the exceptions granted by the challenged Law clearly contradict the very purpose of comprehensive "*harmonization"* for which, it is said, to have been issued. Consequently, the exceptions made were considered to be against the very purpose of the Law and create unreasonable, unproven and arbitrary differentiations.

With regard to Article 3 (in conjunction with Article 24) of the challenged Law, the Court found that at least two (2) of the six (6) fundamental principles on which the challenged Law is said to have been guided were not followed and respected, namely the one of "predictability" and "transparency". The first provided that the salary "*cannot be reduced, except in an extraordinary situation of financial difficulties and only on the basis of law";* while the second provided that *"the procedure for determining the salary,* [will] *be transparent to the public"*. Specifically, regarding the principle of predictability, the Court emphasized that the approach of the legislator to consider as important the principle of "predictability" only for the future, not for the present, has resulted in neglect of the rights of persons who have been negatively affected by the Law on Salaries. This is because according to the new legal regulation of the Assembly, it turns out that for the future, the legislator considers that salaries can be reduced only in extraordinary situations and financial difficulties; while none of the reduced salaries in the public sector by the challenged Law have been justified on the basis of any "extraordinary situation" or "financial difficulty". The Government, in the Draft Law has foreseen such a guarantee for non-reduction of salaries (Article 27 of the initial Draft Law), but the Assembly had eliminated that guarantee with the amendment. Further, the Court does not consider that the principle of "transparency" was applied when about 42% of positions currently receiving salaries from the state budget, still cannot decipher where they are positioned and how much their salary would be with a new Law on Salaries.

Regarding Articles 4, 5 and 12 of the challenged Law, the Court noted that the Assembly, as one of the three classical powers of the government of the Republic of Kosovo, has provided that all matters relating to the allowances and remunerations of its employees, regular and political staff, and the deputies themselves are to be regulated by "special acts" approved by the Presidency of the Assembly and that such an exception, according to the legislator, "*is made based on the nature and specific working conditions of the Assembly of the Republic of Kosovo*".

The Court considered that such exceptions provided for only one power – represent one of the most serious constitutional problems of the Law in question. The very selective exclusion of only one power and non-respect of the constitutional guarantees of other powers, completely ignoring the Judiciary and Independent Institutions is a legislative solution that does not coincide with the values and principles of the Constitution, especially the principle of separation and balance of powers.

The Court also noted the fact that the challenged Law gives sixteen (16) special competencies to the Government to regulate certain matters through sub-legal acts and after consultation with the relevant ministries, including issues affecting the Judiciary and Independent Institutions in terms of their functional, organizational, structural and budgetary independence (See Articles 5.4; 5.5; 6.3; 6.4; 7.5; 8.3; 9.5; 14.4; 15.4; 17.4; 18.2; 19.4; 20.5; 21.6; 21.8; 22.5; 25.3; 26.2; 27.2 of the challenged Law). In this regard, the Court noted that in addition to the Assembly, namely the Legislative, the only other power authorized to regulate certain matters by sub-legal acts is the Government, namely the Executive. The only power, to which the independence has been completely ignored by any kind of specific regulation that would take into account the "*nature and specific conditions*" of its work and independence – is the power of the Judiciary. The same can be said also for the Independent Institutions referred to in Chapters VIII and XII of the Constitution. This meant that all

regulatory competencies through sub-legal acts remained in the hands of the Executive and the Legislative – as two of the powers that have in fact drafted, namely adopted this legal initiative through the vote in the Assembly.

The Court held that the legal regulation, with the complete exception of the self-regulatory competencies of the Judiciary, has undoubtedly created an imbalance in the separation of powers, which the spirit and letter of the Constitution does not aspire to. Such a legal regulation, if confirmed as constitutional, would have the potential to create "interference", of the Executive power with the power of Judiciary and "dependence" and "subordination" of the power of Judiciary to the Executive, because the former would have to depend on the will of the second in terms of internal regulations for staff and functional, organizational, budgetary and structural aspects of work. Such a legal regulation is in open conflict with the Constitution.

Regarding Article 31 (in conjunction with Article 34) of the challenged Law which provided that all sub-legal acts provided by this Law must be "*approved within 9 months after publication in the Official Gazette*" and that the challenged Law "*enters into force 9 months after publication in the Official Gazette*", the Court noted that only one (1) of the eighteen (18) sub-legal acts that should have been approved by 1 December 2019, namely within the period that the legislator left as *vacatio legis* for preparation for the implementation of the challenged Law, was approved. In the answers submitted to the Court, the Ministry of Finance and Transfers has acknowledged that the challenged Law, even if it entered into force today, it could not be implemented in entirety due to the absence of sub-legal acts. The lack of the latter, according to the explanation of the Ministry of Finance and Transfers, has made it impossible for it to respond to about 42% of the positions paid from the state budget because without the approval of sub-legal acts it is not known how much would be the salaries for a number of positions that are currently paid from the state budget. All this careless legislative process, without any doubt, leads to an unacceptable situation of legal uncertainty that can in no way be compatible with the Constitution and its values and principles of predictability, legal certainty and the rule of law.

Regarding Article 32 of the challenged Law, which provides that in case of entry into force of the challenged Law any change in the structure, components or levels of salary coefficients is prohibited, the Court noted some serious conceptual and practical problems to the detriment of the Judiciary and Independent Institutions. This is due to the fact that, if this provision were declared constitutional, it would mean that whenever the Judiciary and other Independent Institutions need to create a new position within their organizational chart, or change the internal organizational structure depending on the need that may arise in the future – they should address the Government to ask for permission and approval to create a new position and to seek permission and approval to change the internal organizational structure. The challenged Law in the final decision-making chain, left the Government as a power that must "*approve*" any proposal of the Judiciary. The Court found that this legal regulation, without any doubt, in a flagrant way goes contrary to the notion of "institutional, functional and organizational" independence of the Judiciary and Independent Institutions. As such, it is unacceptable and contrary to the Constitution and the key principle of separation of powers as a selected constitutional model for the governance of the Republic of the country.

Regarding Article 33 of the challenged Law, the Court noted that *inter alia*, some of the specific articles of the organic laws of the Judiciary that previously regulated the issue of salaries of the judiciary in general, of the Constitutional Court and of the presidents of both Councils, the Judicial and the Prosecutorial, have been expressly repealed. However, Article 28 of the challenged Law provides that the latter shall not be applied for the functionaries until 31 December 2022. The Court noted two evident and fundamental problems in this regard.

The first concerned the vacuum and legal contradiction created by the challenged Law. That is for fact that at the legal moment that the challenged Law would enter into force, Article 33 of this Law would repeal all relevant norms which currently regulate the salaries of the Judiciary, of the Constitutional Court, the chairpersons of the Judicial and Prosecutorial Councils (see points 1.4; 1.6; 1.7; 1.8 of Article 33 of the challenged Law) and for whose salaries at the same time the Law states that they will be saved for the respective period. The question arises as to whether the articles of the organic laws governing the current salaries would be repealed upon the entry into force of the challenged Law – on the basis of which Law these special functionaries would receive a salary. What salary would be preserved for them when the provisions governing their old salary – which was supposed to be maintained – would be repealed.

By this careless legal regulation, it turns out that the legislator would have left the functionaries in question without any legal regulation. The second had to do with the concept of saving the salaries of the Judiciary only until the end of 2022, and then the drastic reduction of salaries after that date. Such a scenario is not considered to contribute to a guarantee of an independent Judiciary. On the contrary, such a legislative solution would place undesirable pressure on the Judiciary versus Legislative and Executive power.

To reach these conclusions, the Court took into account the following aspects.

Regarding the Assembly, the Court emphasized that the legislative power has the main constitutional competence for legislation at the national level. In terms of the circumstances of the present case, it was therefore indisputable the authorization of the Assembly,

that in exercising its competence for "adoption of laws", it regulates salaries in the public sector according to a certain public policy voted by the Assembly itself. The latter has full authority to choose the best and most appropriate modality, which it considers that in terms of public policy fits the salary system for the Republic of Kosovo. The only limitation that the Assembly has in the legislation is to respect the procedures of law-making and to vote laws that are in accordance with the Constitution and the values and principles proclaimed there.

During the analysis of the challenged Law, the Court deliberately focused on arbitrary salary "reductions" and not on the "increase" of salaries, due to the fact that the Assembly during the drafting of laws should have taken care of the rights of persons whose salaries are reduced. Reasons for salary reductions should be many times more sustainable than the reasons for salary increases because, the former reduces an existing right while the latter add to an existing right. Having said that, the Court emphasizes that the Legislator has the right, after this Judgment, to take any kind of step to increase salaries in the public sector, so as to meet any public policy goal for salary increases in certain sectors. It is not the duty of the Court to state where and how salary increases should be made. The possible modalities for this issue remain entirely at the discretion of the Assembly and the Government.

Regarding the role of the Constitutional Court in the abstract assessment of the constitutionality of the challenged Law, it was clarified that in all cases where a Law of the Assembly is challenged before the Constitutional Court by the authorized parties, the focus of assessment is always on the respect of the constitutional norms and human rights and freedoms – and never on the assessment of the selection of public policy that has led to the adoption of a particular law. The competence of the Court in this case was to assess, *in abstracto*, whether the challenged Law is constitutional or not, and depending on the answer – to seal its constitutionality or repeal it as unconstitutional. The second was necessary in this case.

At the level of principles set by the Constitution, the Court emphasized that among the fundamental values embodied in the Constitution on which the constitutional order of the Republic of Kosovo is based, among others, are the "separation of powers" and the "rule of law". The functioning of the democratic state of the Republic of Kosovo is based on the constitutional principle of separation of powers and checks and balance among them. Based on Article 4 of the Constitution regarding the form of government and separation of power: (i) The Assembly exercises legislative power; (ii) The Government is responsible for implementation of laws and state policies; and (iii) The judicial power is unique and independent and is exercised by courts. These three powers constitute the classic triangle of separation of powers. The relationship between the "three powers" is based on the principle of separation of powers and checks and balance among them. The separation of power as a fundamental principle of the highest constitutional level is embodied in the spirit of the Constitution of the country and as such is non-negotiable.

To each of the three classical branches of separation of powers, the Constitution has dedicated a separate chapter. In all three of these chapters [on Legislative; Executive and Judicial power], the general principles as well as the duties and responsibilities of each power are foreseen. In addition, it provides for the mechanisms of checks and balance among them that form the core of how these powers should check and balance each other without creating any unconstitutional "interference", "dependence" or "subordination" among them that potentially could affect the independence of one or the other power. The logic of the principle of separation of powers is that an influence of a power on the other during the process of their institutional interaction should by no means create an interfering or dependence or subordination relationship that could result in the loss of independence to act as a free and unaffected power. This is the essence of the constitutional balance that the Constitution has established and which is required to be maintained in every interactive instance between independent powers.

In addition, the Court emphasized that the Constitution has recognized a special and important status and role in the conduct of public state duties also to the Independent Institutions referred to in Chapter XII of the Constitution, which have been singled out as such, not without reason. This chapter includes: (i) The Ombudsperson; (ii) the Auditor-General of Kosovo; (iii) Central Election Commission; (iv) Central Bank of Kosovo; (v) Independent Media Commission; and (vi) Independent Agencies.

Unlike other institutions referred to in Chapter XII of the Constitution, "Independent Agencies" provided for in Article 142 of the Constitution "*are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies*". This distinction needs to be identified as such, for the reason that the five Independent Institutions referred to in items (i), (ii), (iii), (iv) and (v) have been established as such in the case of voting and entry into force of the existing Constitution by the legislator, namely the Assembly; whereas, the Independent Agencies are not created as such in the case of voting of the existing Constitution – but are agencies for the creation of which the Constitution gives the Assembly the right to create and extinguish them, by law, depending on the needs that may arise in public and social life. Unlike the fact that the Assembly can create and extinguish "*by law*" Independent Agencies; the Assembly can never extinguish "*by law*" any of the five independent institutions mentioned above. This is the main difference between Independent Institutions referred

to in Chapter XII of the Constitution – which should be considered as such whenever actions affecting the Independent Agencies are taken – which differ from other Independent Institutions.
The key conclusions reached by the Court after analyzing the answers of the Forum of the Venice Commission and the Opinions of the Venice Commission and the case law of the various constitutional and supreme courts, were as follows: (i) there is no single possible system for regulating salaries in the public sector and that there is no internationally recognized principle governing the regulation of "equal pay for equal work"; (ii) most countries regulate salaries through different laws and at the same time apply different methods by regulating this issue either through special laws for specific sectors or through some more concentrated legal regulation; (iii) the Assembly, as a legislative body, has the competence and organic right to issue any kind of legislation on the regulation of salaries in the public sector provided that it complies with the Constitution; (iv) the principle of separation of power and the balance between Legislative, Executive and Judicial power does not imply the isolation of powers and the absence of mutual dependence; however, the latter also means avoiding situations in which unconstitutional "interference", "dependence" or "subordination" can be created between independent powers; (v) the independence of the judiciary, as one of the branches of power, implies that the judiciary is free from external pressure, and is not subject to influence by the executive branch; (vi) sufficient resources are essential to guarantee judicial independence from other state institutions and private parties – so that the judiciary can perform its duties with integrity and effectiveness; (vii) the reduction of the budget by the executive is an example of how the resources of the judiciary can be put under excessive and undesirable pressure; (viii) there is no rule that creates absolute guarantee that the salaries in the public sector cannot be reduced *per se* – but that reduction of salaries must be justified; (ix) the reduction of the salary of the judiciary may occur only under conditions of a pronounced economic and financial crisis and which, moreover, must be officially recognized as such; (x) sacrifices in times of crisis [since the emphasis on reduction is always when there are crises] resulting in reduction of salaries that are not universal and are not evenly distributed among all citizens, in proportion to their individual financial ability – are not considered to be compatible with the concepts of distribution of burden among beneficiaries of salaries in a state;
Finally, the Court also noted several important issues.
In case of new legislation in this field, the Government as the proposer of laws and the Assembly as the voter of the laws are obliged to take into account the principles emphasized in this Judgment and other Judgments from the case law of the Constitutional Court in interpreting the respective articles of the Constitution. The "institutional, functional, organizational and budgetary independence" of the Judiciary and Independent Institutions must be recognized, and any legal initiative must respect this independence (See Judgments KO73/16 and KO171/18).
Finding the aforementioned violations made the challenged Law in its entirety unconstitutional. The Court analyzed very carefully the possibility of partial repeal of the challenged Law. However, in the circumstances of the present case such a solution, in contrast to the circumstances of the Law No. 06/L-114 on Public Officials which was partially repealed, was not possible for two main reasons. First, because the constitutional violations evidenced in the challenged Law are of such serious gravity that the latter affect the core of the functioning of government in the Republic of Kosovo – causing an imbalance in the separation of power to the detriment of the Judiciary and Independent Institutions. Second, because the challenged Law does not provide an opportunity to repeal only a few provisions and only a few items of Annexes 1 and 2 because any kind of repeal would make the Law inapplicable in practice. And, in cases where the analysis leads to the conclusion that the Law with partial repeal becomes inapplicable with the remaining articles in force as constitutional, the Court is obliged to repeal the Law in its entirety.
The Court also emphasized that all powers without exception, have a constitutional obligation to cooperate with each other and perform public duties for the common public good and in the best interest of all citizens of the Republic of Kosovo. These public duties also include the obligation of each power to take care during the performance of its constitutional duties for respect of the independence of the power to which it is creating an "interference". For example, the Government and the Assembly, despite having the competence to propose and vote on laws, which could also affect the sphere of the Judiciary, as a third power; they [the Government and the Assembly] must ensure that during the drafting of their proposals and until their finalization by the vote of the Assembly, the constitutional independence of the sister power, namely the Judiciary, is preserved. The Government and the Assembly must show the same care and sensitivity to other state actors, which the Constitution has provided with constitutional guarantees of functional, organizational, structural and budgetary independence. Guaranteeing and prior ensuring of the constitutionality of the initiatives of the Government and the Assembly should be the permanent and inseparable aspect of the legal creativity of these two powers.

Judgment

KI 56/18

Applicant

Ahmet Frangu

Request for constitutional review of Judgment ARJ. UZVP. No. 67/2017 of the Supreme Court, of 22 December 2017

The circumstances of the present case relate to the Applicant's request for registration of his deceased son I.F. in the principal death register (hereinafter: the PDR). The Applicant's deceased son had traveled to Sweden for the purpose of recovering from a serious illness. During his stay in Sweden, the Applicant's son applied for asylum, but using another name, namely the name A.H. The Swedish authorities issued him a card certifying that the Applicant's son was an asylum seeker, namely the LMA-card in the name under which he had applied, namely A.H. The Applicant's son died at a health institution in Sweden. The medical report regarding his death was issued on behalf of A.H. After his death, the Embassy of the Republic of Kosovo in Sweden issued the submission [No. 09/13] by which (i) clarified that it informed the authorities of the Republic of Kosovo about the death of the citizen I.F; (ii) confirmed that there is no impediment to the repatriation of the deceased I.F. in the Republic of Kosovo; and (iii) requested the company responsible for funeral services at Linkoping to enable transportation to Kosovo for the deceased I.F. The latter was buried in Prishtina on June 16, 2013.

The Applicant addressed the Municipality of Prishtina, with a request that his deceased son I.F., be registered in the PDR based on Law No. 04/L-003 on Civil Status (hereinafter: the Law on Civil Status). The Municipality of Prishtina by Decision [No. 01-203-194645] of 16 October 2013 rejected the Applicant's request, *inter alia*, on the grounds that the documents issued by the Swedish health institutions do not coincide with those issued in the Republic of Kosovo, because the former coincide with the person A.H., while the latter with the person I.F. The Applicant challenged the abovementioned Decision, without success, in the Civil Registration Agency of the Ministry of Internal Affairs, in the Basic Court in Prishtina, the Court of Appeals and the Supreme Court. The Civil Registration Agency and the regular courts of all three instances upheld: (i) Decision [No. 01-203-194645] of 16 October 2013 of the Municipality of Prishtina; and (ii) rejected the Applicant's application for registration of his deceased son I.F. in the PDR with the reasoning that the documents issued by the Swedish health institutions do not coincide with those issued in the Republic of Kosovo.

The Applicant challenges the findings of the regular courts before the Court, alleging that the Decisions of the public authorities were issued in violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution and the European Convention on Human Rights (hereinafter: the ECHR). In the circumstances of the present case, the Court decided to hold a hearing in order to clarify the issues of fact and law, and at the same time, the Municipality of Prishtina, the Civil Registration Agency and the Ministry of Foreign Affairs clarified that the lack of medical report under the name of the I.F., has prevented the registration of I.F. in the PDR, while the Applicant clarified that the public authorities have not taken into account the facts and specifics of his case and moreover, as a result of the abovementioned non-registration, the wife and minor son of the deceased have also remained with unresolved civil status.

In examining the Applicant's allegations, the Court found that the Referral is admissible, as it found that the Applicant should be recognized the status of direct or indirect victim, a finding which was reached after elaborating and applying the case law of the European Court of Human Rights (hereinafter: the ECtHR).

Whereas, in examining the merits of the case, the Court initially clarified that the circumstances of the present case, which are related to the refusal of the public authorities to register the deceased son of the Applicant in the PDR , include issues related to the right to privacy of the Applicant and his right to judicial protection of rights and effective remedy, as guaranteed by Articles 36 [Right to Privacy] and 54 of the Constitution and 8 [Right to respect for private and family life] and 13 [The right to an effective remedy] of the ECHR.

With regard to matters relating to the right to privacy, the Court, applying the case law of the ECtHR insofar as it is relevant to the circumstances of the case, has clarified (i) the state's obligations to protect privacy as guaranteed by the Constitution and the ECHR; (ii) the distinction between the negative and positive obligations of the State with regard to the protection of this right; (iii) the fact that in the circumstances of the present case, the State did not necessarily "*interfere*" with the rights of the Applicant, but failed to act to protect the latter, resulting in an assessment of the circumstances of this case from the point of view of

positive obligations of the state; (iv) that the positive obligations of the State require, *inter alia*, that public authorities consider the specifics of a case and take measures to ensure the effective protection of the right to privacy, or by providing a legal framework that protects the rights of individuals or by determining the application of special measures appropriate to the circumstances of a case; and (v) that in such cases, the public authorities are obliged to consider the balance between the interests of the individual, including the nature of the allegations and whether they relate to "*essential aspects*" of private life and the obligations of the State, including whether they relate to "*narrow and precise*" or "*broad and indefinite*" obligations and the potential burden they impose on the state.

With regard to issues related to the right to judicial protection of rights and effective remedy, the Court, applying the case law of the ECtHR insofar as it is relevant to the circumstances of the case, has clarified (i) that these the rights imply the existence of a legal remedy which examines the essence of the content of the dispute, namely the allegations of an Applicant and enables the appropriate correction; (ii) the notion of "*arguable*" claim for the purposes of Article 54 of the Constitution and Article 13 of the ECHR; and (iii) the fact that in the context of claims for protection of private right, the legal remedy must enable consideration of the substance of the respective claims, and assessment of the balance between competing interests. In both cases, the purpose of the Constitution and the ECHR is important, to guarantee "*practical and effective*" and not "*theoretical or illusory*" rights.

In applying these principles in the circumstances of the present case, with regard to Article 36 of the Constitution in conjunction with Article 8 of the ECHR, the Court emphasized that public authorities, including the regular courts, beyond the finding that with regard to the death of the Applicant's son the medical report confirming his death is missing, a finding that has resulted in the refusal of registration of the Applicant's son in the PDR, with the serious consequence of leaving the civil status of his wife and deceased minor son unresolved, have not taken into account the fact that (i) it is not disputed that the Applicant's son died; and (ii) such a fact was confirmed by the public authorities of the Republic of Kosovo, namely the Embassy of Kosovo in Sweden, where the death occurred. Furthermore, the public authorities, by rejecting the Applicant's request for registration of his son's death in the PDR, despite the fact that the same death was not contested, (i) not only had they formally applied the applicable law, thus not considering either the possibility of international legal cooperation with the Swedish state nor the possibilities provided through the provisions of the out -contentious procedure, but (ii) contrary to the constitutional requirements and those of the ECHR, did not consider the balance between the competing interests, namely the essence and features of the Applicant's allegations and the obligations of the state to protect the right to private life. The Court clarified that the examination of such a balance, would result in the finding that the Applicant's allegations and claim are "*narrow and clear*" and do not result in disproportionate obligations to the State. Moreover, through such a refusal in the absence of a medical report, without taking into account any of the circumstances and specifics of the present case, the decisions of public authorities resulted in only "*theoretical and illusory*" constitutional rights for the Applicant, and not "*practical and effective*" constitutional rights, as required by the Constitution and the ECHR. Consequently, the Court found that the proceedings followed by the administrative and judicial system, contrary to the positive obligations of the state, did not result in the exercise of the Applicant's right to respect for his private life, contrary to paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

Whereas, with regard to Article 54 of the Constitution in conjunction with Article 13 of the ECHR, the Court stated that taking into account the abovementioned finding, the allegations of the Applicant of violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, are clearly "*arguable*", as established through the case law of the Court and that of the ECtHR. The Court further stated that contrary to the requirements of the aforementioned articles and the relevant case law, the legal remedies in the circumstances of the present case had neither resulted in examining the substance of the Applicant's allegations nor had they enabled proper correction. The Court reiterated that the limited and extremely formal examination of the Applicant's allegations, in isolation from the specifics of the case and the relevant consequences, resulted in a lack of practical and effective protection of judicial rights and the right of the Applicant for an effective remedy, contrary to Article 54 of the Constitution in conjunction with Article 13 of the ECHR.

Therefore, the Court found that the Judgments of the regular courts and the Decisions of the Civil Registration Agency and the Municipality of Prishtina are not in compliance with the Applicant's fundamental rights and freedoms guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction of Article 8 of the ECHR and Article 54 of the Constitution in conjunction with Article 13 of the ECHR, and consequently the latter should be declared invalid. The Court also through this Judgment ordered the Civil Registration Agency, to register the death of I.F., namely of the Applicant's son by 30 October 2020, in the Principal Death Register.

ECtHR – Important decisions (1 July – 31 December 2020)

* Violation of the right to private life of a transsexual of male appearance whose request for gender reassignment was dismissed without reasons (09/07/2020)

In its Chamber judgment in the case of **Y.T. v. Bulgaria** *(application no. 41701/16)* the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.
The case concerned a transsexual (Y.T.) who had taken steps to change his physical appearance and whose request for (female to male) gender reassignment had been refused by the Bulgarian courts. He claimed that he had become aware of his male gender identity during adolescence and that he had lived in society as a man. The Court found that the judicial authorities had established that Y.T. had begun a process of gender transition, changing his physical appearance, and that his social and family identity had already been that of a male for a long time. Nonetheless, they had considered that the public interest required that the legal change of sex should not be permitted, without specifying the exact nature of this public interest, and had not balanced this interest against Y.T.'s right to legal recognition of his gender identity. The Court identified this as rigidity in the domestic courts' reasoning, which had placed Y.T. – for an unreasonable and continuous period – in a troubling position, in which he was liable to experience feelings of vulnerability, humiliation and anxiety. The domestic authorities' refusal to grant legal recognition to Y.T.'s gender reassignment, without giving relevant and sufficient reasons, and without explaining why it had been possible to recognise identical gender reassignment in other cases, had thus constituted an unjustified interference with Y.T.'s right to respect for his private life.

* Refusal to register the birth details of a child born abroad through surrogacy not in breach of the right to respect for private life, in so far as a legal parent-child relationship can be established through adoption (16/07/2020)

In its Chamber judgment in the case of **D v. France** *(application no. 11288/18)* the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 8 (right to respect for family life)** of the European Convention on Human Rights, and **no violation of Article 14 (prohibition of discrimination)** read in conjunction with Article 8.
The case concerned the refusal to record in the French register of births, marriages and deaths the details of the birth certificate of a child born abroad through a gestational surrogacy arrangement in so far as the certificate designated the intended mother, who was also the child's genetic mother, as the mother. The Court observed that it had previously ruled on the issue of the legal parent-child relationship between a child and its intended father where the latter was the biological father, in its judgments in *Mennesson v. France* and *Labassee v. France*. According to its case-law, the existence of a genetic link did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of the recording of the details of the foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision regarding recognition of the legal relationship with the intended mother, who was the child's genetic mother. The Court also pointed to its finding in advisory opinion no. P16-2018-001 that adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother.

* Defamation verdict against Romanian politician Macovei led to a violation of the Convention (28/07/2020)

In its Chamber judgment in the case of **Macovei v. Romania** *(application no. 53028/14)* the European Court of Human Rights held, by five votes to two, that there had been: **a violation of Article 10 (right to freedom of expression)** of the European Convention on Human Rights
The case concerned the applicant being found liable for defaming another politician. The Court found in particular that the applicant's statements, whereby she had called the other politician's combination of work as a lawyer and as a member of parliament an example of corruption, had been a mix of value judgment and statement of fact. She had not intended to make a gratuitous attack on the other politician, who had won a defamation case against her, but had used her statement to make a general point about corruption in the context of her support for a law to prevent people working as lawyers and members of parliament at the same time. The appeal courts, which had overturned a first-instance judgment rejecting the defamation claim, had not provided convincing reasons for their conclusions and had not struck a fair balance between the competing rights at stake. The penalty – damages and an order to pay for the final judgment to be published in newspapers – had also had a chilling effect on her freedom of expression.

* Remedies for excessive length of proceedings in Croatia found to be largely ineffective between March 2013 and May 2019 (30/07/2020)

In its **Chamber** judgment in the case of **Kirinčić and Others v. Croatia** *(application no. 31386/17)* **and Marić v. Croatia** *(application no. 9849/15)*

the European Court of Human Rights held, unanimously, that there had been: that there had been: **a violation of Article 6 § 1 (right to a fair trial/ length of proceedings)** of the European Convention on Human Rights, and, **a violation of Article 13 (right to an effective remedy)** of the European Convention.
The case concerned the complaints about violations of the right to a fair trial within a reasonable time and the lack of effective domestic remedies for such complaints. In *Kirinčić and Others v. Croatia*, the Court found that civil proceedings over property rights of more than 15 years had breached "the reasonable time" requirement of the Convention. The applicants' complaint to the Constitutional Court had not been an effective remedy as that court had not taken account of the overall length of the proceedings, just a much shorter period of five months. The Court found that the length of the civil proceedings on compensation in the case of Marić v. Croatia which had lasted just over four years, was also excessive. Furthermore, it found that the applicant had not been obliged to use the remedies for protracted proceedings under the 2013 Courts Act as they were not effective. In particular, the remedy to accelerate the proceedings could only be applied once they had already become excessively long while the compensatory remedy had too many restrictions.

* Albanian authorities' response into an acid attack was ineffective (04/08/2020)

In its Chamber judgment in the case of **Tërshana v. Albania** *(application no. 48756/14)* the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 2 (right to life)** of the European Convention on Human Rights, and **a violation of Article 2 (investigation)** of the Convention.
The case concerned an acid attack on the applicant in 2009. She suspected that her former husband, whom she accused of domestic violence, was behind the attack. The Court found in particular that the State could not be held responsible for the attack. If it had been aware of a risk to the applicant, it would have been its duty to take preventive measures. In the present case, however, the national authorities had only found out about the violent behaviour of the applicant's former husband after the incident. On the other hand, the investigation into the attack, which had had the hallmarks of gender-based violence and therefore should have incited the authorities to react with special diligence, had not even been able to identify the substance thrown over her.
The investigation was moreover stayed in 2010, without identifying the person responsible, and the applicant has not been given any information about its progress since, despite her repeated enquiries. The Court could not accept in such circumstances that the authorities' response to the acid attack had been effective.

* Finnish authorities failed to take the precautionary measure of seizing a student's weapon before a school shooting (17/09/2020)

In its Chamber judgment in the case of **Kotilainen and Others v. Finland** *(application no. 62439/12)* the European Court of Human Rights held that there had been, by six votes to one, **a violation of Article 2 (right to life)** of the European Convention on Human Rights owing to the authorities' failure to observe their duty of diligence and seize the killer's weapon before the attack, and, unanimously, **no violation of Article 2 over the investigation after the attack**.
The case concerned complaints about failures by the authorities to protect the lives of the victims of the 2008 school shooting in the town of Kauhajoki, in which 10 people were killed. Nine students and a teacher were killed during the shooting, carried out by a student at the school who then killed himself. The Court found that the authorities could not have known of a real and immediate risk to the life of the applicants' relatives. However, the police had known of posts on the Internet by the student, had interviewed him prior to the attack, and had considered, but decided against, confiscating his weapon. Such a confiscation would have been a reasonable precaution, which had also been allowed by law. The failure to take that step meant the authorities had not fulfilled their special duty of diligence flowing from the particularly high level of risk inherent in any misconduct involving the use of firearms.

* Requirement for a journalist to give evidence and disclose the source of her article on drug trafficking was not sufficiently justified (06/10/2020)

In its Chamber judgment in the case of **Jecker v. Switzerland** *(application no. 35449/14)* the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.
The case concerned a journalist who complained that she had been compelled to give evidence during a criminal investigation into drug trafficking and that the authorities had required her to disclose her sources following the publication of a newspaper article about a soft-drug dealer who had provided her with information. The Federal Supreme Court had found that Ms Jecker could not rely on the right to refuse to testify, since trafficking in soft drugs was an aggravated offence. Referring to the balance struck in the legislation between the interests at stake, it held that the public interest in prosecuting an aggravated drug offence outweighed the interest in protecting a source. The Court pointed out that in view of the importance of the protection of journalistic sources for press freedom in a democratic society, a requirement for a journalist to disclose the identity of his or her source could not be compatible with Article 10 of the

Convention unless it was justified by an overriding requirement in the public interest. In the present case, it was not sufficient for the interference to have been imposed because the offence in question fell within a particular category or was caught by a legal rule formulated in general terms; instead, it should have been ascertained that it was necessary in the specific circumstances. However, the Federal Supreme Court had decided the case with reference to the balancing exercise performed in general and abstract terms by the legislature. Its judgment could not therefore lead to the conclusion that the order for Ms Jecker to give evidence had satisfied an overriding requirement in the public interest.

*** No breach of the right not to be tried or punished twice in driving offence case (08/10/2020)**

In its Chamber judgment in the case of **Bajčić v. Croatia** *(application no. 67334/13)* the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 4 § 1 of Protocol No. 7 (right not to be tried or punished twice)** to the European Convention on Human Rights.
The case concerned the applicant's complaint that he had been tried and punished twice for the same driving offence. In particular, he had first been convicted in minor offence proceedings for speeding and later on in criminal proceedings for causing a fatal road accident. He was fined in the first set of proceedings and given a prison sentence in the second. In the Court's opinion, the aims of punishment, whereby different aspects of the same conduct were addressed, ought to be considered as a whole. In the applicant's case such aims had been realized through two complementary sets of proceedings, which were sufficiently connected in substance and in time to be considered to form part of an integral scheme of sanctions under Croatian law for his failure to comply with road-traffic safety regulations which had, as a result, caused a fatal road accident. The Court therefore found no abuse of the State's right to impose a punishment in the applicant's case. Nor could it conclude that the applicant had suffered any disproportionate prejudice resulting from the duplication of proceedings and penalties.

*** Violation of the right to freedom of religion of a prisoner who did not receive meals compatible with the precepts of Islam in Iaşi Prison (10/11/2020)**

In its Chamber judgment in the case of **Saran v. Romania** *(application no. 65993/16)* the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 9 (right to freedom of thought, conscience and religion)** of the European Convention on Human Rights.
The case concerned the provision to a prisoner of meals compatible with the precepts of Islam. Mr Saran was held in five Romanian prisons (Botoşani, Codlea, Deva, Iaşi and Miercurea-Ciuc), between 2016 and 2018. He complained that he had not received meals compatible with the precepts of Islam in two prisons (Iaşi and Miercurea-Ciuc) which had required him to furnish written proof of his adherence to that religion, although he had declared that he was a Muslim when he was admitted to prison and the ethical and religious assistance records in Iaşi Prison had stated that he was a Muslim. The Court found in particular that in refusing to provide Mr Saran with meals compatible with his religion during his time in Iaşi Prison, the national authorities had not struck a fair balance between the interests of the prison, those of the other prisoners and the individual interests of the prisoner concerned. It also noted that Mr Saran had received meals compatible with his religion in Botoşani, Codlea and Deva Prisons, which suggested that the Romanian prison system was capable of accommodating such requests. The Court rejected the applicant's complaints concerning Miercurea-Ciuc Prison, finding that they had been submitted out of time.

*** Convention does not allow Government to use inter-State application mechanism to defend rights of legal entity that is not a "non-governmental organisation" (16/12/2020)**

The case of **Slovenia v. Croatia** *(application no. 54155/16)* concerned unpaid and overdue debts owed to Ljubljana Bank by various Croatian companies on the basis of loans granted at the time of the former Yugoslavia. **The Court** has by a majority declared that it **does not have jurisdiction to hear the case**. The Court observed that under Article 34 (individual applications) a legal entity could bring a case before it provided that it was a "non-governmental organisation" within the meaning of that Article.
The idea behind this principle was to ensure that a State Party could not act as both an applicant and a respondent in the same matter. Article 33 of the Convention (inter-State applications) did not allow an applicant Government to defend the rights of a legal entity which did not qualify as a "non-governmental organisation" and which therefore would not be entitled to lodge an individual application under Article 34. As Ljubljana Bank was not a "non-governmental organisation" within the meaning of Article 34 it did not have standing to lodge an individual application. Accordingly, Article 33 did not empower the Court to examine an inter-State application alleging a violation of any Convention right in respect of this legal entity. The Court therefore lacked jurisdiction to hear the present case.

*** Dismissal of a teacher for giving classes in Serbian breached the European Convention (17/12/2020)**

In its Chamber judgment in the case of **Mile Novaković v. Croatia** *(application no. 73544/14)* the

European Court of Human Rights held, by six votes to one, that there had been: **a violation of Article 8 (right to respect for private life)** of the European Convention on Human Rights.
The case concerned a teacher's complaint about being dismissed in 1999 for giving his classes in Serbian rather than in Croatian. Of Serb ethnicity, he had lived and worked in Croatia for most of his professional life and at the time of his dismissal was working at a secondary school in Eastern Slavonia, in an area which had been peacefully reintegrated into Croatian territory after the war. The authorities held in particular that he could not be expected to learn Croatian, given that he was 55 years old at the time. The Court ruled that the authorities had dismissed the teacher, without considering any alternatives such as training. Relying solely on his age and years of service, the authorities had applied the most severe sanction, thereby significantly interfering with his rights.

*** A journalist's conviction for using information obtained in breach of the secrecy of the investigation did not constitute excessive interference with his freedom of expression (17/12/2020)**

In its Chamber judgment in the case of **Sellami v. France** *(application no. 61470/15)* the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.
The case concerned the conviction of a journalist for using information obtained in breach of professional secrecy, following the publication of a composite image produced by the police in connection with an ongoing investigation. The Court saw no strong reason to question the assessment made by the domestic courts, which had found, firstly, that the interest in informing the public had not justified the use of the item of evidence in question and, secondly, that the publication of the material had had a negative impact on the conduct of the criminal proceedings. In view of these considerations, and taking into account the margin of appreciation left to States and the fact that the exercise of balancing the competing interests at stake had been properly conducted by the domestic courts, which had applied the relevant criteria under the Court's case-law, the Court concluded that there had been no violation of Article 10 of the Convention protecting freedom of expression.

(*For more information please visit the website of the European Court of Human Rights: www.echr.coe.int*)

INFORMATION ON THE COURT

The building of the Constitutional Court:

The Constitutional Court of the Republic of Kosovo, since it became functional in 2009, has been located in the building of the former Kosovo Protection Corps - KPC, located in the center of Prishtina, in the area of Pejton. The position of the Court in the center of the capital city, symbolizes an equal access to all citizens and other authorized parties to the Constitutional Justice. Over the years this building has been adapted according to the needs and nature of work of the Constitutional Court. This has been carried out with the support of our donors, as in the case of construction of the Courtroom of the Court which has been funded by the Constitutional Court of the Republic of Turkey in 2010, the establishment of the Library of the Court which was entirely supported by the GIZ Legal Reform Project and the donation of additional office space/containers by the Constitutional Court of the Republic of Turkey in 2011.
The building of the Court has a usable office space of 784 m² and is used by 65 employees.

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