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

Prishtina, on 1 March 2021
Ref. no.:RK 1719/21

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RESOLUTION ON INADMISSIBILITY

in

Case no. KI213/19

Applicant

Atdhe Dema

Constitutional review of Decision CML. No. 11/2019 of the Supreme Court of Kosovo of 9 September 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Atdhe Dema, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment CML. No. 11/2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 9 September 2019. The challenged Judgment rejected as ungrounded the request for protection of legality filed against Decision C. No. 3475/18 of the Basic Court in Prishtina, of 28 December 2018 and Decision AC. No. 2504/19 of the Court of Appeals of Kosovo of 31 May 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Supreme Court, whereby the Applicant's rights, guaranteed by Article 23 [Human Dignity] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have allegedly been violated.

4. The Applicant also, in substance, raises allegations of a violation of the right to an impartial court as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 25 November 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 27 November 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 17 January 2020, the Court notified the Applicant about the registration of the Referral. On the same date, the Court notified the Supreme Court about the registration of the Referral.

9. On 23 October 2020, the Court notified the portal Insider about the registration of the Referral and about the opportunity to submit comments regarding the case within 15 (fifteen) days.

10. On 13 November 2020, the Insider submitted the relevant comments to the Court.

11. On 10 December 2020, the Court considered the case and decided to postpone the decision to another session in accordance with the required supplementations.

12. On 3 February 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. It follows from the case file that the name of the Applicant was included in an article published by the Insider portal, which was titled as follows: *"The prosecutor who gave to Afrim Muçiqi over 29 thousand euro is promoted in the Special Prosecution"*. This title according to the Applicant is based on untruths and as such the publication of this article harms his reputation.

Decision-making in the Press Council of Kosovo

14. On an unspecified date, the Applicant complained to the Press Council of Kosovo (hereinafter: PCK), against the online newspaper Insider about the article *"The prosecutor who gave Afrim Muçiqi over 29 thousand euro is promoted in the Special Prosecution"* claiming that the mentioned article damages his reputation with untruths, while with the published article, the Insider has violated the Chapter II (Reporting the Truth), and Chapter IV (Right of Reply) of the Press Code for Kosovo.

15. On 5 February 2019, the Assembly of the PCK reviewed the complaint and the evidence presented, in which case it found that the Insider in the published news has committed a partial violation of the Press Code by violating Chapter II (Reporting the truth), as the PCK found that there were inaccuracies in the facts presented in writing. While there is no violation of Chapter IV (Right of Reply) as the written response of the Applicant is included in the text of the article.

Proceedings conducted before the regular courts

16. On 26 November 2018, the Applicant filed a request for imposition of a security measure with the Basic Court in Prishtina, (hereinafter: the Basic Court) requesting the withdrawal of the above-mentioned article and title from the Insider portal by imposing a measure of security on the grounds that the Applicant's reputation is being damaged. The Applicant requested that the responding party be obliged to compensate the non-material damage in the amount of 50,000.00 euro, due to the loss of reputation from the false writing against him.

17. On 28 December 2018, the Basic Court, by Decision C. No. 3475/18, rejected the Applicant's request for imposing a security measure on the grounds that

the proposal to impose a security measure during that court phase was ungrounded. Among other things, the Court clarified that the Applicant's proposal for imposing a security measure did not meet the legal requirements of Article 297 of Law No. 03/l-006 on Contested Procedure (hereinafter: the LCP).

18. In addition, the Basic Court clarified that it has not assessed whether the article published by Insider is the result of any professional investigation or whether the latter is tendentious and insulting. However, the Basic Court reasoned that this case will be decided on the merits according to the statement of claim and in case the article published with defamatory content turns out to have caused damage to the Applicant's reputation, then the latter will be compensated.

19. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against Decision C. No. 3475/18 of the Basic Court, alleging essential violation of the provisions of the contested procedure and erroneous application of the substantive law.

20. On 21 February 2019, the Court of Appeals by Decision Ac. No. 666/19 approved as grounded the Applicant's appeal, declared Decision C. No. 3475/18 of the Basic Court invalid and remanded the case for retrial to the first instance.

21. The Court of Appeals in its Decision reasoned as follows: "*The court of first instance, without investigating and analyzing the facts at all, renders the challenged decision, by which it rejects the proposal of the claimant - security proposer, for the imposition of the proposed security measure. The first instance court was able to clarify the disputed circumstances, to administer the material evidence found in the case file to correctly determine the factual situation as claimed by the parties to the proceedings. Therefore, the first instance court in this case has not sufficiently and convincingly clarified the factual situation of the case in question, where only after clarifying these circumstances, the court would then be able to assess the merits of the claimant - insurance proposer's proposal for the imposition of the security measure, or its rejection [...]*".

22. On 8 April 2019, the Basic Court in the retrial by Decision C. No. 3475/18 rejected as ungrounded the Applicant's request on the grounds that the proposal for imposing a security measure does not meet the requirements required by Article 297 of the LCP. Among other things, the Basic Court stated that "*The Court considers that in this case, despite the existence of a subjective right of the claimant, there is no risk that without imposing this security measure would be impossible or difficult to realize the request of the proposer, because no evidence has been obtained to prove an existence of such risk [...]*".

23. Furthermore, the Basic Court in its Decision stated that *"[...] the eventual obligation to withdraw the article from publication results in the violation of the right to freedom of expression, while this is a prerequisite in a democratic society, and that in this case and in such cases, if it interfered in the work and*

activity of journalism, then we would also have a violation of constitutional norms, specifically Article 40 of the Constitution of the Republic of Kosovo [...]".

24. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court, alleging essential violation of the provisions of the contested procedure and erroneous application of the substantive law.

25. On 31 May 2019, the Court of Appeals, acting on retrial, rendered Decision Ac. No. 2504/19 and upheld Decision C. No. 3475/18 of the Basic Court of 8 April 2019 on the grounds that the Applicant's request did not meet the requirements required by Article 297 of the LCP.

26. On an unspecified date, at the Applicant's request, the State Prosecutor filed a request for protection of legality with the Supreme Court, against Judgment Ac. No. 2504/19, of 31 May 2019 of the Court of Appeals. In his request, the State Prosecutor alleged that the above-mentioned Decision of the Court of Appeals was characterized by a violation of substantive law.

27. On 9 September 2019, the Supreme Court, by Decision CML. No. 11/2019, rejected the request for protection of legality submitted by the State Prosecutor and upheld the decisions of the lower instance courts on the grounds that the Applicant's proposal for the imposition of the security measure did not meet the conditions required by paragraph 2 of Article 16 of Law No. 02/L-65 Civil Law Against Defamation and Insult.

28. The Supreme Court also explained in its Decision that freedom of expression can only be restricted by law when it is necessary to prevent incitement to violence and hostility on the grounds of racial, national, ethnic or religious basis. The Supreme Court further explained that the courts of lower instance, in accordance with Article 306 item 1 of the LCP, had the opportunity but were not obliged to impose an interim measure and rightly based on Article 306 of the LCP - have notified the opposing party, scheduled a hearing and rejected the proposed measure, as they found that the conditions for its imposition do not exist.

Applicant's allegations

29. The Applicant alleges that Judgment CML. No. 11/2019 of the Supreme Court of 9 September 2019, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 23 [Human Dignity] of the Constitution.

30. The Applicant alleges the following: *"Contradictory court decisions affected my dignity in a flagrant way, especially when it was not decided according to my proposal to determine a court order, but it was decided on a claim that I did not request, a proposal, namely a proposal to impose a security measure".*

31. The Applicant alleges: *"The challenged decisions do not distinguish between the interim measure and the interim security measure. The difference*

between these two terms is also presented in the provision of Article 310 of the LCP when paragraph 1 provides the right to appeal against the decision on the security measure, but not the right to appeal against the interim measure. On the other hand, the civil law on defamation and insult is a special law compared to the Law on Contested Procedure, which means the implementation of this law and not the provision of Article 207 of the LCP".

32. The Applicant alleges: "*The challenged decisions did not prove at all the fact that the disputed article to which the photo of the proposer is attached in order for the public to be acquainted with his identity, and not only by his action and which is suitable for reading and viewing in the whole world, whether or not it violates the dignity of the proposer or may or may not violate his dignity, especially when he is slandered for illegal action in the working place and duties of work and that he is a family person*".

33. With regard to the balancing of the Applicant's right under Article 23 [Human Dignity] with respect to the right of the opposing party under Article 40 [Freedom of Expression] of the Constitution, the Applicant alleges: "*By applying the law incorrectly to the detriment of the proposer, it is practically a logical conclusion that the disputed article based on untruths is considered by the courts as an expression of free opinion, while the approval of the proposal for imposing an interim measure would pose a risk of the expression of free opinion, contrary to the constitutional provision of Article 40 and Article 10 of the European Convention on Human Rights and Freedoms, or more simply expressed by the challenged decisions, it follows that free expression should not be sanctioned (in this case banned from circulation), although it is based on untruths*".

34. The Applicant further alleges that "*The provisions of Article 40 of the Constitution and Article 10 of the European Convention on Human Rights and Freedoms are wrongly applied by the challenged decision. Article 16 of the Civil Code for defamation and insult by the decision of the Supreme Court has also been erroneously applied by invoking the creation of cumulative conditions to make the proposal grounded*".

35. The Applicant also, in substance, alleges violations of the right to an impartial court. The Applicant alleges: "*The Court of Appeals by Decision AC. No. 666/19 of 21.2.2019, by which it annulled the judgment of the first instance court [...] found that the court of first instance decided on a non-existent request [...] but with its subsequent decision Ac. No. 2504/19 of 31.05.2019, for the same violations, in the same state of facts, without producing any other evidence, rejects the appeal and upholds the decision of the court of first instance although in both cases the panel was composed of the same judges*".

36. Finally, the Applicant requests the Court: *"I request the Constitutional Court to hold that the decision of the Supreme Court and of the instance courts violate my rights and freedoms in a flagrant manner, the right to dignity [...]"*

Comments submitted by the interested party "Insider"

37. On 13 November 2020, the Insider submitted to the Court its comments regarding the Applicant's Referral. According to Insider, the published article was based on the documents of public institutions which authenticity is not disputed and that during the publication of the article the procedures for reporting the truth and giving the opportunity to the addressed persons to react and complete the article were fully respected. Further, according to Insider, the published article is based on three official documents a) Report of the Tax Administration of Kosovo; b) Criminal report filed with the Prosecutor's Office; and c) The Prosecution investigative file on the persons addressed in writing. Finally, the Insider proposes to the Court to reject the Applicant's Referral as inadmissible.

Relevant legal provisions

Law No. 03/L-006 on Contested Procedure

Article 297

297.1 Measures for insurance can be determined:

a) if the propose of the insurance makes it believable the existence of the request or of his subjective, and

b) in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed.

297.2 If it's not determined differently by law, the court will determine the measures of insurance within the set deadline by the court as it is determined by the Law for the final procedure, it will issue guaranties on the measure and the type specified by the court for the damage that can be caused to the opposing party by determining and executing the insurance measures.

297.3 If the party proposing doesn't give guaranties within the set deadline, the court will reject the proposal for determining the insurance measures. With request of the party that proposed it, the court can dismiss him from the issuing of the guaranties if it ascertains that there are no financial possibilities for such thing. 297.4 The units of the local government are excluded from the obligations of the paragraph 3 of this article.

297.4 Local government communities are exempt from the obligation of paragraph 3 of this article.

Law No. 02/L-65 Civil Law Against Defamation and Insult

Chapter II
MEASURES FOR PROTECTION FROM DEFAMATION AND INSULT

Article 4
Action against Defamation and Insult

4.1. A person has the right to demand to stop the defamation and insult and to demand that it will not be repeated in the future, the refutation of defamatory or insulting information concerning his/her person and compensation for moral and material damage caused by the defamation and insult, through a court proceeding, unless one of the exemptions to liability is established in accordance with this Law.

4.2. If defamation and insult is made through a mass medium, compulsory, it shall be refuted in the same mass medium and be given the same prominence. The refutation shall be published within eight (8) days of receipt of the relevant demand in the case of daily newspapers on the same page where the defamation and insult was published, in the next issue of a periodical or a telegraph agency and within eight (8) days in the same manner or at the same time of day in case of broadcast information.

4.3. Where the defamation or insult identifies a child, the parent or legal guardian may initiate the procedure against defamation and insult before the competent court according to this Law.

4.4. Where the defamatory or insulting information identifies a deceased person, the first-degree heir of that person may initiate the procedure against defamation and insult before the competent court according to this Law, under the condition that the defamation and insult caused harm to the reputation of the heir.

Chapter III
RESPONSIBILITY

Article 5
Responsibility for Defamation and Insult

5.1. A person is responsible for defamation or insult if he/she made or disseminated the expression of defamation or insult, unless one of the exemptions to liability is established in accordance with this Law.

5.2. For defamation or insult made through media outlets the following may be held jointly or individually responsible: author, editor or publisher or someone who otherwise exercised control over its contents.

5.3. Where the defamation or insult relates to a matter of public concern or the injured person is or was a public official or is a candidate for public office, there may only be responsibility for defamation or insult if the author knew that the information was false or acted in reckless disregard of its veracity.

5.4. Public authorities are barred from filing a request for compensation of harm for defamation or insult. Public officials may file a request for compensation of harm for defamation or insult privately and exclusively in their personal capacity.

Chapter IV
EXEMPTIONS FROM LIABILITY AND ITS LIMITS
Article 6
Proof of truth

6.1. In all actions for defamation and insult, except those involving matters of public concern, the defendant shall carry the burden of proving the veracity of an impugned statement, and a finding by the court that the statement of facts is substantially true shall absolve the defendant of any liability.

6.2. In defamation and insult actions involving statements on matters of public concern, the defendant shall carry the burden of proving that he/she acted responsibly in publishing the impugned statements. A finding by the court that the defendant acted responsibly in publishing the impugned statements, unless the defendant knew that the impugned statement was false or acted in reckless disregard of its veracity, shall absolve the defendant of any liability.

Article 7
Reasonable publications

No one shall be held liable for the defamation and insult of a statement of a matter of public interest if they prove that it was reasonable for a person in their position to disseminate the material in good faith, given the importance of freedom of expression in relation to matters of public interest so that he receives timely information on such matters.

Article 8
Opinions

No one shall be liable for defamation and insult for a statement which the court assesses to be a statement of opinion, on the condition that the opinion is expressed in good faith and has some foundation in fact.

Article 16
Injunctions

16.1. A person has the right to demand through a court proceeding, the termination of defamations and insults and the refutation of defamatory and insulting information concerning his/her person as well as the promise that the defamation and insult will not be repeated in the future, unless one of the exemptions to liability is established in accordance with this Law.

16.2. Preliminary court orders to prohibit disseminating or further disseminating of information may only be issued where publication has already occurred and the allegedly injured person can make probable with virtual certainty that the information caused harm to his or her reputation and that the allegedly injured person will suffer irreparable harm as a result of further dissemination.

16.3. Permanent court orders to prohibit the dissemination or further dissemination may only be applied to the specific expression found to be defamatory or insulting and to the specific author or mass medium making or disseminating the expression.

Admissibility of the Referral

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

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

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

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".

40. The Court also examines whether the Applicant has met the admissibility requirements required by Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

41. In assessing the fulfillment of the admissibility requirements as set out above, the Court notes that the Applicant has the right to file a constitutional complaint, citing alleged violations of his fundamental rights and freedoms. Consequently, the Court finds that the Applicant is an authorized party, who challenges an act of public authority, namely the Decision [CML. No. 11/19] of the Supreme Court of 9 September 2019, after the exhaustion of legal remedies regarding the imposition of a security measure, which has been the subject of the main review in the proceedings conducted before the regular courts. With regard to allegations of violation of the dignity under Article 23 of the Constitution and violation of the right to an impartial tribunal guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, the Court considers that these allegations were not subject to review by the regular courts, for which reason they were rejected as inadmissible due to non-exhaustion of legal remedies based on the reasoning given in the following text.

42. The Court also finds that the Applicant has clarified the rights and freedoms that he alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

43. In addition, the Court examines whether the Applicant has met the admissibility requirements established in Rule 39 (Admissibility Criteria) of the Rules of Procedure. Rule 39 (1) (b) and (2) of the Rules of Procedure stipulate that:

"(1) The Court may consider a referral as admissible if:
[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.

44. The Court considers that the Applicant's allegations may be summarized as follows: (i) the allegation of application of the erroneous law in relation to the imposition of a security measure against the article of the portal Insider; (ii) allegation of violation of the dignity guaranteed by Article 23 of the Constitution; and, (iii) allegation of violation of the right to an impartial court guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR.

Allegation of application of erroneous law

45. The Court notes that the Supreme Court rejected the request for protection of legality submitted by the State Prosecutor against the decisions of the regular courts, by which the regular courts rejected the Applicant's proposal for imposing a security measure (court order). The Supreme Court assessed the decisions of the lower instance courts as fair and based on law.

46. With regard to the Applicant's allegation that the regular courts should have applied the provisions of the civil law on insult and defamation instead of the provisions of the LCP, the Court reiterates that it is not its duty to deal with factual or legal errors that have allegedly been committed by the regular courts, unless and insofar as that they may have violated the rights and freedoms protected by the Constitution and the ECHR. The Court may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of fourth instance, which would be to disregard the limits imposed on its jurisdiction. (See ECHR case, *Perlala v. Greece*, no.17721/04, Decision of 22 February 2007, paragraph 25).

47. The Court notes that the rejection of the Applicant's proposal for imposing a security measure and his Referral as a whole by the regular courts has more to do with non-fulfillment of conditions as required by Article 297 of the LCP and with non-provision of relevant evidence of the damage caused. The Court considers that the regular courts in substance have dealt with the Applicant's Referral and the fact that the Applicant's Referral was rejected does not mean that it violates the fundamental rights and freedoms guaranteed by the Constitution. The Court also notes that based on the principle of *iura novit curia* it is up to the regular courts to determine which law and how it is applied in the circumstances of the cases under their jurisdiction, unless the law applied has flagrantly violated the fundamental human rights and freedoms, what did not happen in the circumstances of the case under consideration.

48. In this regard, the Basic Court, by its Decision C. No. 3475/18, of 28 December 2018, assessed:

"The court, after assessing the allegations of the parties to the proceedings and referring to the legal request from article 297 item a) and b) of the

LCP in relation to the provisions of the Law against defamation and insult, found that the proposal for imposing the measure - withdrawal of the article, at this stage of the procedure is not grounded, as the legal requirements under Article 227 paragraph 1 b) of the LCP - for the imposition of a security measure are not met, which provision stipulates that: Measures for insurance can be determined: a) if the propose of the insurance makes it believable the existence of the request or of his subjective, and b) in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed. In this regard, the court did not enter the assessment of the authenticity of the content of the published article, if it is the result of sufficient and professional research, based on ethics in the field of journalism, or the tendentious or insulting article, because the court considers that the case will be decided on merits upon the statement of claim in the event that it turns out that the article, due to the eventual content of the defamatory information, has caused damage to the proposer, namely the claimant in that situation, the claimant may be awarded a certain amount in the name of compensation for damage. However, at this stage of the proceedings, the court considers that the eventual obligation to withdraw the article from publication results in a violation of the right to freedom of expression, which is a prerequisite in a democratic society. In this context, the Court recalls that the Law against Defamation and Insult stipulates that the law in question is interpreted in a way that ensures that the application of its provisions maximizes the principle of freedom of expression and will be in accordance with the European Convention for the Protection of Fundamental Human Rights and Freedoms, as applied in the case law of the European Court of Human Rights [...] The counter-proposers, through the authorized representative both in the written submission dated 10.12.2018, and in the hearing of 19.12.2018, have objected as unfounded the proposal for imposing a security measure _ with the reasoning that the two cumulative conditions under Article 297 of the Law on Contested Procedure (LCP) for allowing the imposition of a security measure are not substantiated. According to the submissions of counter- proposer; the entire content of the article is true and is based on official documents, such as TAK reports, which prove that the proposer did not take into account the final report of TAK, by which the singer AM was charged with about 45,000.00 €, tax evasion. In the response of the proposer given to TAK but also to the media of the counter proposers, it was that he himself had made a plea agreement for the singer and that he could not take into account the second report of TAK, because the latter was late. In this circumstance it results that the prosecutor has not fulfilled his duties which has effectively resulted in the exemption from responsibility of the singer AM for the payment of the amount of 29,000.00 €, which is the difference between the amount of 15,000.00 €, for which he has pleaded guilty with the proposer and the amount of € 45,000.00, which he would have to pay if the prosecutor were to fulfill his obligations".

49. The Court notes that the Court of Appeals by Decision Ac. No. 2504/19 of 31 May 2019, had clarified:

> *"The requirements provided by this provision must be met cumulatively and not alternatively. The first instance court acted correctly when it rejected the proposal for imposing a security measure, because in this case, especially the second requirement that has to do with the risk that without imposing the measure in question, it would be made impossible or difficult to the proposer to exercise his subjective right, has not been met. This has to do with the fact that the article in question has been published/has not been reproduced, even so far the respondents have not republished or modified the article in question in any way. The article in question was published once, has remained as such. The damage that could have been caused is caused and it is not increased, then the exercise of the claimant's subjective right is not endangered, without the issuance of the measure, as the main request from the claim is compensation for damage in the name of defamation, that there is no element that calls into question this fact in the future at least from the evidence administered as it is. In relation to the first requirement, this condition is partially met if we refer to the current situation, but in this case, since according to the LCP, the fulfillment of the conditions is required cumulatively, the request or proposal for a measure is rightly rejected. The decision to reject the security measure proposed by the claimant / proposer, does not in any way prejudice the main issue and that the court of first instance is obliged to review the evidence and facts in full compliance with the law and finally come up with a fair and accurate epilogue, in accordance with the legal provisions in force. The security measure as a way of securing the claim for the claimant, if it is issued without fulfilling the conditions, is a limitation for the other party, while the limitations should be only based on the existence of legal reasons mentioned above, otherwise it violates other rights. [...] The decision of the Press Council in relation to the proposal of the security measure is not sufficient evidence to prove the fulfillment of the legal conditions in terms of approval of the proposal for the issuance of the security measure [...]".*

50. Finally, the Court refers to the relevant part of Decision CML. No. 11/2019 of the Supreme Court, of 9 September 2019, which explains:

> *"In the present case, the Supreme Court agrees in entirety with the position of the two courts mentioned above that the legal requirements from paragraph 2 of Article 16 of the above mentioned Law have not been met [Law No. 02/L-65 Civil Law Against Defamation and Insult] for the issuance of a court order, since the published article was not repeated or modified in any way but remained as such, then the damage that the claimant eventually suffered was caused and the same has not increased, because no procedure has been initiated against him as a result of this article, the latter has been promoted to an extremely respectful judicial function, Prosecutor in the Special Prosecution Office of the Republic of Kosovo. Thus, in no way is the exercise of the subjective right of the claimant endangered, without the issuance of the measure requested by*

him, so the Supreme Court concludes that in this case the legal requirement from article 16 of this law for the issuance of the proposed measure are not met. [...] The Supreme Court of Kosovo, considers, as well as the court of first and second instance that by rejecting the proposal for the measure proposed by the claimant, the freedom of expression provided by Article 10 of the European Convention for the Protection of Human Rights and Freedoms has not been violated, because in this provision of this Convention is also proclaimed the right to freedom of expression and that the exercise of freedom of expression may be restricted by law if necessary in a democratic society, in interest of national security, etc., as well as for the protection of the dignity or rights of others, but according to the assessment of this Court, this restriction can always be made by certain laws, as the possibility of such a restriction is generally provided for in paragraph 2 of this article of this Convention. In this context, the possibility of restriction by law of freedom of expression is provided by paragraph 2 of Article 40 of the Constitution of the Republic of Kosovo, but in cases where such a thing is necessary to prevent incitement and provocation of violence and hostilities on the grounds of racial, national, ethnic or religious hatred. The possibility of correcting untrue, incomplete or inaccurate information published, if it violates his rights or interests, is given in this provision but in accordance with the law, which in this case with the Civil Law against Defamation and Insult according to which, as elaborated above, the legal requirements for issuing a court order to prevent further dissemination of information, etc. have not been met".

51. In view of the abovementioned allegation of application of the erroneous law, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. Consequently, the Court finds that the Applicant has enjoyed the procedural guarantees included in the concept of a fair and impartial trial (See, *mutatis mutandis, inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also, case *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

52. The Court considers that the Applicant has not substantiated the allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (see, *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

53. Therefore, this allegation must be rejected as manifestly ill-founded.

Allegation of violation of dignity and the right to an impartial tribunal

54. The Court considers that the abovementioned allegations should be considered together.

55. The Court notes that in the circumstances of the present case it is clear that the subject of review in the proceedings conducted before the regular courts is the Applicant's request for the imposition of a security measure against the article of the portal Insider, namely the removal of the article in question. The regular courts have not decided on the issue of violating the dignity of the Applicant vis-a-vis the freedom of expression of the Insider portal because that issue was not initiated in the proceedings by the Applicant. It is true that the regular courts in their decisions have mentioned the issue of dignity and freedom of expression, but only in the context of the examination of the main issue, which is the imposition of a security measure, namely the removal of the article on the portal Insider.

56. From the submitted documents, the issues raised in the proceedings before the regular courts and the subject of review, it results that the Applicant has not initiated any proceedings in the regular courts regarding his allegation under Article 23 [Human Dignity] of the Constitution.

57. In this factual situation regarding the allegation of violation of dignity, the Court finds that in accordance with the principle of subsidiarity it cannot assess the constitutionality of the article of the Insider portal without having been previously assessed by the regular courts.

58. Consequently, this allegation is rejected for consideration due to non-exhaustion of all legal remedies as provided by Articles 113 (7) of the Constitution, 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

59. With regard to the allegation of violation of the right to an impartial court because the same trial panel of the Court of Appeals has twice adjudicated his case, the Court notes that the allegation of partiality of the trial panel of the Court of Appeals was raised for the first time before the Constitutional Court. In addition, the Court does not find that the proceedings before the Court of Appeals were arbitrary, as the latter had once remanded the Applicant's case for retrial to the lower instance court (see Decision Ac. No. 666/19, of the Court of Appeals, of 21 February 2019).

60. The Court notes that in accordance with the principle of subsidiarity, the Constitutional Court cannot assess an allegation or an issue which has not been raised and assessed previously by the regular courts (see the case of the Constitutional Court No. KI89/15, *Applicant Fatmir Koci*, Resolution on Inadmissibility of 22 March 2016, paragraph 35).

61. The principle of subsidiarity requires the Applicant to exhaust all procedural opportunities in the proceedings before the regular courts, in order to prevent a constitutional violation or to remedy such violations once they have occurred. Consequently, the Applicant is responsible when his case is declared

inadmissible by the Constitutional Court, if he fails to avail himself of the opportunities in the proceedings before the regular courts (see the cases of the Constitutional Court No. KI01/19, Applicant *Fatos Rizvanolli*, Resolution on Inadmissibility of 2 September 2020, paragraph 99; and No. KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility of 16 November 2016, paragraph 39 and references cited therein).

62. In addition, the Court notes that in the consolidated case law of the ECtHR, the Applicants are not exempted from the obligation to raise cases in the domestic courts, even in case where the domestic courts have the opportunity, or are obliged, to review the case of their own motion within the rights protected by the ECHR (see ECtHR cases, *Van Oosterwijk v. Belgium*, Judgment on non-exhaustion of legal remedies, of 6 November 1980 and *Gaziyev v. Azerbaijan*, Partial Decision on Admissibility, of 8 February 2007).

63. Therefore, this allegation must also be rejected for consideration on the grounds of non-exhaustion in substance in the proceedings conducted before the regular courts.

64. In view of the above, the Applicant's Referral on constitutional basis must be rejected as inadmissible in entirety, in accordance with Article 113. (7) of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b) and (2) of the Rules of Procedure.

Conclusion

65. In the circumstances of the present case, the Court finds that the main issue adjudicated by the regular courts was the imposition of a security measure against the article of the Insider portal, for which the Applicant alleged the application of the erroneous law to his detriment. The Court rejected this allegation as manifestly ill-founded.

66. With regard to the allegations of violation of dignity and the right to an impartial court, the Court finds that for the allegation of violation of dignity the Applicant has not initiated any proceedings before the regular courts, while for the allegation of an impartial court, the Applicant filed the allegation for the first time in the proceedings before the Constitutional Court. Both of these allegations were rejected for consideration due to non-exhaustion of legal remedies provided by the Constitution.

67. Therefore, the Applicant's Referral, on constitutional basis and in its entirety, was rejected as inadmissible, as established in Article 113 (7) of the Constitution, foreseen in Articles 20 and 47 of the Law and further specified in Rule 39 (1) (b) and (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (1) (b) and (2) and 59 (2) of the Rules of Procedure, on 3 February 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha Arta Rama-Hajrizi

This translation is unofficial and serves for information purposes only