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

Prishtina , 19 March 2021
Ref.no.:RK1730/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI239/19

Applicant

Hakif Veliu

Constitutional review of Decision Pml.no.253/2019 of the Supreme Court of Kosovo, of 30 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 Hakif Veliu, who is represented by Durim Osmani and Feim Alaj, lawyers in K.A.M. PARTNERS, LLC, Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Pml.no. 253/2019], of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 30 September 2019, in conjunction with the Judgment [PAKR. No. 528/2018] of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), of 16 April 2019, and the Judgment [PKR.no.432/15] of the Basic Court in Prishtina, Serious Crimes Department (hereinafter: the Basic Court in Prishtina), of 18 December 2017

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's rights guaranteed by 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).

4. The Applicant has also submitted a request for imposition of interim measures.

Legal basis

5. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo No.03/L-121(hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Requests for Interim Measures] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure)).

Proceedings before the Constitutional Court

6. On 24 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 December 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi(presiding), Gresa Caka-Nimani and Safet Hoxha (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 and requested the case file from the Basic Court in Prishtina, Serious Crimes Department(hereinafter: the Basic Court).

9. On 27 January 2020, the Basic Court submitted the complete case file to the Court.

10. On 4 March 2020, the Court returned the complete case file to the Basic Court.

11. On 10 April 2020, the Court requested from the Supreme Court to inform the Court as in the following: (i) whether the Applicant has been notified about the submission [KMLP.II.no.176/2019] of 27 August 2019 of the State Prosecutor; (ii) to submit a copy of the aforementioned submission of the State Prosecutor; and (iii) referring to the practice of the Supreme Court, whether in the framework of the request for protection of legality, the parties are notified regarding the submissions of the State Prosecutor, whereby it is proposed to reject the requests submitted by the party for protection of legality, as ungrounded.

12. On 7 May 2020, as a result of the non-receipt of the response by the Supreme Court and the expiration of the deadline for the submission of information, the Court submitted a request for repetition of the request for information to the latter.

13. On 8 May 2020, the Supreme Court submitted to the Court a copy of the State Prosecutor's "Response [s] to the request for protection of legality", [KMLP.II. no.176/ 2019], of 27 August 2019 as well as the answer to the questions asked by the Court.

14. On 10 February 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

15. On 31 July 2015, the Special Prosecution of the Republic of Kosovo (hereinafter: the SPRK) filed an indictment [PPS. no. 145/2014] against the Applicant on the grounds that he had committed in co-perpetration the criminal offence of *"fraud in office"* as per Article 341, paragraph 3 in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (hereinafter: the Provisional Criminal Code).

16. The Applicant, in the capacity of the Procurement Officer at the University of Prishtina, was accused that by acting in co-perpetration and with the intent to obtain unlawful material benefit for the Book Translation Company (ISN Company), with which the University had concluded a contract, had "falsified the original contract", and subsequently the contract was modified, thereby enabling the company to obtain a greater financial benefit for the same services.

17. By the same Indictment, as well as for the same aforementioned criminal offence committed in perpetration, were accused also two other persons, one of whom was also A.R. [Applicant in case KI230/19].

18. On 18 December 2017, the Basic Court in Prishtina, Serious Crimes Department (hereinafter: the Basic Court) by Judgment [PKR. no. 432/15] found the Applicant guilty of having committed in co-perpetration the criminal offence of *"fraud in office"* and sentenced him to imprisonment in length of six (6) months, by replacing the sentence of imprisonment with a fine. Subsequently, the Basic Court also obliged the defendant, including the

Applicant, to jointly compensate the damage to the University of Prishtina in the amount of 70,131.27 euros.

19. According to the Judgment of the Basic Court, the Applicant at the hearing session has stated in his defence "[...] *that he has started to work at the University of Prishtina in August 2008, in the position of Manager of the Procurement Office. In relation to the procurement activity "Translation of Books from English to Albanian for the needs of the University of Prishtina", the defendant has stated that all procurement procedures were respected, since the PRB with its decision had approved the request of the UP, to continue with this procurement activity with a single operator, as the other operators had not been responsible. According to [the Applicant] the valid contract was the Contract according to the tender, which was submitted to the Ministry of Finance, which is related to the payment and only that one is original. The second contract is a kind of reference for the purposes of the economic operator and may not be used in connection with the procurement activity. The defendant further explained that the economic operator ISN on the occasion of the change from the term "words" to "characters" has called upon this as an international standard of translation, while adding that he himself was confused as regards the unit of measurement. In relation to the payment of the first invoice, the defendant Hakif Veliu has stated that after the issuance of the Purchase Order by the Procurement, the case must go through four filters, which are: Receiving, Expenditure, and Certifying Officer. The said invoice according to the defendant contains the measurement unit "F" which means "words", while the way how that was calculated was the obligation of the Acceptance Commission. As regards the payment of the second contingent of books, he stated that, when he received the invoice, the amount seemed too high, and that it is him who suspected it and sent this issue to the rectorate, in order to have formed a commission to ascertain the real situation of translations".*

20. The Basic Court had responded to the arguments raised by the Applicant in his defence, as follows: "*The Court does not accept the defence theory presented by the defendant Hakif Veliu himself, as well as by his defence counsel – the lawyer Skender Musa, for the fact that Hakif Veliu while acting as the Head of the Procurement Office of UP, he has been the person responsible for signing contracts, and an expert of public procurement procedures. It is illogical for the Court that after signing the Contract according to the measurement unit "Word" which was also a condition in the tender dossier, the defendant acting in the above mentioned quality, has signed a second Contract, without changing neither the date nor the number , but only the measurement unit. It is a well-known fact that the change of the measurement unit has budget implications as well, and based upon his job duties, it is unbelievable for the Court that he has done this out of ignorance. The statements of Hakif Veliu in the pre-trial procedure and in the main trial were not in harmony with each other. While in the pre-trial procedure he has defended himself by stating that the signature in the Contract according to the measurement unit "character", is not his, it is falsified, after the Graphology Expertise of the Kosovo Forensic Agency, the Sector for Documents and Manuscripts Expertise 2015-22.1112015-1983 of 08.07.2015, he stated that has signed the same, but has signed it as a kind of reference for*

the ISN. The court is aware that the defendant has the right to defend himself in a way that goes to his favour, but this discrepancy in the statements, the signing of the Contract according to the measurement "Character" and then all his actions relating to the preparation of documents for the Commission, reveal what is called Mens Rea (criminal intention) to commit a criminal offence in co-perpetration with the other defendants, in the manner as elaborated above".

21. On 19 December 2017, the Applicant filed an appeal with the Court of Appeals against the above Judgment of the Basic Court.

22. In his appeal the Applicant alleged substantial violation of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation and violation of the criminal law, and presented an appeal due to the sentencing decision.

23. First, with regard to the allegation for violation of the provisions of the criminal procedure, the Applicant alleged a violation of Article 384 (Substantial Violation of the Provisions of Criminal Procedure), paragraph 1, sub-paragraphs 1.7, 1.8 and 1.12 of the Criminal Procedure Code No.04/L-123 (hereinafter: the CPCK) by specifying that the enacting clause of the judgment of the Basic Court was unclear and in contradiction with the reasoning, that the judgment is based on inadmissible evidence and that the Basic Court does not present in a clear manner the facts and reasons why it considers that the evidence in relation to his conviction have been corroborated.

24. Secondly, with regard to the allegation for a violation of criminal law, the Applicant alleged, *inter alia*, that he was not the only responsible official for the performance of the contract because in order for the payment to be carried out, also other actions had to taken by other officials, respectively by the receiving officer, the expenditure officer, the authorized chief officer and the certifying officer. According to the Applicant, in the hierarchy of the payment execution system the procurement officer is the second person.

25. In his appeal the Applicant also alleged a violation of Article 6 of the ECHR, namely a violation of the right to a reasoned court decision, of the principle of best evidence, and the principle of equality of arms, that relates to disregard of a super expertise, which he claims to have sought before the Basic Court.

26. On an unspecified date, the Applicant had supplemented his appeal to the Court of Appeals also in relation to the decision on the legal property claim regarding the University of Prishtina.

27. Also the SPRK filed an appeal against the above-mentioned Judgment of the Basic Court regarding the decision on punishment, namely requesting that a longer sentence of imprisonment be imposed on the Applicant.

28. On 2 May 2018, the Court of Appeals by Judgment [PAKR no. 27/2018] approved the appeal filed by the Applicant in the part concerning the legal property claim of the request, by instructing the University of Prishtina, as the injured party to pursue its property claim in a civil dispute, while the rest of the

appeal was rejected as ungrounded. The Court of Appeals also approved the appeal of the SPRK regarding the decision on the punishment, by sentencing the Applicant to imprisonment in length of one (1) year.

29. The Court of Appeals, in respect of the Applicant's allegation for substantial violation of the provisions of the criminal procedure that the Judgment is based on inadmissible evidence, in its Judgment has assessed as follows: "*The legal provisions - Article 257 of the CPC determine when an evidence is considered inadmissible, whilst as it appears from the case file, the evidence administered in the main trial in this case were obtained in conformity with legal provisions, whereas, the extent to which these evidence are substantiated, respectively prove the elements of the offence, causing of damage or any issue of importance is a matter to be assessed by the Court.*"

30. Secondly, with regard to the Applicant's allegation for a violation of criminal law and erroneous determination of the factual situation, the Court of Appeals has assessed the modification of the contract by the Applicant and the accused A.R., as follows:

> *"By these actions, the accused, according to the assessment of this Court, have fulfilled all the objective and subjective elements of the criminal offence for which they have been accused and found guilty. So, taking into consideration the above circumstances and the reasons provided in more detail in the challenged judgment, this Court considers that in relation to these accused the factual situation has been correctly and fully determined and that the provisions of the criminal law have been correctly applied."*

31. Thirdly, with regard to the claim concerning the legal property claim, the Court of Appeals considered this claim to be well-founded, having assessed that the University of Prishtina, in the capacity of the injured party, did not file such a claim, and consequently it instructed the latter to pursue its property claim in a civil dispute.

32. Finally, with regard to the appeal of the SPRK against the length of sentence, the Court of Appeals accepted the application of mitigating circumstances by the Basic Court in the Applicant's case, however according to it "[...] *they are not of the nature which justifies, or sufficient to mitigate the sentence below the limit provided by law* [...]." Consequently, the Court of Appeals approved the request of the SPRK as grounded by imposing on the Applicant the sentence of one (1) year of imprisonment on the grounds that "[...] *these sentences correspond to the social dangerousness of the criminal offence and liability of the [Applicant], and they may affect the prevention of criminal offences in the future and their rehabilitation, but also the prevention of others from committing criminal offences, respectively thereby can be achieved the purpose of the punishment provided for by the provision of Article 41 of the[CCK]*". As for the appeal against the decision on the punishment, the Court of Appeals found that the Applicant did not reason his appeal regarding the decision on the punishment and finds that a more lenient sentence cannot be imposed on the Applicant.

33. On 21 June 2018, the Applicant filed a request for protection of legality with the Supreme Court against the Judgment [PKR. no. 432/15] of the Basic Court, of 18 December 2017, and Judgment [PAKR.no.27/2018] of the Court of Appeals, of 2 May 2018.

34. In his request for protection of legality, the Applicant alleged substantial violation of the provisions of criminal procedure under Article 384, paragraph 1, sub-paragraph 1.12 of the KCCP, and substantial violation of the criminal law under Article 384, paragraph 1, sub-paragraph 1.4 of the CPCK.

35. In his request for protection of legality, the Applicant also alleged that the Court of Appeals had violated the Article 390, paragraph 1 of the CPCK, for the reason that this Court had increased his sentence from a fine to a sentence of imprisonment in length of one (1) year.

36. In the following, the Applicant specifically alleged that he was not summoned to the hearing of the Appellate Panel. In connection with this allegation, the Applicant refers to the case law of the Constitutional Court, namely case KI104 /16, Applicant *Miodrag Pavić*, Judgment of 29 May 2017.

37. A request for protection of legality against the above-mentioned Judgments of the Basic Court and of the Court of Appeals was filed also by the SPRK.

38. On 15 October 2018, the Supreme Court through Judgment [Pml.No. 238/2018] approved as grounded the request for protection of legality submitted by the Applicant, by annulling the Judgment of the Court of Appeals and remanding the case to the same Court for reconsideration. Whilst the request for protection of legality submitted by the SPRK was rejected as ungrounded.

39. Having referred to the case law of the Constitutional Court (the above case KI104/16), the Supreme Court found that:

> *"[...] in the present case by the judgment of the second instance was violated the right to fair trial guaranteed by Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the ECHR. This Court considers that in the present case the said convicts in have indeed been violated the right to fair trial guaranteed by the Constitution and the European Convention on Human Rights, since as alleged in the requests of their defence councels in the requests of their defense counsels, they were not notified about the second instance hearing in order to present their aspects and arguments related to this criminal case."*

40. The Supreme Court concluded that: *"When reconsidering the case, the court of second instance should eliminate the above violations found in a way that it will notify the convicts and their defence counsels about the next hearing and thereupon render a lawful decision."*

Criminal procedure after remanding the case for reconsideration

41. On 19 November 2018, the Applicant filed a submission for supplementing the appeal against the Judgment [PKR. No. 432/2015], of 18 October 2017, alleging violation of the provisions of criminal procedure and criminal law.

42. With regard to the allegation for a substantial violation of the provisions of the criminal procedure, the Applicant claimed that *"the first instance court did not provide any reason for the decisive facts namely how did [the Applicant] mislead the official person."*

43. Whereas, with regard to the allegation for violation of the criminal law under Article 384, paragraph 1, sub-paragraph 1.4 of the Provisional Criminal Code, the Applicant stresses that *"in the present case the legal qualification is wrong, in the actions of [the Applicant] we are dealing with a blatant case of Falsifying Official Documents foreseen by Article 348 of the Provisional Criminal Code, but with no element of the criminal offence for which he was found guilty."*

44. Finally, the Applicant proposes to the Court of Appeals to *"approve [his] appeal and annul the Judgment of the First Instance Court and remand the case to the first instance court for reconsideration, or alternatively to reject the charge or acquit [the Applicant] of the charge."*

45. On 24 December 2018, the Applicant filed a request with the Court of Appeals to supplementation of the appeal in relation to the decision on the criminal sanction. In his submission, the Applicant alleges that the Basic Court during *"when pronouncing the type of criminal sanction and its length it did not take into consideration the minimum and maximum sentence, the sentence pronounced is not appropriate for our client, respectively the sentence pronounced will not play the role of resocialization, on the contrary it will have a negative impact on the defendant and his family."*

46. The Applicant specifically alleges that the Basic Court did not take into considetration the following mitigating circumstances when measuring the punishment: (i) the Applicant's personal circumstances and character, Article 74 (General rules on mitigation or aggravation of punishments), paragraph 3, sub-paragraph 3.3 of the Criminal Code of Kosovo no. 04/L-082 (hereinafter: the Criminal Code); (ii) Applicant's cooperation with the court and prosecution and voluntary surrender, Article 74, paragraph 3, sub-paragraph 3.8 of the Criminal Code; (iii) post-conflict conduct of the Applicant, Article 74, paragraph 3, sub-paragraph 3.12 of the Criminal Code. Finally, the Applicant specifies that *"the court may mitigate the punishment against [the Applicant] even below the minimum provided by law, in respect of the criminal offence which he [the Applicant] is charged with, for which is provided a minimum sentence of 1 year of imprisonment, the mitigation of sentence within the meaning of Article 75 may come into consideration of the court due to mitigating circumstances ([...] within the meaning of Article 73, paragraph 1, sub-paragraph 1.2 of the Criminal Code)."*

47. On 16 April 2019, the Court of Appeals by Judgment [PAKR. No. 528/2018] partially approved the Applicant's appeal in the part concerning the property claim, by instructing the University of Prishtina, in the capacity of the injured party to pursue the property claim in a civil dispute, while the rest of the appeal was rejected as ungrounded. The Court of Appeals also approved the appeal of the SPRK concerning the decision on punishment, by sentencing the Applicant to imprisonment in length of one (1) year.

48. In relation to the allegation for violation of the provisions of the criminal procedure, the Court of Appeals in its judgment assessed that the Applicant's allegations are ungrounded, by assessing that the challenged Judgment of the Basic Court does not contain substantial violations of the provisions of the criminal procedure.

49. The Court of Appeals, by referring specifically to the Applicant's allegation that the challenged Judgment is based upon inadmissible evidence, assessed that "[...] the evidence administered at the main trial in this case were obtained in conformity with legal provisions, whereas, the extent to which these evidence are substantiated, respectively prove the elements of the offence, causing of damage or any issue of importance is a matter to be assessed by the Court."

50. As regards the allegations for violation of criminal law and erroneous determination of the factual situation, the Court of Appeals found that:

> *"[...] taking into account the administered evidence but also the defenses of the accused which are stated in detail in this judgment according to the assessment of this Court it results that through the change of the basic contract they have misled the authorized persons to carry out the illegal payment. [...] Therefore this Court considers completely illogical and unfounded the allegations that the change of the contract was made only as a reference for ISN and that it did not produce legal effect, especially considering the fact that the defendants were aware that on the basis of the tender terms, the contracting parties were prohibited to do so because it was expressly provided (article IV point 3 of the tender dossier) that the prices in the contract were fixed and could not be changed."*

51. The Court of Appeals, based on its assessment as above, found that by the above actions, the Applicant has fulfilled all the objective and subjective elements of the criminal offence, and consequently the factual situation has been determined in a correct and complete manner and the provisions of the criminal law have been applied correctly.

52. Subsequently, with regard to the SPRK's appeal on the length/severity of the sentence, the Court of Appeals accepted the application of mitigation circumstances by the Basic Court in the Applicant's case, however according to it '[...] however according to it *"[...] they are not of the nature which justifies, or sufficient to mitigate the sentence below the limit provided by law, in particular when considering the gravity of the criminal offence [...]."*

53. In the end, with regard to the claim concerning the legal property claim, the Court of Appeals considered this claim to be well-founded, having assessed

that the University of Prishtina, in the capacity of the injured party, did not file a legal property claim, and consequently it instructed the latter to pursue its property claim in a civil dispute.

54. On 9 July 2019, the Applicant filed a request for protection of legality with the Supreme Court against the Judgment [PKR. no. 432/15], of the Basic Court, of 18 December 2017, and Judgment [PAKR.no.528/2018] of the Court of Appeals, of 16 April 2019.

55. In his request for protection of legality the Applicant alleged: (i) substantial violation of the criminal procedure code under Article 384, paragraph 1, sub-paragraph 1.12 of the KCCP; and (ii) violation of criminal law.

(i) In relation to the Applicant's allegations for substantial violation of the Criminal Procedure Code under Article 384, paragraph 1, sub-paragraph 1.12 of the CPCK

56. The Applicant alleged that: *"[...] this court has not provided any reason for the decisive facts, more specificially for how did [the Applicant] mislead the official person. The court of the first instance has generally described the event as an activity which has led to payments that were contrary to the original contract, but did not provide detailed explanations as to who has misled the payments service to carry out such payments that do not correspond to the content of the unmodified (falsified) contract. On the basis of the development of the event it results to be indisputable that one of the points of the contract has been illegally changed, in a way that the measurement unit "words" has been changed with the measurement unit "characters", it is also indisputable that the payment is higher when the translation is paid based on the measurement unit "characters" than on the measurement unit "words", as contained in the original agreement."*

57. Next, the Applicant also alleged that he was *"[...]misled by the other convict A.R., who asked from him to change the contract only in respect of the point relating to the measurement unit "words" into "characters" arguing that he needed this for personal purposes, but the point of the contract relating to the amount of payment and the method of payment was not changed, whilst the convict Hakif Veliu was deceived by the actions of the other convict A.R., since he was not aware of the difference between the measurement unit "word" and "character" and the consequences that this change would cause."*

58. In his Referral for Protection of Legality the Applicant also alleged that in his actions are not constituted the features of the criminal offence for which he was found guilty and convicted, since he did not mislead the payments service by any concrete action and was not even confronted with this service on the occasion of payments, neither did he prepare the payment reports, they were prepared by the professional commissions and on the basis of these reports the payment was made to the convict A.R..Consequently, according to the Applicant, the Basic Court in its judgment has failed to provide reasons in relation these decisive facts and thereby the judgment became legally inconsistent and involved with substantial violations of the provisions of criminal procedure provided by Article 384(Substantial Violation of the

Provisions of Criminal Procedure), paragraph 1, sub-paragraph 1.12 in conjunction with paragraph 6 of Article 370 (Content and Form of Written Judgment) of the CPCK.

(ii) In relation to the Applicant's allegations for violation of criminal law

59. In this regard, the Applicant alleged that the judgment of the Basic Court has erroneously qualified the criminal offence, for the reason that according to him *"we are dealing with the falsifying of official documents as provided by the provision of Article 248 of CCK [Provisional Criminal Code] and not with the criminal offence for which he was found guilty."*

60. The Applicant further alleges that the Court of Appeals did not eliminate the violations of the first instance court relating to the legal property claim and the instruction to the injured party to pursue the property claim in a civil dispute, and consequently the Court of Appeals has put in a dilemma the factual situation determined by the Basic Court in respect of the damage caused.

61. Subsequently, the Applicant alleged that the Basic Court and the Court of Appeals *"[...] when measuring the punishment did not take into account all mitigating circumstances, namely personal circumstances, convict's cooperation with the judiciary authorities and the fact that this case was detected by the contribution of the convict who prevented a greater damage to the University of Prishtina."*

62. On 29 July 2019, the Applicant had filed a request for supplementing his request for protection of legality at the Supreme Court. In this request, the Applicant had alleged that Judgment [PAKR. No. 528/2018] of the Court of Appeals, of 16 April 2019, was issued in violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR because *"the composition of the decision-making Trial Panel of the Court of Appeals was identical to the panel that had decided for the first time in his case by Judgment [PAKR. No. 27/2018] of 2 May 2018."* In regard to this allegation, the Applicant refers to the case law of the Constitutional Court, respectively case KI24/17, Applicant *Bedri Salihu*, Judgment of 17 May 2019.

63. On 27 August 2019, the State Prosecutor by submission [KMLP II. No. 176/2019] had filed a response to the Applicant's request for protection of legality proposing that it be rejected as ungrounded. In his response, the Prosecutor stated that *"the first and second instance courts did not violate the provisions of the criminal procedure and the criminal law as described and reasoned in detail above".*

64. On 30 September 2019, the Supreme Court through Judgment [Pml. No. 253/2019] rejected as ungrounded the request for protection of legality filed by the Applicant.

65. In regard to the Applicant's allegation for violation of criminal provisions, the Supreme Court, assessed that:

"In the conceret case, it results to be indisputable the fact that between the University of Prishtina, respectively the Procurement Office, represented by [the Applicant] and the Economic Operator "Institute of International Studies" in Tirana, represented by the other convict A.R. was concluded a contract bearing the number 43/08 of 05.12.2008, for the translation of books pertaining to the legal field for the needs of the UP, whilst in article 17 it is specified that the contract price per unit was "1000 words 12.65 €" , the contract was signed by the contracting parties respectively by now the convict. The contract bearing the same number and date has been modified in its article 17 in a way that the contract price per unit from "1000 words 12.65 €" has been changed to "1000 characters 12.65 €", which was signed by the convicts and as a result of this change the amount of the payment was obviously changed. In the Judgment of the court of first instance, was presented a reasoning regarding the decisive facts, specifically on page 18 of the said Judgment is described the fact that [the Applicant] had signed the purchase order of 07.09.2009 and on this basis was initiated the payment in the total amount of 87,541.80, according to which the payment order was made and thereby it was made possible for "ISN" from Tirana that was represented by the other convict A.R. to obtain unlawful material benefit, and which payment was the result of the change of Article 17 of the contract from the measurement unit "1000 words" to the measurement unit "1000 characters".
The Supreme Court of Kosovo, considers that the court of first instance in its judgment has correctly found that in the actions of [the Applicant] are manifested all the elements of the criminal offence of fraud in office as per Article 341 para.3 in conjunction with para. 1 as read by Article 23 of the CCK, since [the Applicant] had the capacity of an official person as defined by the provision of Article 107 para.1 sub-para.1.1 of the CCK, as he was selected to represent the UP , respectively the procurement office and for the purpose of obtaining unlawful material benefit for the other party he has made a false presentation of the report respectively has misled the person to carry out an unlawful payment after having previously modified the measurement unit in Article 17 of the contract from "1000 words 12.65 €" to "1000 characters 12.65 €" and consequently higher payments had to be carried out for the translation of University textbooks."

66. In regard to the Applicant's allegation for a violation of criminal law, namely Article 385, paragraph 1, sub-paragraph 1.4 of the CPCK, the Supreme Court found that this allegation is ungrounded. In this respect, the Supreme Court, referring to the reasoning provided by the Basic Court, concluded that *"[...] we are not dealing with the criminal offence of falsifying official documents under Article 248 of the CCK, but with the criminal offence of fraud in office under Article 341 para.3 in conjunction with para.1 of the CCK because even though the contract has been changed, this change, namely the interference with article 17 of the contract has been made in order to enable the other party to obtain unlawful material benefit that would result in the translation of a smaller number of books."*

67. Further, the Supreme Court found that the Court of Appeals *"[...] when instructing the injured party to pursue its legal property claim in a civil*

dispute has not violated the aspect of qualification of this criminal offence as stated in page 13 of the judgment of this court [Court of Appeals], that the qualifying element is the unlawful material benefit exceeding the amount of 5000 € and that the criminal offence has resulted in unlawful material benefit in this amount. Despite the fact that the claim that the representative of UP as an injured party had not filed a legal property claim is correct, while the court of second instance had instructed the injured party to pursue its legal claim in a civil dispute and this was the result of the fact that the court of first instance had first obliged the convict to compensate the damage, yet this had no bearing on the legality of the challenged judgments."

68. With regard to the allegation concerning the length of sentence, the Court found that the Court of Appeals *"[...] has acted within its competencies when reviewing the appeal claims and in this case it is at its discretion that in the case of ascertaining that the court of first instance has not imposed an adequate sentence, to modify the sentence, respectively to impose a more severe punishment as it has done in the present case, by having approved the appeal of the Special Prosecution of the Republic of Kosovoas grounded. On this occassion the court of second instance has presented sufficient and clear reasons, by reasoning on pages 12 and 13 of its judgment particularly what were the circumstances which influenced the imposition of such a sentence and what circumstances are reasoned in accordance with the provision of Article 370 para.7 and 8 of the CPCK, and moreover, based on the provision of Article 385 paragraph 5 of the CPCK, when it comes to the decision on punishment, a violation of criminal law occurs when in rendering a decision on punishment, alternative punishment, court reprimand or in rendering a decision on the measure of mandatory rehabilitation treatment or confiscation of material benefit obtained by a criminal offence, the court has exceeded the legal competencies, which has not occurred in this case."*

69. Finally, with regard to the Applicant's allegation, raised through the request for supplementation of the request for protection of legality, that the case was decided in the Court of Appeals by the same trial panel, the Supreme Court found that this allegation *"was unfounded since the fact that the trial panel of the court of second instance is changed after the case being remanded for reconsideration does not present a substantial violation of the provisions of the criminal procedure. Taking into consideration the fact that the annulment of the judgment of the court of second instance was made only due to the failure to notify the parties about the hearing session in the court of second instance and that this violation was eliminated by the court of second instance when reconsidering the case".*

70. In conclusion, the Supreme Court found that the challenged judgments of the Basic Court and the Court of Appeals did not contain any substantial violations of the provisions of the criminal procedure or violations of the criminal law.

Applicant's allegations

71. The Applicant alleges that the challenged Judgment of the Supreme Court was issued in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of ECHR.

Consequently, the Applicant alleges that the challenged Judgment has violated, as follows: (i) the principle of adversarial proceedings and (ii) the principle of equality of arms in proceedings; (iii) the principle of legal certainty related to the right to a reasoned court decision, as (iv) and the principle of the presumption of innocence and the absence of "specific protection".

(i) In relation to the Applicant's allegation for violation of the principle of adversarial proceedings and equality of arms in proceedings

72. As regards the violation of the principle of adversarial proceedings and equality of arms, the Applicant alleges that he was not aware that the State Prosecution by submission [KMLP.II. no.176/2019] of 27 August 2019 had proposed that his request for protection of legality be rejected as ungrounded. According to him, he became aware of the existence of this submission only after the publication of the Judgment [Pml. No. 253/2019] of the Supreme Court, of 30 September 2019. In this context, the Applicant specifies that he was not able to file his objections against those submitted by the State Prosecutor's Office.

73. In relation to this allegation, the Applicant initially refers to the case law of the Court, respectively cases KI108/10, KI103/10 and KI10/14, underlining that *"in all these cases the [Constitutional] Court has consistently held a uniform stance"* where the Applicants must be placed on an equal footing with the State Prosecutor.

74. The Applicant also refers to the case of the ECtHR *Grozdanoski v. the former Yugoslav Republic of Macedonia*, Application no. 2150/03, Judgment of 31 May 2007, which according to him is similar to his case, underlining that *"the ECtHR had found a violation of Article 6, because the Supreme Court of that State had not served on the Applicant the documents submitted by the State Prosecution."*

75. The Applicant alleges that in his case *he "was placed on an unequal footing vis-á-vis the State Prosecutor's Office, because he had become aware of the existence of a submission submitted by this authority, only after the publication of the Judgment [Pml. No. 253/2019] of 30.09.2019."*

76. Consequently, the Applicant alleges that *"the Supreme Court violated the principle of adversarial proceedings and denied the Applicant's right to submit his arguments, against the claims of the State Prosecution." In this regard, the Applicant considers that "[...] the judicial authorities should be careful to treat the position of the State Prosecutor in the capacity of an equal party to the proceedings and not to provide him with an advantage over the other party, which at the very beginning is a factual unequal position because it is facing a public authority."*

77. The Applicant initially states that the "principle of equality of arms between the parties to the proceedings" is applicable through Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

78. In this context, the Applicant refers to the ECtHR case *Borgers v. Belgium*, in which according to him *"the Applicant [of this specific case] was prevented*

from responding to the findings of the Deputy Chief Prosecutor." In the context of this case, the Applicant argues that [...] the element of inequality is argued by the fact that he was not only prevented to submit his comments against the "legal remedy" filed by the State Prosecutor's Office to the Supreme Court, but also by the fact of having not received the evidence submitted by him, during the entire course of the criminal procedure".

79. In this line of argumentation, the Applicant alleges that the regular courts did not accept as evidence the electronic communications which were crucial for determing his innocence, on the grounds that they constitute evidence which were obtained without a relevant court decision and without being subjected to expertise. In the light of this allegation concerning the rejection by the regular courts of the evidence proposed by him, the Applicant also alleges a manifestly arbitrary interpretation and application of the law.

80. The Applicant also requests from the Court to consider the allegations whether the law and the facts were interpreted and applied contrary to the guarantees of a fair and impartial trial in the light of the ECtHR judgments: in cases *Waldberg v. Turkey*, Application no. 22909/93, Judgment of 6 December 1995; *Kuznetsov and Others v. Russia*, Application no. 184/02, Judgment of 11 January 2007; *Khamidov v. Russia*, Application no. 72118/01, Judgment of 15 November 2007, cases in which, according to the Applicant, the ECtHR had found violations of Article 6 of the ECHR, due to the arbitrary interpretation and application of the law. Further, the Applicant states that it is the duty of the Court to protect his right to a fair and impartial trial, according to the case law of the ECtHR in the case *Koshoglu v. Bulgaria*, Application no. 48191/99, Judgment of 10 May 2007.

81. Further, the Applicant states that evidence which are obtained without a court decision should be declared inadmissible when they are submitted by the State Prosecution, not when they are submitted by the party to the proceedings. According to him, the applicable legislation does not provide for any restrictions regarding the right of the accused party to provide evidence and arguments whereby it proves his/her innocence. Consequently, according to him, it is in the competence of the regular judiciary to order an expertise on the issue of authenticity of communication (inadmissible evidence) and to confirm the authenticity of that evidence (electronic communication).

82. In the context of his allegation concerning the administration of evidence, the Applicant by his allegation emhpasizes that the evidence presented by him, namely the Decision of the Steering Board of the University of Prishtina ,of 28 December 2007, on the determination of the price of translation services, has not been reviewed at all by the Court. The admission of this evidence, as well as the submitted e-mails, according to him is of extreme importance, because by accepting these evidence there would have been reached a different result from the one that is reached by the regular courts.

83. In the following the Applicant challenges the admission as evidence by the courts of *"a document which it considers a contract"*, and on the basis of which document a sentencing decision was rendered against him; according to him, the said document is located neither in the archive of the University of

Prishtina nor of the Ministry of Finance and has never been used by him to carry out any payment.

84. On this basis, the Applicant alleges that by rejecting the evidence presented by him *"in arbitrary manner - through erroneous and unconstitutional interpretation of the admissibility of the submitted evidence - the Applicant has been denied the right to fair and impartial trial, namely the principle of equality [of arms] in proceedings."*

(ii) In relation to the allegation for violation of the principle of legal certainty in conjunction with the right to a reasoned court decision

85. In regard to the principle of legal certainty related to the right to a reasonable court decision, the Applicant alleges that none of his allegations after 19 November 2018, respectively after his case was remanded to the Court of Appeals for reconsideration have been reviewed and reasoned by the regular courts.

86. The Applicant specifies that *"the fact that [...] declares to the Court that "no allegation has been dealt with by the Court of Appeals and the Supreme Court" as well as the fact that he has attached all the submitted documents, are sufficient reasons for the Court to examine whether the mentioned allegations have been addressed or not. The repetition of these allegations also in this constitutional referral would be considered a repetition of the allegations raised before the regular courts, and would result in allegations for a fourth instance. Therefore, the Applicant does not want to slip into that area, since he considers that his allegations should remain at the constitutional level - and that it is the duty of the Constitutional Court to consider the constitutional arguments raised by him in relation to the non-reasoning of his allegations."*

87. In addition, the Applicant alleges that the reasoning of the Judgment [Pml.no.253/2019]of the Supreme Court, of 30 September 2019, is contradictory.

88. Among other things, the Applicant states that in the session of 16 April 2019 in the Court of Appeals the minutes were not taken regularly, which is an obligation which derives from the Criminal Procedure Code and enables him to prove that *"he has raised other allegations, which are not mentioned in the filed submissions."* Furthermore, he states that despite the fact that no minutes were kept, the Supreme Court in the Judgment [Pml.no.253/2019] of 30 September 2019, has stated that *"on the basis of the case file, it is ascertained that the minutes were kept".*

89. Finally, as to the entirety of the allegations for a reasoned court decision, the Applicant states that the Supreme *Court "[...] has issued an arbitrary and contradictory decision, similar to the case of Court KI31/17, Applicant Shefqet Berisha, when the Basic Court in Prishtina had rendered a decision which was clearly in contradiction with the factual situation determined through the review of the matter in that case. One of the reasons for finding a violation of the right to fair trial, in the case of the Applicant Shefqet Berisha, was exaclty*

the fact of falsification of court decisions." According to the Applicant, almost in identical manner, through a falsified decision, he was denied the right to fair and impartial trial, which consequently resulted in an arbitrary trial against him.

(iii) In relation to the allegation for violation of the principle of presumption of innocence and the lack of "specific protection"

90. Whereas, in regard to the principle of *presumption of innocence* and the lack of specific protection, the Applicant considers that throughout the criminal proceedings he was placed in a position which consistently infringed the principle of presumption of innocence, since the case was highly sensitive, as a result of other people's involvement in this case and pressure from the public and the media, resulting in influence in his case. He alleges that the pressure on the regular courts was intensified on the occasion of the initiation of criminal reports against the Chief State Prosecutor and Prosecutor D.H., by other parties involved in the proceedings.

91. The Applicant refers to the case *Kuzmin v. Russia*, in which the ECtHR found that a campaign *"full of bitterness"* could impair the regularity of a process by influencing the public opinion and, consequently, the members of a trial panel.

92. In this respect, the Applicant also states that the fact that his allegations submitted through his lawyers were not reviewed and that the failure to keep the minutes had deprived him of the specific protection that should be offered to whistleblowers. He further claims that the regular courts did not even address the fact that it was exactly him who informed the management of the University of Prishtina about the *"irregularities of the contract"*.

93. In support of this allegation the Applicant also refers to the case *Guja v. Moldova* (Application no. 14277/04, Judgment of 12 February 2018, paragraph 72) in which case the ECtHR states that *"the Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large."*

94. Moreover, according to the Applicant in the same decision the ECtHR also states that *"In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public"* (see, the ECtHR case *Guja v. Moldova*, cited above, paragraph 73).

95. Finally, the Applicant alleges that he was deprived of the protection which he requested through the submissions filed by his lawyers and which he alleges to have raised in the session of 16 April 2019, held in the Court of Appeals. Therefore, the failure to keep the minutes made it impossible for him to prove to the Court *"that in the same session were raised literally same allegations,*

as in this Referral." According to him, those allegations, in similar wordings, but without reference to the case law of the ECtHR, are contained in the documents submitted through his lawyers.

Applicant's request for interim measures

96. The Applicant has also submitted a request for interim measures, by referring to the case law of the ECHR, where according to him: *"The ECHR in its decisions through which it has anchored the importance of imposing interim measures has emphasized that the interim measures allow the Court to effectively consider the Applicant's request, but also to ensure that the protection granted to him is also effective"* (see, the ECtHR Judgments in *Mamatkulov and Askarov v. Turkey* [GC], Application No. 46827/99 and No. 46951/99, paragraph 12; *Paladi v. Moldova* [GC], Application No. 39806/05, paragraph 86). In regard to his argument for the approval of interim measures, the Applicant considers that he has provided the Court not only with a *prima facie* reasoning on the merits of the case, but has clearly revealed the arbitrariness of the judicial authorities and the violation of his fundamental freedoms and rights.

97. Consequently, according to the Applicant, the Court has sufficient arguments before it to approve the request for imposition of interim measures and to suspend the implementation of the court decisions. On this occassion the Applicant refers to the case of the Court [KI78/12, Applicant *Bajrush Xhemajli*, Decision on Interim Measures, of 21 September 2012, and Decision Extending Interim Measures, of 24 January 2013], in which, according to him, the reasons for imposing interim measures are the same as in his case.

98. Finally, the Applicant requests from the Court: (i) to declare the Referral admissible, to find that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR; (ii) to declare invalid the Judgment [Pml.no.253/ 2019] of the Supreme Court, of 30 September 2019, and all decisions related to this procedure, and remand the case to the Basic Court for reconsideration; (iii) as well as to approve the request for interim measures and suspend the implementation of the decisions.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

European Convention on Human Rights

Article 6 (Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Provisional Criminal Code [UNMIK Regulation 2003/25]

Article 23
CO-PERPETRATION

When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.

Article 341
FRAUD IN OFFICE

[...]

(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to ten years.

Criminal Procedure Code of the Republic of Kosovo No. 04/L-123

Article 87
Definition of Covert and Technical Measures of Surveillance and Investigation During Preliminary Investigation

For the purposes of the present Chapter:

1. A covert or technical measure of surveillance or investigation ("a measure under the present Chapter") means any of the following measures:

1.1. covert photographic or video surveillance;
1.2. covert monitoring of conversations;
1.3. search of postal items;
1.4. Interception of telecommunications and use of an International Mobile Service Identification "IMSI" Catcher;
1.5. interception of communications by a computer network;
1.6. controlled delivery of postal items;
1.7. use of tracking or positioning devices;
1.8. a simulated purchase of an item;
1.9. a simulation of a corruption offence;
1.10. an undercover investigation;
1.11. metering of telephone-calls; and
1.12. disclosure of financial data.
[...]

Article 88
Intrusive Covert and Technical Measures of Surveillance and Investigation

1. Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial data may be ordered against a particular person or place if:

1.1. there is a grounded suspicion that a place is being used for, or such person

has committed a criminal offence which is prosecuted ex officio or, in cases in
which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and
1.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.
2. Metering of telephone calls or disclosure of financial data may also be ordered against a person other than the suspect, where the criteria in paragraph 1 subparagraph 1.1 of the present Article apply to a suspect and the precondition in paragraph 1 subparagraph 1.2 of the present Article is met and if there is a grounded suspicion that:
2.1. such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or
2.2. the suspect uses such person's telephone.
3. Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or positioning devices, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation may be ordered against a particular person, place or item if:
3.1. there is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of this Code;
3.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.
4. The search of postal items, the interception of telecommunications or the interception of communications by a computer network may also be ordered against a person other than the suspect, where the criteria in paragraph 3 subparagraph 3.1 of the present Article apply to a suspect and the precondition in paragraph 3 subparagraph 3.2 of the present Article is met and if there is a grounded suspicion that:
4.1. such person receives or transmits communications originating from or intended for the suspect; or
4.2. the suspect is using such person's telephone or point of access to a computer system.

Article 435
Consideration of Request for Protection of Legality by Panel of Supreme Court

1. A request for protection of legality shall be considered by the Supreme Court of Kosovo in a session of the panel.
2. The Supreme Court of Kosovo shall dismiss a request for protection of legality by a ruling if the request is prohibited or belated under Article 434, paragraph 2, of the present Code, otherwise it shall send a copy of the request to the opposing party who may reply thereto within fifteen (15) days of receipt of the request.

3. Before a decision is taken on the request, the reporting judge may, if necessary, provide a report on the alleged violations of law.
4. Depending on the content of the request, the Supreme Court of Kosovo may order that the enforcement of the final judicial decision be postponed or terminated.

Assessment of the admissibility of Referral

99. The Court first examines whether there are fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.

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

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

[...]

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

101. The Court also examines whether the Applicant has fulfilled the admissibility criteria, as 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 [...]".

102. In addition, the Court must also examine whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure.

Rule 39
[Admissibility Criteria]

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

(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.

103. As to the fulfillment of the aforementioned criteria, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Pml.no.253/2019 of the Supreme Court of Kosovo, of 30 September 2019, after having exhausted all legal remedies prescribed by law. The Applicant has also specified all rights and freedoms which he claims to have been violated through court decisions, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadline established in Article 49 of the Law.

104. In addition, the Court also examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure stipulates that:

"(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."

105. The Court, initially recalls that the Applicant alleges that the challenged Judgment of the Supreme Court has violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR , namely the Applicant specifies that in his case have been violated the following principles: I. The principle of adversarial proceedings and the principle of equality of arms in proceedings, (i) as a result of the failure to notify him about the submission of the State Prosecutor and (ii) the principle of equality of arms due to non-admission of evidence by the regular courts; II. The principle of legal certainty related to the right to a reasoned court decision, as well as III. The principle of presumption of innocence and the lack of *"specific protection"*.

106. Therefore, in the following, the Court will examine the aforementioned allegations of the Applicant in the light of the procedural guarantees

guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, which have been interpreted in detail through the case law of the ECtHR, in accordance with which, the Court pursuant to Article 53 [Interpretation of the Provisions on Human Rights] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. In relation to the allegation for violation of the principle of adversarial proceedings and of the equality of arms in proceedings

107. The Court first recalls that the Applicant alleges that in the proceedings before the regular courts as a result of the failure of the Supreme Court to notify him about the submission [KMLP.II. no.176/2019] of State Prosecutor, of 27 August 2019 the principle of adversarial proceedings and that of equality of arms has been violated.

108. Secondly, the Applicant alleges that as a result of the rejection of regular courts to accept the evidence proposed by him, the principle of equality of arms in proceedings has been violated.

109. Consequently, in the light of the Applicant's allegations, the Court will elaborate on the general principles developed in the case law of the ECtHR in respect of the principle of adversarial proceedings and equality of arms.

110. Finally, the Court, when considering and elaborating the general principles established through the case law of the ECtHR in respect of the principle of adversarial proceedings and equality of arms, will examine and consider whether the cases of the ECtHR and of the Court referred to by the Applicant in his Referral refer to similar factual and legal circumstances as those in his case and will also assess whether those cases are applicable to his case.

a. General principles according to the case law of the Court and the ECtHR regarding the principle of adversarial proceedings and that of equality of arms

111. Referring to the case law of the ECtHR, the Court first reiterates that the principle of *"equality of arms"* is an element of a wider concept of a fair trial (see, the ECtHR case *Borgers v. Belgium*, Application no.12005/86, Judgment of 30 October 1991, paragraph 24).

112. The ECtHR and the Court have emphasized in the case law that the principle of *"equality of arms"* requires a *"fair balance between the parties"* where each party must be afforded a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-á-vis the opposing party(see, the ECtHR cases *Yvon v. France*, Application no. 44962/98, Judgment of 24 July 2003, paragraph 31; and *Dombo Beheer B.V. v. the Netherlands*, Application no.14448/88, Judgment of 27 October 1993, paragraph 33 see also other references in this Judgment, *Öcalan v. Turkey* [GC], paragraph 140, *Grozdanoski v. the former Yugoslav Republic of Macedonia*, Application no. 2150/03, Judgment of 31 May 2007, see also the cases of Court, KI52/12, Applicant *Adije Iliri*, Judgment of 5 July 2013,

KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40).

113. The Court further recalls that the case law of the ECtHR has determined that the requirement of equality of arms, in terms of a fair balance between the parties, applies in principle to both civil and criminal cases (see *Dombo Beher B.V v. Netherlands*, Judgment of 27 October 1993, paragraph 33).

114. Moreover, the Court also notes that a fair trial also includes the right to a trial in accordance with the *"principle of adversarial proceedings"*, a principle which is linked to the principle of *"equality of arms"*. In this context, there has been a considerable development in the case law of the ECtHR, in particular in respect of the importance attached to appearances and to the increased attention and sensitivity of the public to the fair administration of justice (see, the case *Borgers v. Belgium*, cited above, paragraph 24).

115. Furthermore, within the criminal proceedings the ECtHR has emphasized that: *"It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence"* (see the case of ECtHR *Leas v. Estonia*, Application no. 59577/08, Judgment of 6 March 2012, paragraph 77). Consequently, in respect of the adversarial principle, the ECtHR stated that, in criminal proceedings, both the prosecution and defence should must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party (see, the case *Brandstetter v. Austria*, cited above, paragraph 67).

116. As regards the issues which relate to the adduced evidence and their admissibility, the Court also refers to the case law of the ECHR which, in principle, has stated that "*While Article 6 guarantees the right to a fair trial, it does not, lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law and national jurisdiction"* (see, the ECtHR cases *Schenk v. Switzerland*, paras.45-46 and *Heglas v. Czech Republic*, para.84).

117. However, the ECtHR has underlined that the aspect to be considered in such cases is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see, the ECtHR case *Khan v. The United Kingdom*, paragraph 34; *PG and JH v. the United Kingdom*, paragraph 76; and Allan v. the United Kingdom, paragraph 42).

a. Application of these principles to the Applicant's case

118. The Court first recalls that the allegation for his lack of knowledge about the existence of the submission [KMLP.II. no.176 / 2019], of the State Prosecutor, of 27 August 2019, whereby the latter had proposed that the Applicant's request for protection of legality, filed against Judgment [PKR.No.432/15] of the Basic Court, of 18 October 2017, and Judgment [PAKR. No.528/2018] of the Court of Appeals, of 16 April 2019, be rejected as ungrounded specifically relates to the violation of the principle of adversarial proceedings. However, in

a part of his request, referring to the allegations for violation of the equality of arms, the Court recalls that in respect of the "proposal of the State Prosecutor for rejection of his request for protection of legality", expressed through the *submission* [KMLP.II .no.176/2019] of 27 August 2019, the Applicant refers to the ECtHR case *Borgers v. Belgium*, in which the ECtHR had found a violation of the equality of arms in proceedings.

119. Secondly, the Court recalls that the Applicant's allegation for non-admission of the material evidence proposed by him in the proceedings before the regular courts, namely the electronic correspondence and the Decision of the Steering Board of the University of Prishtina, relates to the principle of equality of arms.

120. Whereas, as regards the reasoning of the regular courts for non-admission of electronic correspondence as material evidence, the Applicant alleges that the regular courts have interpreted and applied the law in a manifestly arbitrary manner. The Applicant also emphasizes the admission by the courts of *"a document which it considers a contract"*, a document on the basis of which a sentencing decision was rendered against him. According to him, the said document is located neither in the archive of the University of Prishtina nor of the Ministry of Finance and has never been used by him to carry out any payment.

121. Consequently, in the light of the Applicant's allegations, the Court shall consider his allegation for violation of: (i) the principle of adversarial proceedings and that of equality of arms in proceedings, (i) as a result of the failure to notify him about the submission of the State Prosecutor and (ii) the principle of equality of arms due to non-admission by the regular courts of the evidence proposed by him, namely the electronic correspondence and the Decision of the Steering Board of the University of Prishtina.

(i) In relation to the allegation for violation of the principle of adversarial proceedings and that of equality of arms as a result of the failure to notify him about the submission of the State Prosecutor

122. The Court recalls that following the submission of the request for protection of legality by the Applicant against the Judgment of the Basic Court and that of the Court of Appeals, filed on 9 July 2019, the State Prosecutor through submission [KMLP.II. no.176 / 2019] of 27 August 2019 had proposed that the request of the Applicant be rejected as ungrounded. In this regard, the Court recalls that the Applicant alleges that he became aware of the existence of this submission only after having received the challenged Judgment of the Supreme Court. In connection with this, the Court initially notes that the State Prosecutor did not file a request for protection of legality against the above Judgment of the Basic Court and of the Court of Appeals, but upon being notified about the filing of a request for protection of legality by the Applicant, on 27 August 2019 he had submitted a "response to the Applicant's request for protection of legality". This fact of the proposal being submitted by of the State Prosecutor through the submission [KMLP.II. no.176/2019] of 27 August 2019 was also reflected in the challenged Judgment of the Supreme Court [Pml. Nr. 253/2019], of 30 September 2019 [titled the Opinion of the Office of Chief State Prosecutor] and also contained the following text: *"The Office of Chief*

State Prosecutor of Kosovo, by submission KMLP.II.No.176/2019 of 27.08.2019, has proposed that the requests for protection of legality submitted by the convicts' defence counsels be rejected as ungrounded."

123. As regards his lack of knowledge about the existence of this submission, the Applicant alleges that he was not able to file his response or objections against those of the State Prosecutor. In his request, submitted to the Court, the Applicant on one occassion had qualified this response of the State Prosecutor as a legal remedy. In this respect, the Applicant had specified that *"Moreover, on the basis of the above elaboration, the Applicant reiterates that the element of inequality is argued by the fact that he was not only prevented to submit his comments against the legal remedy filed by the State Prosecution to the Supreme Court [...]".*

124. The Court first refers to the above-mentioned cases of the Court, respectively the cases which the Applicant had referred to in his Referral.

125. In the case KI108/10[Applicant *Fadil Selmanaj*, Judgment of 5 December 2011] concerning an administrative dispute, the Applicant was not notified about the claim of his former employer against the Decision of the Independent Oversight Board, filed with the Supreme Court, a decision which was in the favour of Applicant. The Applicant was also not notified about the Judgment of the Supreme Court, whereby the claim of his former employer was approved and, consequently, the decision of the Independent Oversight Board was annulled. The Court found that there was no evidence that the Applicant was informed about the initiation of administrative proceedings in the Supreme Court, and further having referred to the case law of the ECHR found that the Supreme Court had violated the Applicant's right to fair and impartial trial guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. Consequently, the Court declared the challenged Judgment of the Supreme Court invalid, and remanded the case for reconsideration to the Supreme Court in accordance with the Judgment of the Court.

126. In the case KI103/10 [Applicant *Shaban Mustafa*, Judgment, of 12 April 2012] concerning a civil procedure, the Municipality of Podujevë had submitted a request for revision to the Supreme Court against lower instance judgments. At the same time, the Public Prosecutor had filed a request for protection of legality against the same judgments of the lower courts due to substantial violations of the provisions of the contested procedure and erroneous application of substantive law in the Supreme Court. Consequently, the Supreme Court in the presence of the then Public Prosecutor had approved the request for revision filed by the Municipality of Podujeva, as well as the request for protection of legality filed by the Public Prosecutor, thus annulling the judgments of lower instance courts, to the detriment of the Applicant. The Applicant was not notified about these actions, and in his Referral submitted to the Court, among other things, he has alleged a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution because *"the parties to the proceedings before the Supreme Court were not treated equally."* The Court found that the Supreme Court by its Judgment had violated the Applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 (1) of the ECHR. The Court declared

the Judgment of the Supreme Court invalid, by remanding the case for reconsideration to the Supreme Court, in accordance with the Judgment of the Court.

127. In the case, KI10/14 [Applicant *Raiffeisen Bank J.S.C.*, Judgment, of 20 May 2014], the Supreme Court had decided dismiss the request for revision of E.N. as out of time. Following this Decision, E.N. had filed a request for return to previous situation, for which the Applicant, in his capacity as a party to the proceedings, had not been notified by the Supreme Court. Consequently, the Supreme Court had approved the request of E.N. for return to previous situation, and by the same Judgment approved as grounded the revision of E.N., thus annulling the Judgment of the District Court, to the detriment of the Applicant. The Court, having referred to the principle of equality of arms in proceedings, established through the case law of the EtCHR, declared the Applicant's Referral admissible and found a violation of his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. Consequently, the challenged Judgment of the Supreme Court was declared invalid and the case was remanded for reconsideration to the Supreme Court, in accordance with the Judgment of the Court.

128. In the following, the Court refers to the ECtHR case *Borgers v. Belgium*, cited by the Applicant [Application no.12005, Judgment, 30 October 1991], which will be briefly summarized. The complainant, Mr. Borgers, was accused of falsifying documents. At its appeal hearing, the floor was given for a closing speech to the attorney general (avocat général) a member of the prosecutor's office who was not a party to the trial, instead his task was to recommend to the court whether the appealing should be allowed or not. The Advocate General was also allowed to participate in the court hearings, whilst the Applicant Borgers complained that the Advocate General's participation in the hearing and discussions violated the equality of arms as he was unable to comment on the statements of Advocate General. During the criminal proceedings, respectively in the review session, held in the Court of Cassation, the Advocate General had submitted his proposal that the Applicant's Referral submitted to this Court was ungrounded. Because of the fact that the Applicant had not been notified in advance regarding the proposal of the Advocate General, during this review session the Applicant was not able to respond to his proposal, and thereupon to submit his written observations to the Court. In assessing the application, the ECtHR acknowledged that the Advocate General was not part of the prosecution and that his role in the proceedings was only to provide independent and impartial advice to the Court of Cassation on the legal issues raised in this case and on the consistency of its case law, without having the right to vote during the review and decision-making in the panel of judges. In essence, the ECtHR had assessed whether the participation of the Advocate General in the deliberations of the Court of Cassation and the fact that the Applicant did not have the opportunity to respond to the latter's submissions or to address the Court of Cassation had violated the principle of equality of arms in proceedings, and consequently his right to a fair trial. The ECtHR considered that *"it cannot see the justification for such restrictions on the rights of the defence. [...] Further and above all, the inequality was further increased even more by the Advocate General's participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given the total*

objectivity, maybe of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. [...] (paragraphs 27-28 of the Judgment). Consequently, the ECtHR concluded that *"[...] having regard to the requirements of the rights of the defence, and of the principle of equality of arms, and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 paragraph 1 of the ECHR "*(paragraph 29 of the Judgment).

129. Whereas, in the ECtHR case *Grozdanoski v. FYROM*, cited by the Applicant [Application no.2150/03, Judgment of 31 May 2007] the public prosecutor had filed a request for protection of legality with the Supreme Court. The Applicant, as a party to the proceedings, was never notified about that request, which was approved by the Supreme Court, and which was unfavorable to the Applicant. The ECtHR found that the procedural failure to notify the other party prevented him from effectively participating in the proceedings before the Supreme Court of the FYROM. The ECtHR concluded that, in civil proceedings, the principle of equality of arms means that each party should be afforded a reasonable opportunity to present his/her case under conditions that do not place him/ her at a substantial disadvantage vis-á-vis the opposing party.

130. In the present case, the Court recalls that based on its request for the submission of information by the Supreme Court of 10 April 2020 and the repetition of the request of 7 May 2020, the Court had requested from the Supreme Court to inform the Court as follows: (i) whether the Applicant has been notified about the submission [KMLP.II. no.176/2019] of the State Prosecutor, of 27 August 2019, given the fact that this information was not found in the case file received by the Basic Court; (ii)to submit a copy of the aforementioned submission of the State Prosecutor; and (iii) pursuant to the practice of the Supreme Court, if in the framework of the request for protection of legality, the parties are notified regarding the documents of the State Prosecutor, whereby the State Prosecutor proposes the rejection as unfounded of the requests for protection of legality submitted by the parties.

131. On 8 May 2020, the Supreme Court had submitted the requested copy of the submission [KMLP.II. no.176/2019] of the State Prosecutor, of 27 August 2019. Whereas as to the questions of the Court whether (i) the Applicant was notified about the submission [KMLP.II. no.176/2019] of the State Prosecutor, of 27 August 2019; and (ii) whether, pursuant to the case law of the Supreme Court and in the context of the request for protection of legality, the parties are notified about the State Prosecutor's submissions, the Supreme Court has responded as follows:

> *At this Court has been ongoing and completed the criminal procedure PML.no.253/2019, according to the request for protection of legality submitted by the defense counsels of the convicts, Hakif Veliu and A.R., exercised against the judgment PKR.no.432/2015 of the Basic Court in Prishtina – Serious Crimes Department, of 18.10.2017 and the judgment PAKR.no.528/2018 of the Court of Appeals of Kosovo, of 16.04.2019. The requests were rejected as ungrounded. As regards the issues raised in the request, I would like to inform you that pursuant to the provision of Article*

435 paragraph 2 of the Criminal Procedure Code, the obligation of the Supreme Court is determined to be only the forwarding of a copy of the request for protection of legality (in this case the request was submitted by convicts) to the opposing party (in this case to the State Prosecutor, and it has done so) who may reply thereto, within a term of 15 days (the State Prosecutor has done so).
Given that on the request for protection of legality is ruled in a session of the panel, based on the practice of this court so far, in no case have the responses to the request for protection of legality been forwarded to the party exercising the request as this has not been determined by the lawmaker. Thus, in respect of the response of the party, the law does not provide that the other party has the right to any response and it is logical since in this way the procedure will not have a final epilogue. The essence is that the party dissatisfied with the judgment of the lower courts has the right to file a request for protection of legality whilst the opposing party as mentioned above can file a response to the request and thereby the obligation of the court ends and the procedural conditions for deciding regarding the request for protection of legality are considered to have been met.

132. In the following, the Court also refers to the submission [KMLP.II. no.176/2019] of the State Prosecutor, of 27 August 2019, titled "*Response to the Request for Protection of Legality*" whereby it is proposed that the requests for protection of legality submitted by the Applicant and A.R. [Applicant in case KI230/19] against the Judgments of the Basic Court and that of the Court of Appeals be rejected as ungrounded.

133. In his response, the State Prosecutor reasons as follows:

The challenged judgments [the Judgment of the Basic Court and that of the Court of Appeals] are based on correctly administered and assessed evidence and in this respect the reasonings of these judgments have clearly presented which facts and for what reason they are considered as proven or as unproven; in the reasonings of these judgments are also provided appropriate reasons and clear conclusions for all relevant facts relating to the guilt of the accused [the Applicant and A.R.]. Also, the court of second instance in its judgment has provided clear and complete reasons regarding the conclusion of the court on the groundlessness of the appeals of the defense counsels of the accused exercised against the judgment of first instance. That on the basis of all the evidence administered during the main trial and on the basis of the electronic correspondence mentioned above, the prosecution considers that it can be indisputably confirmed that [the Applicant], with direct intent and upon the prior agreement, has committed the criminal offence, fraud in office as per Article 341 para.3 in conjunction with para.1 and as read by Article 23 of the Criminal Code of Kosovo, as described in detail in the prosecution's indictment. Also, the claims of the defense counsels of the above-mentioned defendants, that the mentioned judgments have violated the criminal code, are ungrounded. Further, also the criminal code was correctly applied when finding that in the actions of the defendants [the Applicant and A.R.], are manifested the elements of the criminal offence: Fraud in office committed in co-

perpetration as per Article 341 para.3 in conjunction with para. 1 and as read by Article 23 of the Criminal Code of Kosovo, therefore both courts have acted correctly as regards the administered evidence, by assessing them individually and collectively, and providing sufficient reasons regarding the evidence, their credibility and probative value. Therefore, based on all what is stated above, I consider that the court of first instance as well as of the second instance have not committed violations of the provisions of criminal procedure and violations of the criminal law as described and reasoned in detail above.

134. In the light of the above elaborations, the Court finds that in the mentioned cases the Applicants' non-notifications were related to non-notifications which mainly consisted in using of a legal remedy defined in the respective laws (in the case KI108/10 the Applicant was not notified in relation to the claim of his former employer against the Decision of the Independent Oversight Board submitted to the Supreme Court, in the case KI103/10 - the Applicant was not notified about the submission of the request for protection of legality by the Public Prosecutor and the challenged Judgment of the Supreme Court, was rendered in the presence of the Public Prosecutor, but without notifying and summoning the Applicant to participate in the proceedings in the same way as it had summoned the Public Prosecutor, and in the case KI10/14 - the Supreme Court did not notify the Applicant about the existence of the procedure regarding the request for return to a previous situation submitted by the opposing party. Moreover, the Supreme Court had approved the request of the opposing party for return to the previous situation, and by the same Judgment had accepted his revision as grounded, thus annulling the Judgment of the District Court, to the detriment of the Applicant; in the case of the ECtHR *Borgers v. Belgium* - During the hearing before the Court of Cassation, the Advocate General submitted his proposal that the Applicant's Application submitted to this Court was ungrounded. Because of the fact that the Applicant had not been notified in advance regarding the proposal of the Advocate General, during this hearing session he was not able to respond to his proposal, and thereupon to submit his written observations to the Court; and in the case of the ECtHR *Grozdanoski v. former FYROM* - The Applicant, as a party to the proceedings, was never notified about the request for protection of legality submitted by the Public Prosecutor, which was approved by the Supreme Court, and which was unfavorable to the Applicant).

135. Based on the foregoing, it results that the factual and legal circumstances of the above cases coincide with circumstances different from those in the Applicant's case. In the present case, the Court recalls that the explanation provided by the Supreme Court, wherein it is stated that the applicable legal provision, namely paragraph 2 of Article 432 of the Criminal Procedure Code *"[...] determines as the only obligation of the Supreme Court to be the forwarding of a copy of the request for protection of legality, [...] to the opposing party [the State Prosecutor] who may reply thereto within a term of 15 days [...]"* and consequently upon the submission of the response by the Prosecutor to the request for protection of legality *"[...]the obligation of the court ends and the procedural conditions for deciding regarding the request for protection of legality are considered to have been met"*.

136. Therefore, the Court finds that the application of paragraph 2 of Article 435 [Consideration of Request for Protection of Legality by Panel of Supreme Court] of the Criminal Procedure Code, as well as the explanation provided in the Supreme Court's response of 8 May 2020, consists in respect of the principle of adversarial proceedings provided in Article 31 of the Constitution and Article 6 of the ECHR.

137. Consequently, this allegation of the Applicant is manifestly ill founded on constitutional basis, therefore this part of the Referral must be declared inadmissible in accordance with Article 113.7 of the Constitution and Rule 39 (2) of the Rules of Procedure.

(iii) In relation to the allegation for violation of the principle of equality of arms as a result of nom-admission of the material evidence proposed by the Applicant in the proceedings before the regular courts, respectively the electronic correspondence and the Decision of the Steering Board of the University of Prishtina

138. The Court initially notes that on the basis of the case file, it does not result that the Applicant has specifically raised the allegation of *non-admission of evidence by the regular courts* in the proceedings before the regular courts.

139. With regard to the issue of *non-admission of evidence by the regular courts*, the Court recalls that the Applicant states that: **(i)** the evidence obtained without a court decision should be declared inadmissible when they are submitted by the State Prosecutor's Office, not when they are submitted by the party to the proceedings. According to him, the applicable legislation does not provide for any restrictions regarding the right of the accused party to provide evidence and arguments whereby he/she proves his/her innocence. Consequently, according to him, it is in the competence of the regular judiciary to order an expertise on the issue of the authenticity of communication (inadmissible evidence) and to confirm the authenticity of that evidence (electronic communication).

140. In this context and on the basis of the allegations raised in his Referral it is not specified which evidence or electronic communication in question is rejected by the regular court. In this case, the Court, having referred to the content of the Judgment of the Basic Court PKR.no.432/15, of 18 December 2017, which reflects also the objections of the parties during the hearing regarding the administration of evidence by the court, notes that in respect of the request to accept an electronic communication (e-mail) between the Applicant and the Deputy Director of ISN Company, this request was made by A.R. (the Applicant in Referral KI230/19). In this regard, the Basic Court had stated that *"[...] according to the Court, there cannot stand the argument of the Prosecution, which has stated that since the defendant A.R. and his defense counsel have proposed the reading of the evidence, and this is not disputed by the defendant Hakif Veliu and his defense counsel, such evidence is not disputable to be read. The Court does not agree with this finding due to the fact that the availability of the parties is not a principle of criminal procedure, but of some other procedures, and in criminal proceedings it may be an exception when it is provided by law, whilst in this case for the issuance of such evidence the*

law has provided clear procedures, due to the sensitivity of the human freedoms and rights provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Constitution of the Republic of Kosovo, because if such evidence are accepted it would violate the legal certainty of the citizens of Kosovo, or of those who commit acts in Kosovo."

141. Therefore, based on the foregoing, and if the Applicant in his Referral refers to this evidence then the Court notes that the allegation regarding the electronic communication was raised by the other defendant, namely the Applicant in case KI230/19 and not the Applicant herein.

142. The Applicant in his allegation also emphasizes that the evidence presented by him, namely **(ii)** the Decision of the Steering Board of the University of Prishtina of 28 December 2007 on determination of the price of translation services, has been examined at all by the Court. The admission of this evidence, as well as the submitted e-mails, according to him is of extreme importance, because by accepting these evidence there would have been reached a different result from the one that is reached by the regular courts.

143. In the following, the Applicant challenges the admission as evidence by the judiciary of **(iii)** *"a document which it considers a contract"*, and on the basis of which document a sentencing decision was rendered against him; according to him, the said document is located neither in the archive of the University of Prishtina nor of the Ministry of Finance and has never been used by him to carry out any payment.

144. In this context, the Court notes that these allegations were not raised in his appeal to the Court of Appeals or in his request for protection of legality and for supplementation of the request for protection of legality, filed with the Supreme Court, on 9 July 2019 and 29 July 2019, respectively.

145. Consequently, the Court notes that the Applicant is raising the aforementioned allegations specifically for the first time in his Referral before this Court.

146. In such a context, as regards the criterion for exhaustion of legal remedies in the substantial sense the Court refers to its case-law and the case law of the ECtHR.

147. The Court initially notes that, while in the context of the machinery for the protection of human rights, the rule of exhaustion of legal remedies must be applied with some degree of flexibility and without any excessive formalism, this rule normally requires also that the complaints and allegations intended to be made subsequently at the court proceedings, should have been brought before the regular courts, at least in substance and in compliance with the formal requirements and time limits laid down by the applicable law (see, the ECtHR case, *Jane Nicklinson v. the United Kingdom* and *Paul Lamb v. the United Kingdom*, Judgment of 16 July 2015, paragraph 89, and references therein; see also the cases of Court 154/17 and KI05/18, Applicants *Basri Deva, Aferdita Deva and Limited Liability Company "BARBAS"*, Resolution on Inadmissibility, of 22 July 2019, paragraph 92; and KI155/18, Applicant

Benson Buza, Resolution on Inadmissibility, of 25 September 2019, paragraph 50).

148. More specifically, the ECtHR maintains that, in so far as there exists a remedy enabling the regular courts to address, at least in substance, the argument of a violation of a right, then that remedy is to be used. If the complaint brought before the Court has not been put, either explicitly or in substance, before the regular courts when it could have been raised in the exercise of a legal remedy available to the Applicant, the regular courts have been denied the opportunity to address of the issue, which the rule on exhaustion of remedies is intended to give (see the case of the ECtHR, *Jane Nicklinson v. the United Kingdom and Paul Lamb v. the United Kingdom*, cited above, paragraph 90, and references therein; and see also the case of Court, KI119/17, cited above, paragraph 72; case KI154/17 and KI05/18, cited above, paragraph 93; and case KI155/18, cited above, paragraph 49).

149. Therefore, the Court reiterates that the exhaustion of legal remedies includes two important elements: (i) the exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority, in a higher instance with full jurisdiction; and (ii) exhaustion of the remedy in a substantial aspect, which implies reporting of constitutional violations in *"substance"* before the regular courts so that the latter have the opportunity to prevent and correct the violation of human rights protected by the Constitution and the ECHR. The Court considers as exhausted the legal remedies only when the Applicants, in accordance with applicable laws, have exhausted them in both aspects (see, also the cases of Court, KI71/18, Applicant, *Kamer Borovci, Mustafë Borovci and Avdulla Bajra*, Resolution on Inadmissibility, of 21 November 2018, paragraph 57; case KI119/17, cited above, paragraph 73; as well as the case KI154/17 and KI05/18, cited above, paragraph 94).

150. Taking into consideration these principles and the circumstances in which, according to the case file, it results that these specific allegations of the Applicant have been raised for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, including the Supreme Court, to address these allegations and on that occasion, to prevent alleged violations raised by the Applicant directly to this Court without exhausting legal remedies in their substance. (See, *mutatis mutandis,* the case of Court, KI118/15, Applicant *Dragiša Stojković,* Resolution on Inadmissibility, of 12 April 2016, paragraphs 30-39; case KI119/17, cited above, paragraph 74; as well as the case KI154/17 and KI05/18, cited above, paragraph 95).

151. Consequently, the Court finds that the Applicant's Referral in respect of his allegation for violation of the equality of arms as a result of the non-admission of evidence by the regular courts is inadmissible due to the substantial non-exhaustion of all legal remedies, as required by the paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

II. In relation to the allegation for violation of the principle of legal certainty as a result of the non-reasoning of the court decision

152. Referring to its case-law and that of the ECtHR, the Court reiterates that, even though the authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6(1) of the ECHR, their courts must "indicate with sufficient clarity the grounds on which they based their decision" (see, *Hadjianastassiou v. Greece*, Application no. 12945/87, Judgment of the ECtHR of 16 December 1992, paragtaph 33; see also the case of Court KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018, paragraph 45, see the case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility, of 17 May 2018, paragraph 54).

153. Consequently, the Court reiterates that the right to have rendered a judicial decision in accordance with the law includes the obligation of the courts to provide reasons for their decisions, both at the procedural and the material level (see *mutatis mutandis* the above-mentioned case of Court KI97/16, Applicant IKK Classic, paragraph 54).

154. The Court recalls that the Applicant specifically alleges that: *"no allegation has been dealt with by the Court of Appeals and the Supreme Court" as well as the fact that he has attached all the submitted documents, are sufficient reasons for the Court to examine whether the mentioned allegations have been addressed or not. The repetition of these allegations also in this constitutional referral would be considered a repetition of the allegations raised before the regular courts, and would result in allegations for a fourth instance. Therefore, the Applicant does not want to slip into that area, since he considers that his allegations should remain at the constitutional level - and that it is the duty of the Constitutional Court to consider the constitutional arguments raised by him in relation to the non-reasoning of his allegations".*

155. In the light of this allegation of the Applicant, the Court first recalls that the Court of Appeals had rejected his appeal against the Judgment of the Basic Court and thereupon the Supreme Court had rejected his request for protection of legality filed against the Judgments of the Basic Court and of the Court of Appeals. In this context, the Court notes that the Supreme Court and the Court of Appeals when rendering the decision have fulfilled their constitutional and legal obligations to provide sufficient legal reasoning as required by Article 31 of the Constitution and Article 6 of the ECHR.

156. The above conclusion was reached by the Supreme Court after having considered the reasoning provided by the Basic Court, when finding the Applicant guilty of the criminal offence committed, his appeal to the Court of Appeals and his request for protection of legality, filed with the Supreme Court

157. In this regard, the Court recalls that when rejecting an appeal, or as in the present case, rejecting a request for protection of legality, the Supreme Court may, in principle, simply endorse the reasons for the lower court's decision, in this case the Court of Appeals (see, the ECtHR cases, *García Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, Application no. 20772/92, Judgment of 19 December 1997, paragraphs 59-60).

158. The Supreme Court, through its Judgment, in respect of the allegation for violation of the provisions of the criminal procedure had found that the Basic Court had provided legal reasoning regarding all the allegations raised in his request for protection of legality. Whereas, as regards his allegation for violation of criminal law by the Basic Court and Court of Appeals, the Supreme Court had found se *"[...]The Supreme Court of Kosovo, considers that the court of first instance in its judgment has correctly found that in the actions of [the Applicant] are manifested all the elements of the criminal offence of fraud in office as per Article 341 para.3 in conjunction with para. 1 as read by Article 23 of the CCK, since [the Applicant] had the capacity of an official person as defined by the provision of Article 107 para.1 sub-para.1.1 of the CCK, as he was selected to represent the UP , respectively the procurement office and for the purpose of obtaining unlawful material benefit for the other party he has made a false presentation of the report respectively has misled the person to carry out an unlawful payment after having previously modified the measurement unit in Article 17 of the contract from "1000 words 12.65 €" to "1000 characters 12.65 €" and consequently higher payments had to be carried out for the translation of University textbooks."*

159. In this context, the Court recalls the reasoning of the Basic Court provided through the Judgment [PKR.No.432/15] of 18 dhjetorit 2017, wherein it had stated that: *"The Court does not accept the defence theory presented by the defendant Hakif Veliu himself, as well as by his defence counsel – the lawyer Skender Musa, for the fact that Hakif Veliu while acting as the Head of the Procurement Office of UP, he has been the person responsible for signing contracts, and an expert of public procurement procedures. It is illogical for the Court that after signing the Contract according to the measurement unit "Word" which was also a condition in the tender dossier, the defendant acting in the above mentioned quality, has signed a second Contract, without changing neither the date nor the number , but only the measurement unit. It is a well-known fact that the change of the measurement unit has budget implications as well, and based upon his job duties, it is unbelievable for the Court that he has done this out of ignorance. The statements of Hakif Veliu in the pre-trial procedure and in the main trial were not in harmony with each other. While in the pre-trial procedure he has defended himself by stating that the signature in the Contract according to the measurement unit "character", is not his, it is falsified, after the Graphology Expertise of the Kosovo Forensic Agency, the Sector for Documents and Manuscripts Expertise 2015-22.1112015-1983 of 08.07.2015, he stated that has signed the same, but has signed it as a kind of reference for the ISN. The court is aware that the defendant has the right to defend himself in a way that goes to his favour, but this discrepancy in the statements, the signing of the Contract according to the measurement "Character" and then all his actions relating to the preparation of documents for the Commission, reveal what is called Mens Rea (criminal intention) to commit a criminal offence in co-perpetration with the other defendants, in the manner as elaborated above."*

160. Whereas, the Court of Appeals through its Judgment [PAKR. No. 528/2018, of 16 April 2019] had initially found that the Applicant's allegations are unfounded, considering that the challenged Judgment of the Basic Court does not contain substantial violations of the provisions of the criminal procedure.

The Court of Appeals, having referred specifically to the Applicant's allegation that the challenged Judgment is based upon inadmissible evidence, assessed that "[...] *the evidence administered in the main trial in this case were obtained in conformity with the legal provisions, whereas, the extent to which these evidence are substantiated, respectively prove the elements of the offence, causing of damage or any issue of importance is a matter to be assessed by the Court." Secondly, the Court of Appeals in respect of the Applicant's allegations for violation of criminal law* and erroneous determination of the factual situation had established that: *"[...] taking into account the administered evidence but also the defenses of the accused which are stated in detail in this judgment according to the assessment of this Court it results that through the change of the basic contract they have misled the persons authorized to carry out the illegal payment. [...] Therefore this Court considers completely illogical and unfounded the allegations that the change of the contract was made only as a reference for ISN and that it did not produce legal effect, especially considering the fact that the defendants were aware that on the basis of the tender terms, the contracting parties were prohibited to do so because it was expressly provided (article IV point 3 of the tender dossier) that the prices in the contract were fixed and could not be changed."* Finally, the Court of Appeals had found that *"found that by the above actions, the Applicant has fulfilled all the objective and subjective elements of the criminal offence, and consequently the factual situation has been determined in a correct and complete manner and the provisions of the criminal law have been applied correctly."*

161. In this context, the Court also recalls that in cases where a court of third instance, as in the Applicant's case, the Supreme Court, which confirms the decisions taken by lower courts - its obligation to reason the decision-making differs from cases where a court modifies the decision-making of lower courts. In the present case, the Supreme Court did not modify the decision of the Court of Appeals or that of the Basic Court – whereby the Applicant was found guilty instead it has only confirmed their legality, given that, according to the Supreme Court, there were no substantial violations of criminal procedure and criminal law (see the case of Court KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility, of 5 February 2020, paragraph 106).

162. In this respect, the Court considers that, even though the Supreme Court may have not responded to every possible issue raised by the Applicant in his request for protection of legality, it has addressed the Applicant's substantial arguments as to the application of substantive and procedural law (see, mutatis mutandis, ECtHR cases: *Van de Hurk v. the Netherlands*, paragraph 61; *Buzescu v. Romania*, cited above, paragraph 63; and *Pronina v. Ukraine*, Application no. 63566/00, Judgment of 18 July 2006, paragraph 25, and see also the case cited above KI194/18, Applicant *Kadri Muriqi and Zenun Muriqi*, paragraph 107). In doing so, the Court reiterates that the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, as required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

163. Finally, based on the foregoing and taking into consideration the allegations raised by the Applicant and the facts presented by him, the Court also having relied on the standards established its case law in similar cases and the case law of The ECtHR finds that the Applicant has not sufficiently proved and substantiated his allegation for violation of his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR , and consequently his Referral in respect of this allegations is manifestly ill-founded on constitutional basis.

164. The Court also recalls that the Applicant, referring to the case of Court KI31/17 (Applicant *Shefqet Berisha*, Judgment, of 30 May 2017), states that also in his case, as of the Applicant in case KI31/17, he has been denied the right to fair and impartial trial, through a falsified decision resulting in an arbitrary trial against him.

165. In the relevant case KI31/17, the Court found a violation at the level of the Basic Court, by declaring the Judgment [C. no.162/09] of the Basic Court in Prishtina, of 29 October 2013 invalid and consequently, as a result of respective appeals also all other decisions of public authorities have been declared invalid. Moreover, the Court considered that the failure of the courts to give due consideration to the evidence and witnesses proposed by the Applicant in all instances of the proceedings is contrary to the principle of equality of arms and the right to a reasoned decision, as core components of the right to fair and impartial trial (see, paragraph 107 and the enacting clause of Judgment in case KI31/17, cited above).

166. Based on the above, the Court considers that the Applicant has not substantiated his allegation for a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of the non-reasoning of the court decision, and is therefore manifestly ill founded on constitutional basis.

III. In relation to the allegation for violation of the principle of presumption of innocence and "specific protection"

167. The Court first recalls that the Applicant considers that *"throughout the criminal proceedings he was placed in a position which consistently infringed the principle of presumption of innocence, since the case was highly sensitive, as a result of other people's involvement in this case and pressure from the public and the media, resulting in influence in his case."* He alleges that the pressure on the regular courts was intensified on the occasion of the initiation of criminal reports against the Chief State Prosecutor and Prosecutor D.H., by other parties involved in the proceedings.

168. In the following, the Applicant in the context of the allegation relating to *"specific protection"* states that his allegations submitted through his lawyers were not reviewed and that the failure to keep the minutes had deprived him of the specific protection that should be offered to whistleblowers. He further claims that the regular courts did not even address the fact that it was exactly him who informed the management of the University of Prishtina about the *"irregularities of the contract"*.

169. However, on the basis of the case file it results that the Applicant is raising these specific allegations for the first time in his Referral before this Court, namely these allegations were raised neither in his appeal, or in his supplementation of the appeal in the Court of Appeals, nor in his request for protection of legality and supplementation of the request for protection of legality [9 July 2019 and 29 July 2019] in the Supreme Court.

170. In this context, the Court notes that the Applicant in the supplementation of his appeal, of 24 December 2018, filed with the Court of Appeals, regarding the sentence, had requested the application of mitigating circumstances in his case, because among other things, *"during all stages of this criminal procedeedings he has shown readiness by coopering with the justice authorities, answering to the questions of the prosecution in the most honest way and to the best of his the knowledge, and at the same time, he has shown cooperation and correctness with the court, a circumstance which was not assessed correctly by the court of first instance when determining the type and the length of the punishment."*

171. The same reasoning was provided by the Applicant in his request for protection of legality, submitted to the Supreme Court on 9 July 2019, whreby he had alleged that the Court of Appeals, in Judgment [PAKR. Nr. 528/2018] of 16 April 2019 when measuring the sentence did not take into account the fact that, according to him, *"as a result of the case being reported [by the Applicant] to the Rectorate of UP, this criminal case was detected and tried, and thus a damage greater than the amount of 320.000.00 to the budget of the UP was prevented, this is an exceptionally mitigating circumstance [...]."*

172. The Applicant specifically states that he was deprived of the "protection" which he has requested through the submissions submitted by his lawyers and which he claims to have raised in the session of 16 April 2019, held in the Court of Appeals. Therefore, the failure of the Court of Appeals to keep the minutes made it impossible for him to prove to the Court *"that in the same session were raised literally same allegations, as in this Referral."* According to him, those allegations, in similar wordings, but without reference to the case law of the ECtHR, are contained in the documents submitted through his lawyers.

173. In regard to the allegation about not keeping of minutes, which was specifically raised by A.R. [the Applicant in case KI230/19] the Supreme Court had found that: *"The allegation that there were no minutes kept in the court of second instance also results to be unfounded, since such record is also contained in the case file."*

174. Moreover, on this occasion the Court refers to the minutes kept in the session of the Court of Appeals on 16 April 2019, which this Court has provided through the complete case file, sent by the Basic Court.

> *"The hearing sessions started at 10:00h*
> *The Presiding Judge Afrim Shala opened the session of the trial panel and informed the participants about the composition of the panel: Afrim Shala – Presiding Judge*

Mejreme Memaj- Judge Rapporteur
Hava Haliti - members
The minutes are kept by the professional associate [S.G.].
There are no remarks on the composition of the trial panel.

The Court of Appeals scheduled and held the trial panel session pursuant to the provision of Article 390 of the CPC, in which participated the accused Hakif Veliu and his defense counsel Durim Osmani engaged in this appellate stage, and the defense counsel of the accused A.R. lawyer Artan Qerkini also engaged in this appellate stage. The Appellate Prosecutor, despite having been duly notified, did not attend the hearing session. The acknowledgment of receipt for the accused A.R. was not returned, but according to his defense counsel, he has received the notification but due to health reasons he could not attend the hearing, and he agrees that the hearing be held without his presence. The Judge Rapporteur [M.M] presented the criminal case. There were no remarks by the parties. The Appellate Prosecutor by his written submission PPA/ I.m.34/2018 of 23.01.2018 has proposed that the appeal of the Prosecutor be approved, whilst the appeals of the defense counsels of the accused Hakif Veliu and A.R. to be rejected as ungrounded. The defense counsel for the accused Hakif Veliu lawyer Durim Osmani having clarified some of the allegations from the appeal and the supplementation of the appeal supported the proposal made therein, while the accused supported the defense counsel and his appeal in writing. Also the defense counsel of the accused A.R. after clarifying some of the allegations from the appeal supported the proposal made therein.

The hearing session was concluded at 11.00h"

175. Consequently, the Court reiterates that the Applicant did not raise these specific allegations in his submissions before the regular courts.

176. Therefore, referring to the criterion for exhaustion of legal remedies in the substantial sense elaborated in paragraphs 139 to 143 of this Decision, the Court considers that the Applicant's Referral is inadmissible due to the substantial non-exhaustion of all legal remedies as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

177. Therefore, and finally, the Court finds that the Applicant's Referral is inadmissible because:

I. The allegation in respect of (i) the violation of the principle of adversarial proceedings and that of equality of arms in the proceedings as a result of his non-notification about the State Prosecutor's submission is manifestly ill founded on constitutional basis, as established in Articles 47 and 48 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure; whilst the allegation for (ii) a violation of the principle of equality of arms due to non-admission of evidence by the regular courts is inadmissible as a result of non-exhaustion of legal remedies in accordance with paragraphs 1 and 7 of

Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure;

II. The allegation for a violation of the principle of legal certainty related to the right to a reasoned court decision is is manifestly ill founded on constitutional basis, as defined through Articles 47 and 48 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure; and

III. The allegation for a violation of the principle of presumption of innocence and *"specific protection"* is inadmissible as a result of non-exhaustion of legal remedies in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

Request for Interim Measures

178. The Court recalls that the Applicant also requests from the Court to issue a decision on imposition of interim measures, namely the *"suspension of court decisions"*.

179. In his request for imposition of interim measures, the Applicant considers that he has provided the Court not only with a *prima facie* reasoning on the merits of the case, but has also clearly shown the arbitrariness of the judicial authorities and the violation of his basic freedoms and rights.

180. Having in mind that the Court has now decided on the inadmissibility of the Referral, it does not consider it necessary to examine the Applicant's request for approval of the interim measure.

181. Therefore, in accordance with paragraph 1 of Article 27 (Interim Measures) of the Law and item (a) of paragraph 4 of Rule 57 (Decision on Interim Measures) of the Rules of Procedure, the Applicant's request for an interim measure must be rejected, because it cannot be a subject of review, as the Referral is declared inadmissible (see, in this context, the cases of Court KI107/19, Applicant *Gafurr Bytyqi*, Resolution on Inadmissibility of 21 April 2020, paragraph 90; KI159/18, Applicant *Azem Duraku*, Resolution on Inadmissibility of 6 May 2019, paragraphs 89-91; KI19/19 and KI20/19, Applicant *Muhamed Thaqi and Egzon Keka*, Resolution in Inadmissibility of 26 August 2019, paragraphs 53-55).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and in accordance with Rules 39 (1) (b), 39 (2), 57 (2) of the Rules of Procedure, on 10 February 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Remzije Istrefi – Peci Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.