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GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 8 January 2021
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JOINT CONCURRING OPINION

of Judges Bajram Ljatifi, Safet Hoxha and Radomir Laban

in

Case No. KI230/19

Applicant

Albert Rakipi

Constitutional review of Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo of 30 September 2019

Expressing at the beginning respect and agreement with the opinion of the majority of judges that in this case, there has been a violation of 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 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), we consider that there has been another violation of human rights committed to the Applicant and which relates to the violation of the Applicant's rights guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR, which we will reason below.

Reasoning of joint concurring opinion

1. First of all, we remind you that the Applicant claims the following: *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person"*.

2. The Applicant first specifies that *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this*

expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo towards the other states. It is more than clear that the expression used in the Criminal Code "A person who exercises specific official duties, based on authorisation provided for by law", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the Republic of Albania and not from the law of the Republic of Kosovo. This fact is confirmed by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".

3. Secondly, the Applicant claims that in his case the regular courts "*violated the principle of prohibition of analogy"* in criminal law by interpreting the provisions of the Law on Public Procurement. In the context of this allegation, the Applicant specifies that: *"The application of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not have applied, because the status of official person can have only persons explicitly defined in the Criminal Code".*

4. According to the Applicant: *"Prohibition of the application of analogy in the criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the regular courts have violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

5. Pursuant to the Applicant's abovementioned allegations, we consider that in the light of the circumstances of the present case, the constitutionality of the Applicant's allegations of manifestly arbitrary interpretation and application of law due to the application of analogy by regular courts should be assessed. In this context, we note that the Applicant bases his allegation of manifestly arbitrary interpretation and application of law on the right to fair and impartial trial, which is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. However, we note that the very essence of the Applicant's allegations of "*prohibition of application of analogy in the criminal law*" which falls within the scope of the law guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR and its application, are extensively interpreted in the case law of the ECtHR.

6. In this respect, we recall the case law of the ECtHR and that of the Court, where it has been established that: "*A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECtHR case *Ştefanica and Others v. Romania*, Judgment of 2 November 2010, paragraph 23; see also the cases of the Court, KI145/18, Applicants *Shehide*

Muhadri, Murat Muhadri and Sylë Ibrahimi, Judgment, of 19 July 2018, paragraph 35, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraph 83 and KO73/16, Applicant *the Ombudsperson*, Constitutional review of Administrative Circular No. 1/2016 issued on 21 January 2016 by the Ministry of Public Administration of the Republic of Kosovo, Judgment of 8 December 2016, paragraph 78).

7. Accordingly, in the light of the reasoning above, we consider that the Applicant's allegations should be considered on the basis of the stated facts and evidence attached to the Referral, in order to respond to the Applicant's allegation regarding "*prohibition of application of analogy in criminal law*" (see, similarly, case KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi,,* cited above, paragraph 36).

8. Therefore, it is necessary to assess the constitutionality of the Applicant's allegations of arbitrary interpretation and application of law as a result of the use of analogy, referring to the principles relating to "*the principle of legality"* and "*prohibition of the application of analogy in criminal law"* embodied in Article 33 of the Constitution, Article 7 of the ECHR and the relevant case law of the ECtHR.

9. In this context, in reasoning of the the concurring opinion, we will first present **a)** The principle of legality - the limit for the application of analogy in the criminal law, **b)** The justification and scope of the prohibition of analogy in criminal substantive law, in order to proceed with **c)** legal analogy in criminal law, in conjunction with the "*principle of legality*" and the "*prohibition of application of analogy in criminal law*" guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law).

10. At the end of the reasoning of the concurring opinion, we will set out the general principles, which relate to the application of analogy in criminal law established by the case law of the ECtHR and apply these principles to the factual and legal circumstances of the case, namely the Applicant's case, and thereafter, on the basis of the latter, we will express our opinion regarding the constitutional review of the challenged decisions.

a) The principle of legality - the limit for the application of analogy in criminal law

11. Unlike other branches of law, the application of analogy as a form of logical interpretation of criminal law norms *"is reduced to a minimum"* due to the validity of the principle of legality: *nullum crimen, nulla poena sine lege*. In criminal substantive law, the principle of legality is inviolable - it determines the limits of interpretation of criminal law in general, as well as logical interpretation using the argument of analogy.

12. In order to understand in what way and to what extent the principle of legality is an obstacle to the application of analogy in substantive criminal law, it is necessary to point out its effect in general and its influence on determining the limits of interpretation of criminal law norms.

13. The principle of legality has multiple effects and is reflected in the following: (1) only the law can be the source of criminal law *(nullum crimen sine lege scripta),* which excludes the application of customary law; (2) the creation of new incriminations by analogy is excluded *(nullum crimen sine lege stricta);* (3) only the law in force at the time of the commission of the criminal offense is valid: *nullum crimen, nulla poena sine lege* (this requirement in theory is still referred to as the principle of prohibition of retroactive effect of criminal law *(nullum crimen sine lege praevia);* (4) descriptions of the substance of criminal offenses in legal norms must be clear and precise. The principle of legality understood in this way ensures the guaranteed function of criminal law - the protection of freedoms and human rights.

14. By its effect "*principle of legality"* also determines the limits of interpretation of criminal norms. First of all, due to the validity of this principle, the requirement that the legal text is the beginning and basis of any interpretation is especially expressed. Loyalty to the legal text leads the interpretation to the true meaning and limits of the law - the more you respect it and the less you move away from it.

15. The next specificity of the interpretation of incriminations is related to the basic function of criminal law - the protection of certain values, which must not be lost sight of in any interpretation. Determining a protective object is a fundamental precondition for a correct interpretation of criminal law. By discovering the object of protection, we find out what the legislator wants to protect with a criminal norm, what is its goal. With this knowledge of the object of protection, the true meaning and significance of the norm being interpreted becomes clear. Hence, this interpretation according to the object of protection is a special feature of the teleological interpretation in criminal law. In addition to the object, the scope of criminal protection is also important for the interpretation of the criminal law. The fragmentary, partial character of criminal protection determines the limits that can be reached in the interpretation: to determine the true meaning of the norm, it must be known to what extent the interpreted norm provides protection to some goods (protected goods do not enjoy criminal protection from all attacks but only some, according to rule of the most difficult). The amount of the threatened punishment is also important for determining the relationship between the legal substance of certain criminal acts, especially those that are closely related to each other. Finally, any interpretation contrary to the essence and purpose of the principle of legality in criminal law, as a guarantor of legal certainty in the interpretation of criminal law, is prohibited.

16. The abovementioned interpretation of the limits of application of the analogy dominates modern criminal legislation, and if we take into account the general historical development of criminal law and individual solutions in comparative law, it can be concluded that legislators have or have had different views on this issue: (1) that analogy is explicitly forbidden, but such a legislative procedure is very rare; (2) that there is no explicit prohibition, but the principle of legality is prescribed, so from the prescribed content and diction of the norm on this inviolable principle it follows that the analogy is prohibited; (3) that by introducing the so-called general clauses in the disposition of the criminal law

norm in certain provisions is provided the analogy "*intra legem*"; (4) that the legal or juridical analogy, or both, is known to the relevant legislation as a general legal institute.

b) Justification and the scope of validity of the prohibition of analogy in criminal substantive law

17. Criminal law provisions protect the most important goods of people and prescribe the most severe sanctions for their violation, so the inviolable validity of the principle of legality appears necessary to ensure the legal certainty of citizens. This is the main reason to prohibit analogy in criminal law, as a means of creating new criminal offences, as it is directly contrary to the meaning and function of this basic principle of criminal law.

18. Such an analogy is also prohibited in our criminal law. It is not allowed for a court to qualify an act as a criminal offense if it is not provided for in the criminal law as a criminal offense, even though it is similar to a criminal offense provided by law. Such a prohibition is expressly prescribed by the Provisional Criminal Code [UNMIK Regulation 2003/25], which in paragraph 3 of Article 1:

> *3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted.*

19. „The principle of legality has been raised to the rank of a constitutional principle and applies to all criminal offenses, and is regulated in the provisions on the right to legal certainty in criminal law (Article 33, paragraph 1 of the Constitution). From the guarantee that there is no criminal offense or punishment without law, which is marked as the principle of determination of the offense and punishment in law, by applying the rules *argumentum a contrario*, as a form of logical interpretation, it is concluded that a criminal offense and punishment cannot be determined by a norm outside the law, which also means a norm resulted in the process of creating rights by applying analogy.

20. Therefore, the analogy by which new criminal offenses are created is prohibited: a person's behavior, no matter how socially dangerous and harmful, cannot be qualified as a criminal offense, if it is not provided by law as a criminal offense. Such an analogy is excluded from criminal law as directly contrary to the principle of legality because it creates legal uncertainty and allows for arbitrariness and abuse by the judiciary.

21. Precisely the protection of freedoms and human rights from any arbitrariness and possible abuses by the court is the decisive motive for prohibiting the analogy which creates a new criminal offense, even if it is similar to some of them provided by law. In short, the meaning and function of the principle of legality determine the scope, limits and forbidden zone of analogy in criminal law.

22. Setting from a purpose and limits of the prohibition of analogy thus determined, in criminal cases it is considered that the prohibition covers in particular:

    a) prohibition of the analogy by which a new criminal offense is created by applying criminal regulations that govern the most similar case (e.g. when misconduct that is not provided by law as a criminal offense, the court would qualify as a criminal offense);
    b) the prohibition to create by analogy new qualified forms of the basic criminal offense (e.g. by declaring a circumstance qualifying and which as such is not provided for in that criminal offense but is the same or similar to a qualifying circumstance provided for in another similar or related criminal offense;
    c) a ban on more severe sentence by interpretation by analogy; and
    d) prohibition of legal analogy, namely prohibition to create a criminal offense or punishment by an individual legal norm on the basis of general principles of criminal legislation or the spirit of the entire legal order.

23. In all these cases, by applying the analogy, the law is amended to the detriment of the defendant, which is in direct contradiction with the principle of legality in criminal law, and therefore these cases are in the zone of prohibited analogy.

c) Legal analogy in criminal law

24. Modern criminal legislation that does not explicitly provide for the application of legal analogy, but it is considered that legal analogy is not totally prohibited and that its application is still possible in the field of interpretation and application of criminal regulations, within certain principles of legality. In order to find the missing solutions in the law, the application of a legal analogy is allowed if it is in favor of the defendant and does not contradict other criminal regulations and criminal law principles. For example, the court can use this analogy, especially in the matter of excluding unlawfulness, since this area is largely not sufficiently regulated.

25. The application of the legal analogy is also advocated in other criminal law areas. There are opinions that it is extremely possible to apply this type of analogy when interpreting legal provisions: **(1)** on grounds that exclude the existence of a criminal offense, **(2)** on grounds that exclude punishment or serve for calculating sentence, and (3) on grounds relating to all those circumstances that create a favorable situation for the defendant.

26. Based on the above, on the analogy as a type of conclusion and type of interpretation of law, the position is taken that from its creation, analogy in law is associated with legal gaps and serves as a means to fill them. In discussing the place of analogy in the theory of law, the arguments presented are inspired by the idea that analogy is a procedure that lies in the middle between the interpretation of law in the strict, narrower sense of the word and the very creation of law. The scope of the analogy in criminal substantive law is limited by *"principle of legality nullum crimen, nulla poena sine lege"*.

27. Modern criminal law doctrine is of the opinion that legal analogy is always prohibited, as it is directly contrary to the principle of legality, and that the application of legal analogy is not excluded outside the forbidden zone, determined by this principle.

(ii) General principles relating to Article 7 established by the case law of the ECtHR

28. The guarantee enshrined in Article 33 of the Constitution and Article 7 of the ECHR, which is an essential element of the rule of law, occupies a prominent place in the protection system of Convention, as it is underlined by the fact that no derogation from it is permissible under Article 15 of the ECHR in time of war or other public emergency. It should be construed and applied, as follows from its objective and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see Judgment *Korbely v. Hungary* [GC], Application no. 9174/02, dated 19 September 2008, paragraph 69)

29. Accordingly, Article 33 of the Constitution and Article 7 of the ECHR *„are not confined to prohibiting the retroactive application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable"* (see Judgment *Korbely v. Hungary,* cited above, paragraph 70).

30. When speaking of "law" Article 7 of the ECHR and Article 33 of the Constitution allude to the very same concept as that to which the ECHR refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see case *EK v. Turkey*, application no. 28496/95, judgment of 7 February 2002, paragraph 51). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see Judgment *Del Rio Prada v. Spain*, application no. 42750/09, of 21 October 2013, paragraph 91).

31. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and

could reasonably be foreseen (see Judgment *Jorgić v. Germany*, application no. 74613/01, of 12 October 2007, paragraphs 100-101).

32. However, the lack of an accessible and reasonably foreseeable judicial interpretation may even lead to the finding of a violation of the accused's rights under Article 7 (see, as regards the constituent elements of the criminal offense, *Pessino v. France*, application no. 40403/02, judgment of 12 February 2007, paragraphs 35-36, for sentence see judgment *Alimuçaj v. Albania*, application no. 20134/05, 7 February 2012, paragraphs 154-162). In order to avoid this, the goal and purpose of this provision is namely that no one should be subjected to arbitrary prosecution, conviction or punishment (see Judgment *Del Rio Prada v. Spain*, cited above, paragraph 93).

33. In addition, we recall that, in principle, it is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution (see Judgment *Waite and Kennedy v. Germany*, application no. 26083/94, 18 February 1999, paragraph 54, see also Judgment *Korbely v. Hungary*, cited above, paragraph 72)

(ii) Application of the abovementioned principles to the Applicant's case

34. In the light of the aforementioned principles concerning the scope of its supervision, we recall that the Constitutional Court is not called upon to decide on the individual criminal liability of the Applicant, which is primarily a matter for the assessment of the regular courts. Also, the Court is not called upon to decide whether there is a criminal offense in the Applicant's actions (for example, Fraud under Article 261 of the PCCK or Falsifying Documents under Article 332 of the PCCK), this is also at the discretion of the regular courts (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532 / 97 and 44801/98, of 22 March 2001, paragraph 51)

35. The function of the Court, from the point of view of Article 33 of the Constitution and Article 7 paragraph 1 of the ECHR, is to consider whether the criminal offense for which the Applicant was convicted constituted a criminal offense defined with sufficient accessibility and foreseeability and whether regular courts contrary to the principle of legality applying the analogy broadly interpreted the criminal law to the detriment of the accused (see judgment *Kokkinakis v. Greece*, Application no. 14307/88, of 25 May 1993, paragraph 52).

A) Accessibility

36. As regards the application of the principles established by the ECtHR, we consider that it must first be established whether the criminal law and the Law on Public Procurement were accessible to the Applicant, given that the Applicant claims that the regular courts to him as a foreign national *"[...] have*

arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person".

37. In this regard, in relation to the Applicant's allegation, we recall, first of all, the Judgment of the Basic Court PKR. No. 432/15 of 18 December 2017, in which the Applicant was characterized as an "*official person*" and found guilty of the criminal offense under Article 341 [Fraud in Office], paragraph 3 in conjunction with paragraph 1 of the Provisional Criminal Code [UNMIK Regulation 2003/25], which prescribes:

> *1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.*
>
> *[...]*
>
> *3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.*

38. In the following, the Basic Court considers as the main material evidence the "*Declaration under oath*", signed by the Applicant, as the company's representative, who stated at the time of the submission of the tender that *" the economic operator [the company represented by the applicant] meets the eligibility requirements of the Law on Public Procurement in Kosovo, Law no. 2003/17, Article 61 [...] I accept the possibility of criminal and civil sanctions, penalties and damages if the said economic operator intentionally or through negligence submits any document or statement containing information that is incorrect in its content or may be misleading".*

39. Based on the above, we conclude that the Applicant as a representative of an economic operator from the Republic of Albania who performed works in the territory of the Republic of Kosovo and participated in public tenders in accordance with the laws of the Republic of Kosovo in accordance with the Law on Public Procurement in Kosovo, Law No. 2003/17, should have been acquainted with the positive legal regulations of the Republic of Kosovo.

40. By signing the "*Declaration under oath*", the Applicant accepted as valid the positive legal legislation of the Republic of Kosovo, regardless of the fact that he is a foreign citizen, namely a citizen of the Republic of Albania, and regardless of the fact that the NGO whose applicant is the Executive Director is registered in Albania.

41. Also, the positive legal regulations of the Republic of Kosovo, and thus the Provisional Criminal Code [UNMIK Regulation 2003/25], according to which the Applicant was found guilty, as well as the Law on Public Procurement in Kosovo, Law no. 2003/17, according to which the Applicant participated in the public bidding, are documents available on the websites of the Assembly of the Republic of Kosovo, the Official Gazette of the Republic of Kosovo and a

number of other websites of public institutions of Kosovo, which for the Applicant as a representative of the economic operator were sufficiently available.

42. Based on the above, we conclude that the laws referred to by the Basic Court in Judgment PKR. No. 432/15 of 18 December 2017, the Court of Appeals in Judgment PAKR. No. 528/2018 of 16 April 2019, as well as the Supreme Court in Judgment Pml. No. 253/2019 of 30 September 2019, namely the Provisional Criminal Code [UNMIK Regulation 2003/25] and the Law on Public Procurement in Kosovo, Law No. 2003/17, were in force and thus the applicable legal regulations were sufficiently available to the Applicant.

B) Foreseeability

43. In the continuation of the test under Article 7 of the ECHR, we must examine whether the Provisional Criminal Code [UNMIK Regulation 2003/25] and the Law on Public Procurement in Kosovo, Law no. 2003/17, were foreseeable and whether the regular courts interpreted them by analogy extensively and unpredictably to the detriment of the Applicant.

44. We remind that by signing the "*Declaration under oath*", the Applicant accepted as valid positive legal legislation of the Republic of Kosovo, regardless of whether he is a foreign citizen, namely a citizen of the Republic of Albania, and regardless of the NGO which applicant is the Executive Director registered in Albania, but the question now before us is **i)** whether the Applicant acquired the status of an "*official person*" by signing the "*Declaration under oath*" and **ii)** whether the Applicant could have foreseen that he had acquired the status of an "*official person*".

45. We note that on the basis of this "*Declaration under oath*", which is part of the tender documents, the Basic Court found that "*...it is a fact that the convict Albert Rakipi represented the Institute as an official person, because he acted as a business organization - legal person, because according to the Law on Public Procurement, namely the provision of Article 61 of the mentioned law, has exercised special duties related to the public procurement activity*".

46. We note that it is obvious that the Basic Court concluded that the Applicant has the status of an official person by applying the analogy from the Law on Public Procurement, namely under the provision of Article 61 of the said Law, where the "*Declaration under oath*" itself is not part of the Law on Public Procurement, but it is also derived from the legal norm of Article 61 of the Law on Public Procurement. Therefore, the Court notes that the Basic Court did not reason the status of "*official* person" pursuant to Article 107 of the Provisional Criminal Code of Kosovo, which was the obligation of the Basic Court.

47. Furthermore, we recall that the Applicant has already raised the allegation that he does not have the status of an "*official person*" before the regular courts, namely in his appeals to the Court of Appeals and in his requests for protection of legality. Therefore, in this case, we will refer to both the reasoning of the Court of Appeals and the reasoning of the Supreme Court regarding the claim of the Applicant.

48. First of all, the Court of Appeals, by Judgment PAKR No. 27/2018, regarding the allegation of the Applicant that he does not have the status of an *official person*, assessed that the Basic Court gave the necessary reasoning in relation to this allegation, and which reasoning "[...] *is approved by this court and does not see it necessary to do more assessment*".

49. We note that in the present case the Court of Appeals continued to apply the analogy in determining the status of the "*official person*" of the Applicant himself, accepting the earlier analogous interpretation of the Basic Court.

50. In the retrial before the Court of Appeals, in its judgment PAKR No. 528/2019 of 16 April 2019, regarding the allegations of the Applicant that he does not have the status of "*official person*", assessed that:

> *"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work) and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the contracting authority (the University of Prishtina) has undertaken the exercise of special official duties based on the authorization given by law".*

51. We note, that the Court of Appeals continued with a broad and analogous interpretation of the term " *official person"* referring also to the Law on Public Procurement in Kosovo No. 2003/17, without giving a specific reasoning according to which paragraph of Article 107 of the Provisional Criminal Code of Kosovo, the Applicant, as a legal entity, has the status of "*official person*", and did not reason "***what public function or what public authority was exercised by the Applicant in order to be considered an official person***". In contrast, the Court of Appeals reasons by the negation that "*... it cannot be concluded that the accused in this case* ***does not have the capacity of an official person****",* which is obviously a broad interpretation of the term "*official* person", applying a negative analogy. The Court of Appeals was obliged to prove and reason **"why the defendant has the status of an official person".**

52. We also refer to the Applicant's specific allegation raised in his request for protection of legality, where he emphasized:

> *„The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:*

a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:
b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person".

53. We further recall the reasoning given by the Supreme Court, which in its challenged Judgment Pml. No. 253/2019, of 30 September 2019, stated that: *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the courts of lower instance have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to the fact that he was a representative of "ISD" and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]."*

54. We note that in addition to the Applicant's allegations throughout the proceedings that he did not have the status of "*official person*", the only explanation regarding his status was given by the Supreme Court with the sentence "*as determined by Article 107 of the PCCK [Provisional Criminal Code of Kosovo]", accepting* previous interpretations of the Court of Appeals and the Basic Court, without explaining what paragraph of Article 107 of the PCCK is in question, what official authority and what public authority the Applicant exercised, although the law itself clearly distinguished between Kosovo citizens and foreign citizens and the status of official person in Article 107 of the PCCK.

55. In support of the Applicant's allegations that the regular courts granted the Applicant the status of an official person by analogy, we also refer to the Supreme Court's conclusion regarding the other accused H.V. where "*The Supreme Court of Kosovo assesses that the first instance court in its judgment has correctly found that the actions of the convict H. V. manifest all elements of the criminal offense of fraud under Article 341, paragraph 3 in conjunction with paragraph 1 and Article 23 of the PCCK, „****since the convicted H. V. had the status of an official person as determined by the provision of Article 107, paragraph 1, subparagraph 1.1 of the PCCK, because he was elected to represent the UP, namely the public procurement office".***

56. In this context, we note that such a clear explanation regarding the status of "*official person*" was not given to the Applicant in any judgment of the regular courts, on the contrary, his status was always determined by analogy under the Law on Public Procurement No. 2003/17, without explaining in a single letter on the basis of which paragraph of Article 107 of the Provisional Criminal Code the Applicant has the status of an official person.

57. We further recall that during the qualification of the Applicant as an official person, the regular courts also referred to the provisions of the Law on Public Procurement, reasoning that he signed the "Declaration under oath" in accordance with the procedures set out in this Law, and he offered the bid and was selected as an economic operator to perform service for one public institution, namely the University of Prishtina.

58. We reiterate that the Applicant raised the issue of analogous interpretation and application of the Law on Public Procurement in the same way as before the lower courts, and before the Supreme Court. However, in his request for protection of legality, submitted on 12 June 2019, the Applicant also specifically stated that "*The application of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would have not been applied, because the status of official person can have only persons explicitly defined in the Criminal Code. Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted"*.

59. Returning to the specific allegations of the Applicant on the interpretation of the Law on Public Procurement on the basis of analogy, we remind that this principle is included in the constitutional provisions, namely in Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, and Article 7 [No punishment without law] of the ECHR which stipulates that "*only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.*" (see ECtHR case, *Kokkinakis v. Greece*, application no. 14307/88, judgment of 25 May 1993, paragraph 52). In addition, this principle is embodied in paragraph 3 of Article 1 [Principle of Legality] of the PCCK, which establishes: "[...] *3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted*".

60. We consider that the Applicant's allegations that the Law on Public Procurement does not provide a definition of "*official person*" are grounded, however, we note that the regular courts in their decisions referred to this law to explain that the Applicant, as a representative of the company, provided services as an economic operator for the needs of one public authority.

61. Based on the abovementioned reasoning of the Supreme Court, we note that this court, by analogy, interpreted the law extensively and unpredictably to the detriment of the Applicant when it found that the Applicant is an official person in accordance with Article 107 of the PCCK, without explaining or elaborating in a single word Article 107 of the PCCK itself. This is because it upheld the finding or assessment of the lower instance courts, which applied the provisions of the Law on Public Procurement by analogy.

62. Accordingly, we find that the Applicant, by signing the "*Declaration under oath*" under the Law on Public Procurement, could not have sufficiently foreseen that he had acquired the status of an "*official person*". By signing the "*Declaration under oath*" based on the Law on Public Procurement, the Applicant could have foreseen that he was criminally liable under the applicable laws of the Republic of Kosovo, but not that he had acquired the status of "*official person*", which may lead to become liable for the qualified criminal offences.

63. Therefore, we consider that the regular courts throughout the entire proceedings, by analogy, interpreted the law extensively and unpredictably to the detriment of the Applicant, interpreting that by signing the "*Declaration under oath*" the Applicant acquired the status of "*official person*" under the Law on Public Procurement, and that Law does not determine or provide for the definition of an official person, whereby such an unpredictable interpretation for the Applicant directly affected the qualification of the criminal offense for which he was found guilty.

64. Furthermore, we reiterate that the Supreme Court upheld the position of the regular courts, not responding to the Applicant's specific claim regarding the interpretation and application of the Law on Public Procurement, in which case, consequently, the Applicant was qualified as an official person.

65. In the present case, we consider that the regular courts, including the Supreme Court, did not reason, or specifically explain the reasons why the criminal offenses of "Fraud" or "Falsifying Documents" could not be applied in his case.

66. Therefore, we consider that the challenged judgments, namely: Judgment [Pml. No. 253/2019] of the Supreme Court of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017, did not meet the criteria of the "principle of legality" under Article 33 of the Constitution in conjunction with Article 7 of the ECHR, because the regular courts throughout the court proceedings interpreted the applicable legal provisions by applying analogy extensively and unpredictably to the detriment of the Applicant (see *Kokkinakis v. Greece*, Application no. 14307/88, no. 25). May 1993, paragraph 52).

67. Finally, we emphasize again that this conclusion concerns exclusively the challenged judgments from the point of view of the interpretation of law in the circumstances of the Applicant's case, and does not in any way prejudices the outcome of the merits of his case in retrial. We reiterate that the Court is not

called upon to decide on the Applicant's individual criminal liability, which is primarily a matter for the regular courts. Furthermore, the Court is not called upon to decide whether there is a substance of another criminal offense in the Applicant's actions, which is also on the assessment of the regular courts in the retrial (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98, of 22 March 2001, paragraph 51).

Conclusion

68. Based on the above, and taking into account the consideration of the Applicant's allegations in his Referral:

I. We agree that the Applicant's allegation that there has been a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are grounded.

II. Also, we consider that the Applicant's allegations that the regular courts throughout the court proceedings by applying analogy interpreted the applicable legal provisions extensively and unpredictably to the detriment of the Applicant are grounded, and that as a result Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR have been violated. Also, we consider the challenged judgments, namely: Judgment [Pml. No. 253/2019] of the Supreme Court of 30 September 2019, Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court of 18 December2017, did not meet the criteria of the "principle of legality" under Article 33 of the Constitution in conjunction with Article 7 of the ECHR, because the regular courts by applying analogy interpreted the applicable legal provisions extensively and unpredictably to the detriment of the Applicant.

III. In the end, we consider that Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019, Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo – Serious Crimes Department of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court, Serious Crimes Department of 18 December 2017, should have been declared invalid.

Concurring opinion was submitted by Judges;

Bajram Ljatifi, Deputy President

Safet Hoxha, Judge and

Radomir Laban, Judge

This translation is unofficial and serves for informational purposes only.